IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

6 March 2025

CASE No: AIFC-C/CFI/2023/0018

KANIYA BIZHANOVA

Appellant

v

CENTER FOR SCIENTIFIC AND TECHNOLOGICAL INITIATIVES LTD.

Respondent

JUDGMENT

Chief Justice of the Court:

The Rt Hon. The Lord Burnett of Maldon PC DL

ORDER

1. **Appeal allowed.**

2. **Order of Justice Banner KC varied to provide that the appellant receives renumeration for 30 days' notice instead of 7 days' notice.**

3. **Parties to agree the revised judgment sum within 7 days of the date of this order but in default of agreement to submit their respective calculations.**

4. **Parties to file submissions on costs within 7 days of the date of this order.**

5. **The Court to resolve any outstanding issues on the basis of the written submissions referred to in 3 and 4 above.**

JUDGMENT

1. The parties agree that the issue in this appeal is whether the judge at first instance was wrong to conclude that the appellant, Ms Kaniya Bizhanova, was entitled to 7 days' notice of termination of her employment with the respondent, Centre for Scientific and Technological Initiatives Limited (the Employer), or whether she should have been given 30 days' notice. Permission to appeal on that ground was given by Justice The Rt Hon. Sir Jack Beatson FBA. Additional grounds were advanced in the Notice of Appeal on which the question of leave was reserved to the hearing but were not pursued. Both parties developed their submissions by reference to the contemporaneous documents and the AIFC Employment Regulations (the Regulations).

2. The judgment and order of Justice Charles Banner KC dated 24 March 2023 in the Small Claims Court is AIFC Court Case No. 28 of 2022 and on the permission to appeal application AIFC Court Case No. 18 of 2023.

3. Ms Bizhanova commenced her employment on 3 May 2022 as the Financial Director and Chief Accountant of the Employer. No written contract was given to her at or before the commencement of her employment. Regulation 11 of the Regulations provides that an employee may only be employed under a contract written in English and signed by both parties and that a copy of it must be provided to the employee within two months of the start of the employment. The employer's factual case is that they sent Ms Bizhanova a written copy of the contract on 11 July for her signature but that she 'intentionally did not sign it, pursuing a certain dishonest goal' and that 'she did not sign it completely acting in bad faith'.

4. Before the judge at first instance the question whether Ms Bizhanova was entitled to 7 days' notice or 30 days' notice was argued by reference to the question whether or not her contractual terms included a probation period of three months. Regulation 15 of the Regulations provides:

> '*(1) An Employer may require an Employee to undergo a probationary period, if the probationary period does not exceed 3 months and is specified in the Employee's Contract of Employment.*
> *(2) During the probationary period either the Employer or the Employee may terminate the Contract of Employment without cause on 1 week notice to the other or for cause without notice*.'

5. If there is no probationary period, the minimum notice of dismissal is governed by Regulation 60(1) and (2):

'*(1) An Employer or an Employee may terminate an Employee's employment in accordance with this section.*

(2) Subject to subsection (5), if the Employee has been continuously employed by the Employer for 1 month or more, the notice required to be given by the Employer or Employee to terminate the Employee's employment must not be less than:

(a) 7 days, if the period of continuous employment is less than 3 months; or

(b) 30 days, if the period of continuous employment is at least 3 months but less than 5 years; or

(c) 90 days, if the period of continuous employment is at least 5 years.'

6. Comparing Regulations 15 and 60 one sees that whether or not there is a probation period, if an employee has continuous employment for three months or more he must be given at least 30 days' notice.

7. Regulation 61(2) allows an employer to dismiss an employee for cause, which includes a repudiatory breach of contract by the employee, or when the employee 'has materially contravened these Regulations, and the contravention has had a material and detrimental impact on the Employer.' The reference to dismissal for cause in Regulation 15 takes it meaning from Regulation 61.

8. I have recorded the Employer's contention in documents filed in the appeal that Ms Bizhanova did not sign the copy of the contract of employment sent to her in mid-July. Indeed, that contention first appears in a letter to her from the Employer on 3 August 2022, albeit without the attribution of a bad motive. Despite that position having been adopted from the outset by the Employer, it appeared to be suggested before the judge that she had signed the copy of the contract sent to her on 11 July because a version of it in the papers purported in one place to bear her signature. On Ms Bizhanova's behalf it was argued that the signature was not hers. There was a discussion before the judge whether a handwriting expert should be appointed to determine that question. The judge concluded that it was not necessary. Sir Jack Beatson gave leave to appeal that ruling but it has not formed any part of the appeal, because the Employer does not suggest that she did sign the document she was sent in mid-July.

