

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE
BEFORE H.E. JUSTICE ALI AL MADHANI

BETWEEN

JOHN VITALO

Claimant

and

ATLAS MARA MANAGEMENT SERVICES LIMITED

Defendant

ORDER WITH REASONS OF H.E. JUSTICE ALI AL MADHANI

UPON the Claimant's Application No. CFI-018-2018/1 dated 24 May 2018 seeking an immediate judgment on 2 claims put forward by the Claimant (the "Application")

AND UPON reading the documents submitted in the Court file and hearing the Claimant's and Defendant's arguments at the Hearing on 20 June 2018

IT IS HEREBY ORDERED BY THAT:

1. The Application is dismissed. The case in full shall proceed to trial.
2. Parties are required to submit a Case Management Timetable leading to a trial to be held in the first week of September 2018.
3. The Claimant shall be responsible for the costs of the Application on the standard basis, to be assessed by the Registrar if not agreed by the Parties within 30 days of the issuance of this Order.



A handwritten signature in blue ink, appearing to read 'Ayesha Bin Kalban'.

Issued by:
Ayesha Bin Kalban
Assistant Registrar
Date: 26 June 2018
At: 2pm

SCHEDULE OF REASONS

Introduction

1. This Order addresses the Claimant's Application for Immediate Judgment, which was filed on 24 May 2018. In summary, this is a Claim brought by a former employee of the Defendant Company following his termination in August 2017. The Claimant's Claims for payment fall under four different alleged entitlements:
 - a. A claim for an inflation indexation adjustment based on Dubai education, housing and utilities cost indices to the Claimant's annual benefits allowance under Clause 5.1.2 of his Employment Contract.
 - b. A claim for payment in lieu of unused holiday pursuant to Article 28 of the DIFC Law No. 4 of 2005, as amended (hereafter the "DIFC Employment Law"). The Claimant maintains that he was already on a paid leave of absence at the time when the Defendant required him to take holiday leave pursuant to Article 29(2) of the DIFC Employment Law and he could not be required to take holiday leave on the grounds that it was not mutually acceptable to do so (mutual acceptability being a condition of the taking of holiday leave in the Claimant's Employment Contract at Clause 6.1). The Claimant also maintains that a different statutory regime applies upon termination pursuant to Article 28(1) of DIFC Employment Law and in any event (regardless of mutual acceptability) the Defendant could not invoke the provisions of Article 29(2).
 - c. The Claimant alleges that pursuant to his Employment Contract at Clause 5.5, he was entitled to be provided with access to certain medical coverage post-termination (albeit at his own cost, such as was provided by his previous employer), and that equivalent access to the same medical coverage ought to have been offered by the Defendant. Instead, coverage was offered and then later revoked by the Defendant as the offer was conditional on the Claimant signing an agreement which he refused to sign. The Claimant subsequently purchased equivalent medical coverage in the market and claims damages for the additional cost of obtaining that coverage.
 - d. The Claimant was owed a net sum from the Defendant at the date of termination, therefore he claims penalty payment pursuant to Article 18(2) of the DIFC Employment Law.

2. The Defendant, on the other hand, denies the above listed Claims on the grounds that:
 - a. The indexation is a discretionary allowance and the Defendant validly exercised its discretion in good faith to award the Claimant a zero uplift.
 - b. The Claimant was validly told to take his unused annual holiday leave during the period of his Garden Leave (as defined in Clause 7.4 of his Employment Contract).
 - c. The Defendant denies the claimed post-termination medical coverage and asserts that the Employment Contract did not require it to offer the Claimant access to the coverage that he was seeking.
 - d. The Defendant also lodged a Counterclaim against the Claimant for:
 - i. A sum payable by the Claimant to the Defendant for excess holiday leave taken prior to his termination (pursuant to Article 28(1) of the DIFC Employment Law); and
 - ii. A sum of AED 451,410 which was paid to the Claimant as fees for his role as a director of a Nigerian Bank, Union Bank of Nigeria.
3. By the current Application, the Claimant seeks Immediate Judgment on two of his Claims: holiday pay and indexation. There is no application in respect of the Claims relating to medical coverage or the statutory penalty payment which the Claimant accepts must go to trial.
4. As such, even if the Application is successful, the Claim, at least in substantial part, will proceed to a trial and in any event, the trial will consider the Defendant's Counterclaims against the Claimant.
5. This Application for Immediate Judgment to deal with the Claims of indexation and holiday pay require addressing the following issues:
 - a. Does the Employment Contract give the Defendant discretion as to whether to apply an adjustment to the allowances paid to the Claimant?
 - b. If an adjustment to the allowance should have been made, how was the adjustment to be calculated and how much is the Claimant owed (assuming the adjustment is positive)?

- c. Did the Claimant have annual leave that had accrued but had not been taken at the date of termination (if any)?
- d. If the Claimant had outstanding leave, how much should the Defendant have paid at termination?
- e. If the Defendant owed the Claimant a sum on termination, can the Defendant set-off any sums due from the Claimant (including under the Counterclaims) at the date of termination?
- f. If so, how much can be set-off?

