



IN THE COURT OF FIRST INSTANCE
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

28 March 2024

CASE No: AIFC-C/CFI/2024/0009

MR. SARINOV AYAN TOLEUOVICH

Appellant

v

(1) KHAN TENGRI CAPITAL LLP
(2) APEX MANAGEMENT GP LTD

Respondents

JUDGMENT

Chief Justice of the Court:

The Rt. Hon. The Lord Burnett of Maldon

JUDGMENT

1. This is an application by the Appellant/Claimant for permission to appeal against the order of Justice Saima Hanif KC of 1 February 2024 in Case No. AIFC – C/SCC/2023/0042. By her order, the judge allowed his claim against the First Respondent/First Defendant (Khan Tengri Capital LLP) for breach of his contract of employment with them. She ordered the termination of the contract from 1 November 2023 and made monetary awards totalling KZT 6,702,415.77. That was made up of wages due from June to October 2023, a penalty due under Article 113.3 of the Labour Code and money due for unused holiday leave. The judge dismissed a claim for damages relating to a bank loan taken out by the Appellant. She also dismissed a claim for moral harm that was described in various ways by the claimant, but was essentially for distress and anguish he said was caused by the Khan Tengri Capital's failure to pay him his contractual wages. This part of his claim was encompassed under the heading 'Seeking Redress for Unimaginable Hardship' in the original claim form described as 'moral distress' in seeking relief.
2. The judge dismissed all the claims against the Second Respondent/Second Defendant (Apex Management GP Ltd), concluding that the Appellant had no contractual relationship with them. His contention was that he had an implied contract of employment with Apex Management concurrently with his employment with Khan Tengri Capital.
3. The Appellant has provided a comprehensive argument in his application form of 14 February 2024. The Respondents responded with a detailed Respondents' Notice on 6 March 2024.
4. Apex Management was a new financial services company which needed regulatory approval. Khan Tengri Capital had a substantial financial interest in Apex Management. The judge accepted that the Appellant's contract of employment with Khan Tengri Capital as an associate encompassed expressly the work he did in connection with the establishment and registration of Apex Management. She also observed that the Appellant's case, if accepted, would have resulted in his working full-time for two separate employers.
5. The application for permission to appeal must be considered in accordance with Rule 29.6 of the AIFC Court Rules and will be granted where 'the appeal would have a real prospect of success' or 'there is some other compelling reason why the appeal should be heard'. Rule 29.7 identifies that an appeal will be allowed where the decision of the lower court was 'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings' below.
6. The overriding contention of the Appellant in support of his application for permission to appeal against the dismissal of his claim against Apex Management is that in rejecting his case that he was an employee of Apex Management, as well as Khan Tengri Capital, the judge 'failed to consider all the facts and evidence' he had presented which amounts to a serious irregularity for the purposes of Rule 29.7(2). He suggests that the judge made 'an incomplete assessment' with the result that there should be a 'reconsideration that takes into account the complexities of modern work arrangements, emphasising the substantive aspects that establish a clear employer-employee relationship.'
7. In seeking compensation for 'Moral Distress' the Appellant suggests that the judge was wrong to consider this part of his claim by reference to the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan No. 7 of 2015 on Moral Harm because it is not part of the Acting Law of the Republic of Kazakhstan for the purposes of Article 4.1(3) of the Constitutional Statute of the AIFC. Instead, he seeks to rely upon the Canadian Law of punitive damages as articulated in

the decision of the Supreme Court of Canada in *Whiten v. Pilot Insurance Co* [2002] 1 SCR 595 at para 36.