9. How that misunderstanding arose is unclear, but it can be seen to have distorted the focus of the hearing before the judge and also the consideration of the application for permission to appeal.

10. On the appeal that focus has changed. In short, Mr Sabiev for Ms Bizhanova submits that on a proper construction of the contemporaneous documents, the employer did not dismiss her until 3 August 2022. Since her employment started on 3 May 2022, that was one day outside the three month period which would have been covered by a probationary period (if there was one) and the notice period was governed by Regulation 60(2), namely 30 days. By contrast, Mr Iztaev for the Employer submits that Ms Bizhanova was dismissed on 26 July 2022 with the result that the judge was right to conclude that she was entitled only to 7 days' notice because Ms Bizhanova had not completed 3 months service.

11. The parties were content for the judge to decide the case on the papers but he considered that it would be in the interests of justice to hear argument at an oral hearing. Neither party presented oral evidence.

12. Judgment was given for Ms Bizhanova in the sum of 747,866.74 KZT, made up of 336,666.75 KZT for one week's salary (the 7 days' notice that the judge concluded should have been given) and 411,200 KZT for unlawful deductions from salary made by the Employer. The Employer had argued that they were entitled to dismiss her without notice because she was off work due to sickness from 7 July 2022 and did not, in accordance with Regulation 33 of the Regulations notify them 'as soon as reasonably practicable' that she was unable to perform her duties and failed to provide them with medical

certificates stating that she was unable to perform her duties between 7 July and 26 July, until 28 July. The Employer argued that this amount to a repudiatory breach of contract for the purposes of Regulation 61(2)(b). That argument was rejected by the judge and there is no cross appeal from his finding. In any event, it should be noted that Regulation 33 itself provides the remedy for an employer in the event that an employee fails to give notice or sickness certificates. That is not dismissal, but simply the withholding of the sick pay that would otherwise be payable, a contention not advanced by the Employer before the judge.

13. A further argument developed before the judge by the Employer was that Ms Bizhanova agreed to be dismissed on a date before the end of July 2022. He rejected that on the basis that there was no clear evidence of such an agreement. That finding is not subject to a cross appeal.

14. The judge recorded that it was 'common ground' that Ms Bizhanova was dismissed within three months of the commencement of her employment but there is much confusion in the documentation concerning when the Employer considered that it had dismissed her, and for what reason. It has been the consistent position of Ms Bizhanova, first articulated in the Claim form, that she did not receive notification of her dismissal until 3 August 2022. It is unclear how this further misunderstanding occurred but, as I will explain when I summarise the contemporaneous documents, there was no doubt that the Employer purported to dismiss Ms Bizhanova on both 21 and 26 July but in neither instance did they give her notice of that intention.

15. The judge did not have the benefit of the clarity of argument that Mr Sabiev and Mr Iztaev presented at the hearing of the appeal, for which I am grateful. Neither appeared at first instance.

16. The judge's conclusion that the notice period should be 7 days was based on the proposition that it was for the Employer to decide whether to include a probationary period of three months in the contract which resulted in two possibilities. He considered that either the Employer included such a clause in the contract or, if Ms Bizhanova did not agree to a probation period, there was no contract of employment at all.

17. In giving permission to appeal, Sir Jack Beatson considered that a third possibility existed. Ms Bizhanova worked for over two months and the Employer accepted her work. Although the judge was correct to state that it was entirely up to the employer whether to include a clause providing for a probationary period in the contract, Ms Bizhanova's consent was necessary for it to be included in her contract. The rendering and acceptance of work by an employee may well mean that a contract between them came into existence without the inclusion of a probationary period.

18. In my judgment that analysis is correct. Regulation 15 of the Regulations is concerned with the formalities of the employment contract and requires that a copy of what has been agreed in writing and signed by both parties must be provided to the employee. It presupposes that the terms of employment have been agreed at the outset. If, for whatever reason, a written agreement is not concluded before the employment commences that employment would be subject to whatever terms had been agreed and to the Regulations.

19. However, this case does not turn on whether there was a probationary period. That is because whether Regulation 15 or Regulation 60 applies if Ms Bizhanova was in continuous employment for three months she was entitled to 30 days' notice, but only 7 days' notice if less. The issue identified in paragraph [1] above as agreed by counsel is thus to be answered by reference to the contemporaneous documents.

20. The first relevant document is 'Order No.4 of the Chief Executive Officer' of the Employer entitled 'on

termination of the employment contract'. It is dated 21 July 2022. It refers to Regulation 15(2) of the Regulations and the probationary period from 3 May to 3 August 2022. It then purports to terminate the contract of employment for cause.