The Claimant's Arguments

- 6. Regarding the issue of the indexation allowance, the Claimant alleges that Clause 5.1.2 of the Employment Contract entitles him to "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."
- 7. The Claimant argues 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. Those indices are available from the Government of Dubai, and although the Defendant challenges the use of certain indices, it is not disputed that the source of those indices is the Government of Dubai.
- 8. The Claimant then says that the wording "as determined by the Company" relates to the determination of the amount of the adjustment to the allowance. In making that determination, the Company is under an obligation to act reasonably and in good faith.
- 9. The Claimant further argues that the obligation to adjust the annual allowance is clear and that the Defendant has done so for other ex-employees, and the calculation is simple and does not require expert evidence. The Claimant insist that this is an issue that can be decided at the Hearing for Immediate Judgment.
- 10. As for the issue of holiday leave, the Claimant's case is that on 4 May 2017, the Defendant sent the Claimant a letter which stated that the Defendant's records showed that the Claimant

had 30 days of holiday leave, and which required the Claimant to take the holiday time “during the period from (and including) 4 July 2017 to 14 August 2017.”

11. The Claimant’s argument is that the letter required the Claimant to take leave without his consent where as his Employment Contract says that holidays were to be taken at times which were “mutually acceptable”. The Claimant says he did not consider that he needed to take holiday leave, nor did he agree to it. He further argues that the letter itself required the Claimant to sign it in order to confirm that he had read and understood it and accepted its terms. He did not sign it.
12. The Claimant asserts that the requirement for holiday leave to be taken at times which are “mutually acceptable” is an interpretation that is more favourable to the Claimant’s rights, citing Article 10(2) of the DIFC Employment Law. The letter from the Defendant requiring the Claimant to take holiday leave was therefore ineffective. The Claimant insist he was already on a paid leave-of-absence and the demand that he take holiday time was not mutually acceptable.
13. The Claimant’s case is that if he is successful in arguing that he could not be forced to take holiday leave in 2017 when he was already on a paid leave-of-absence, it follows that he should have been paid 14.5 days accrued but untaken holiday leave from 2017 as part of his termination package.
14. He also takes the view that even if the Court finds that the Defendant’s arguments regarding 2016 holiday time are correct (i.e. even if the New York trip was included as holiday), there is a balance due to the Claimant of 8 days of holiday pay. This assumes 6.5 days of excess holiday in 2016 and 14.5 days due to the Claimant in 2017, leaving a balance of 8 days due to the Claimant. The Claimant argues that it is more likely on the evidence that is currently available (and likely to be available at trial) that the Claimant did not take a 10-day holiday in New York and was owed at least 3.5 days holiday in 2016 plus 14.5 in 2017 making a total of 18 days of holiday leave remaining.

The Defendant’s Arguments

15. The Defendant objects to the Claimant’s Application for Immediate Judgment, arguing that even if the Application is successful, the Claim, at least in substantial part, will proceed to a trial that, in any event, will also consider the Defendant’s Counterclaims against the Claimant.

16. The Defendant's argument in regards to the indexation issue is that Clause 5.1.2 of the Employment Contract gives the Defendant contractual discretion whether or not to apply an uplift in any given year. While the Defendant accepts that the Claimant's construction of Clause 5.1.2 is possible, it argues that there are two plausible ways of reading the given language with the Claimant emphasizing that "Such allowance will be adjusted annually" and the Defendant emphasizing that the adjustment will be "as determined by the Company."
17. The Defendant's case is that the allowance "will be adjusted" but only if the Defendant has "determined" that it will exercise its contractual discretion in favour of such an uplift in any given year. It is analogous to a contractual discretion whether or not to award a bonus. These plausible and competing constructions of the Clause illustrate why the Defendant's defence has a realistic prospect of success and must be disposed of at trial rather than at the Immediate Judgment phase.
18. The Defendant further argues that even if the Court felt sufficiently confident of construing the meaning of Clause 5.1.2 in the Claimant's favour at this time, the Court cannot determine the quantum without further evidence and argument. The choice of index is open to debate, and in any event, that choice is a matter for the Defendant's discretion "as determined by the Company".
19. In response to the Claimant's arguments regarding holiday leave, the Defendant argues that there is a factual overlap between the Claimant's holiday claim, on which he seeks Immediate Judgment, and the Defendant's excess holiday Counterclaim, which will be determined at Trial. The Defendant argues that the Court should note that both parties have submitted a significant amount of evidence in relation to the Application with reference to witness statements and related exhibits, which only serves to highlight that there is a significant issue to be determined at trial, given the factual disputes at the heart of each of the Claims.
20. As regards the holiday time issue, the Defendant also argues that there is legal issue that remains appropriate for trial, given that all the Claims relate in some way to the meaning of the parties' Employment Contract. As such, the Court is faced with the highly unusual position of being asked to determine on a summary basis the meaning of a contract which the Court will also consider at trial. According to the Defendant, this approach makes little sense and risks conflicting outcomes given that different Judges may not approach the issues in the same way, and only the trial Court will have a complete evidence set before it. In contrast, the Court has only an incomplete and untested evidence set before it at the Immediate Judgment phase.

21. The Defendant further argues that even if the Court considered it safe to dispose of liability on the two claims at issue in this Application at this time, there is still a serious issue to be tried as to the right quantum and any set-off of the Defendant's Counterclaims. In short, there is no point disposing liability issues in the absence of full evidence and a proper trial of the facts where the Court is not in a position to determine how much should be paid and whether or not that amount is subject to a set-off on account of the Defendant's Counterclaims.
22. The Defendant contends that it has submitted cogent evidence in support of its defence to the holiday claim, including a detailed summary of the leave that the Defendant can prove that the Claimant in fact took in 2016 (28.5 days) and 2017 (43 days). In short, the Defendant can prove at trial that the Claimant is not entitled to the pay in lieu of holiday set out in his Claim.
23. Furthermore, the Defendant argues that the Claimant's evidence tacitly accepts that there is a real issue to be tried considering that the Claimant admits in his evidence that he took at least 18.5 days holiday in 2016.
24. The Defendant insists that it must be allowed to cross-examine the Claimant at trial on his holiday leave and diary entries in 2016 and 2017 in order to show that there must be holiday time not accounted for by him. That cannot be done on this Application. The Claimant complains that he has "not had access to" his work diaries, however, this is a further point in favour of a trial as opposed to an Immediate Judgment of the holiday claim. The Defendant has stated that these diaries would be exchanged as part of the disclosure stage.
25. The Defendant's case is that its defence to the holiday claim has, at the very least, a "realistic" as opposed to "fanciful" prospect of success. On the evidence presently before the Court as to the substantive question of how much leave the Claimant in fact took in 2016 and 2017, the Defendant says it has a thoroughly cogent case based on contemporaneous evidence and that the Claimant has not discharged his burden to show that the defence is hopeless.
26. The Defendant finally argues that this Court should avoid being drawn into an attempt to resolve these conflicts of fact which are in this case properly reserved for the trial process.

Discussion

27. The legal standard applicable in assessing an Application for Immediate Judgment pursuant to RDC 24.1 was recently summarised by Deputy Chief Justice Sir David Steel in *The Estate of Christos Papadopoulos v Standard Chartered Bank* [2017] DIFC CFI-004 (27 February

2018), at [16]. The Deputy Chief Justice adopted the well-known summary of the principles set out by Justice Roger Giles in *GFH Capital Limited v Haigh* [2014] DIFC CFI 020 (18 October 2016). As regards the legal principles articulated, the following are of particular relevance to the Application at hand:

- a. The Court must consider whether the respondent to the application for immediate judgment has a "realistic" as opposed to "fanciful" prospect of success; where a fanciful claim is one that is entirely without substance.
- b. The Court should avoid conducting a mini-trial without disclosure or oral evidence.
- c. Factual assertions (in witness statements) may have no real substance, particularly where they are contradicted by contemporaneous evidence.
- d. The Court should avoid being drawn into an attempt to resolve those conflicts of fact which are normally reserved for the trial process.
- e. The Court must take account of the evidence actually placed before it on the application for immediate judgment and the evidence reasonably expected to be available at trial.
- f. The overall burden of proof remains on the claimant to establish that there are no real prospects of success and no compelling reason for trial.
- g. There will be a compelling reason for trial where there are circumstances that ought to be investigated.

28. I must note that the Hearing for this Application took place a mere 10-weeks before the proposed trial date, at which time a substantial portion of the Claimant's Claims, including the issues of post-termination medical coverage and statutory penalty, along with the entirety of the Defendant's Counterclaims, shall be assessed in full. One of the important overriding objectives of a grant of Immediate Judgment is to preserve time and resources that may be wasted at an unnecessary trial, an aspect that is not meaningfully relevant to the case at hand.

29. It is my judgment that the Court shall avoid being drawn into an attempt to resolve the two issues at stake in the Application at this time without very careful investigation that will be needed at trial. This is due to the fact that the issues in the case, especially as regards quantum, are interrelated and furthermore, the quantum at stake for the two issues contained

in this Application pales in comparison to the quantum potentially connected to the statutory penalty Claim.

30. While the assessment required to determine the correct interpretation of the Employment Contract as regards holiday pay and indexation may be possible at this stage, without further evidence, the question of quantum cannot be resolved without conducting a mini-trial. It is appropriate to refrain from engaging in this assessment without the benefit of a trial in full including disclosure and oral evidence.
31. In my assessment, the Defendant's submissions regarding the number of utilised holiday days and the interpretation regarding indexation carry some conviction and as such, the defence has a "realistic" as opposed to a "fanciful" prospect of success. I cannot find at this time that the defence as to these two issues is entirely without substance and thus the benefit of a full trial must be given.
32. For the above said reasons I dismiss the Claimant's Application for Immediate Judgment and order that the entire case must proceed to trial. As agreed during the Hearing, the parties are required to submit to the DIFC Courts' Registry a Case Management Timetable leading to trial in the first week of September 2018.
33. The Claimant shall be responsible for the costs of this Application on the standard basis, to be assessed by the Registrar if not agreed by the Parties within 30 days of the issuance of this Order.