21. A number of observations arise on this document. First, the judge rejected the argument that the Employer was entitled to terminate Ms Bizhanova's employment for cause. Secondly, this document was not served on her. Thirdly, even if there was a probationary period, as the reliance of Regulation 15(2) suggests, the period is misstated. Three months' employment commencing on 3 May 2022 is completed on 2 August and not 3 August. That can be tested by a simple example. If a person starts work on 1 May he will complete three months continuous service on 31 July. The following day is the beginning of the fourth month of work. Fourthly, Mr Iztaev does not seek to suggest that this Order terminated the employment.

22. He argues that the effective date of termination was 26 July.

23. In a letter of 3 August with the reference 01/22, the Employer records that a draft contract was forwarded to Ms Bizhanova in June 2022 and that on 11 July a copy signed on behalf of the employer was sent to her. It is this letter that records that she did not sign the contract. The letter continues by referring to Regulation 33 and that the relevant medical opinion supporting the absence through sickness was not provided until 28 July. It then continues:

> '*At the same time, taking into account the provision by you of additional information by letter dated 28 July 2022, as well as the repeated negotiations held with you (including on 29 July and 1 August of the current year) to resolve the current situation … [the Employer] hereby satisfies your request to terminate the said Contract of Employment by mutual agreement of the parties…namely in accordance with Order No. 7 of 28 August (sic) 2022 the Contract of Employment is terminated from 26 July 2022 and 26 July 2022 is considered the last working day.*'

24. Order No. 7 is dated 3 August 2022 and notes that Ms Bizhanova was absent through illness between 7 and 25 July 2022 and notes the mutual agreement to terminate the contract of employment from 26 July.

25. The Employer has not provided Ms Bizhanova's letter dated 28 July referred to in their letter of 3 August. Nor is there any record of the 'repeated negotiations'. The explanation for the lack of further material is that the relevant file has been lost. The reference in the letter to Order No. 7 of 28 August rather than 3 August is a typographical error of no consequence. As I have already noted, the judge's conclusion that there was no agreement to terminate the employment is not the subject of an appeal. It follows that these documents provide no support for the Employer's contention that the employment was terminated on 26 July 2022.

26. The final contemporary document under Reference 02/22 is also dated 3 August 2022 and presents a different picture. It is headed Notice of Termination of Employment by Mutual Agreement. After the salutation it continues:

> '*We hereby inform you … in connection with difficult economic situation, we are forced to terminate the above contract.*'

27. It then refers to the same letter and negotiations recited in Reference 01/22 and says, 'the contract with you is terminated from 26 July 2022, and 26 July 2022 is considered the last working day.'

28. The terms of this letter are inconsistent with Order No. 7. Both that and the first letter of 3 August link the termination of employment with the absence through sickness rather than the economic situation. The judge's conclusion that there was no agreement to terminate the employment, whether on 26 July or at all, precludes the Employer from relying on this document to support a contrary conclusion. It is hardly surprising that the judge was not prepared to accept the contention that such an agreement had been reached. As he said, there was an absence of records of the discussions; but also the frankly contradictory reasons for agreement given by the Employer further undermine the contention.

29. It must not be forgotten that both Regulation 15 and Regulation 60 of the Regulations are concerned with notice periods. An employer gives notice by telling its employee that the employment is being terminated not be making a record on an internal document. The documentation provided to the Court by the parties supports the inevitable conclusion that the Employer gave notice to Ms Bizhanova that her employment was being terminated on 3 August 2022. She had completed three months' continuous service the day before. By virtue of Regulation 60 of the Regulations the Employer was obliged to give her 30 days' notice of termination.

30. It follows that Ms Bizhanova was entitled by virtue of Regulation 60 to 30 days' notice of termination of her employment from 3 August 2022. Whilst sympathising with the judge because of the confused way in which the arguments developed before him, my conclusion is that he was wrong to decide that she was entitled only to 7 days' notice. To that extent this appeal is allowed.

31. I direct the parties to calculate the correct judgment sum to reflect my conclusion and submit any agreed figure within 7 days of this order. In default of agreement the parties may file a short submission explaining their respective calculations. Submissions of costs are to be made in writing within the same timescale.

By the Court,

The Rt Hon. The Lord Burnett of Maldon PC DL,
Chief Justice, AIFC Court

Representation:

The Appellant was represented by Mr Erik Sabiev, Legal Consultant, Astana Chamber of Legal Consultants, Astana, Kazakhstan.

The Respondent was represented by Mr Ergali Iztaev, Lawyer, Centre for Scientific and Technological Initiatives "Samgau" Foundation, Astana, Kazakhstan.