8. The judge considered this small claim on the basis of the papers provided to her by the parties. Those papers, which I have reviewed, contained a large volume of emails, screenshots etc., on which the Appellant relied in support of his contention that he was employed implicitly by Apex Management.
9. The argument that the judge failed to take into account all of the evidence with which she was provided is, in my judgment, unsustainable.
10. In setting out the 'salient facts' the judge referred to that large body of material. In para 32 of her judgment, when finding for Apex Management, she referred to 'having regard to the documentary evidence'. In particular, the judge explained that she considered that the documentary materials were consistent with what was envisaged as falling within the scope of the Appellant's employment with Khan Tengri Capital in a critical email of 31 May 2023. The short point was that the contractual arrangement with Khan Tengri Capital envisaged his employment being with them whilst he was closely involved in setting up Apex Management. All the work relating to the activities of Apex Management was to be carried out by the Appellant under the contract with Khan Tengri Capital read with the email of 31 May.
11. There was no arguable irregularity here nor could it be said that the judge was wrong in her conclusion that the evidence did not support a finding of concurrent employment of the Appellant by Apex Management. The judge was also right to consider the odd consequences of the Appellant's suggestion that he was employed by two separate employers, full-time and concurrently.
12. The Appellant mentioned in his original claim form that there was a witness who could support his claim against Apex Management but no evidence from the witness was provided in the claim. He refers again to the witness's existence in his notice of application for permission to appeal. But an appeal does not provide an opportunity to bring evidence before the court which could have been made available at first instance.
13. The application for leave to appeal against Apex Management is, in reality, based upon a disagreement with the judge's conclusion on the totality of the evidence rather than any appealable point.
14. I have summarised the way in which the Appellant put his case for damages for Moral Distress. His claim form and the preceding correspondence did not identify the legal basis for such a claim. In their Defence, both Respondents made reference to the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan No. 7 of 2015 on Moral Harm. They explained that this law did not assist the Appellant because it applied only to non-property claims. In his Reply to the Defence, the Appellant argued that 'despite legal distinctions between property and non-property claims, the suffering experienced by the Claimant goes beyond mere monetary loss. [The] breach of contract caused substantial emotional distress...' I do not read that Reply as disputing that his claim did not fall within the scope of 'moral harm' in Kazakh law nor did it advance a different basis upon which such damages could be paid.

15. It is therefore not surprising that the judge failed to make an award. The claim is now put forward on a different basis but also suggests that the Regulatory Resolution of the Supreme Court is not part of the law applicable in the AIFC Court.
16. Article 4 of the Constitutional Statute of the Republic of Kazakhstan on the Astana International Financial Centre provides the Acting Law of the AIFC. It includes ‘the Acting Law of the Republic of Kazakhstan, which applies in part to matters not governed by this Constitutional Statute and AIFC Acts’. Article 13.6 allows the Court to take account of the final judgments of the courts of other common law jurisdictions and Regulation 29 of the AIFC Court Regulations enables the court to apply ‘such law as appears to the Court to be the most appropriate in the facts and circumstances of the dispute’ so long as it is not inconsistent with the governing AIFC law.
17. The Appellant now argues that the Regulatory Resolution of the Supreme Court is not part of the Acting Law of Kazakhstan. He refers to the Law of Kazakhstan ‘On Legal Acts’ No. 480 V dated 6 April 2016, and specifically Article 10 concerning the Hierarchy of Legal Acts. As the Respondents point out in their Respondent’s Notice, the Appellant has taken one part of this Law out of context. Articles 4 and 5 make clear that a Regulatory Resolution of the Constitutional Court of the Republic of Kazakhstan or the Supreme Court of the Republic of Kazakhstan is part of Kazakh Law. The judge was fully entitled to consider this part of the claim by reference to the relevant Regulatory Resolution. The Appellant does not suggest that his claim falls within the concept of ‘moral harm’ as articulated by the Supreme Court of Kazakhstan. I would add that the law of England and Wales, save for extremely limited exceptions, does not allow for the recovery of damages for the distress caused by a breach of contract. Exemplary damages may be awarded in exceptional circumstances. This breach of contract claim is far removed from such a circumstance. The Appellant has referred to Canadian law where the concept of exemplary damages is referred to as punitive damages. Although the approach in Canada is considered to be more flexible than in England, the paragraph in the judgment in *Whiten* to which he refers shows its wholly exceptional nature. Even were it applicable, it would not assist him.
18. There is no merit in this part of the Appellant’s application.
19. The Appellant notes that no order for costs was made by the judge. Part of her reasoning appears to rest on an assumption that Khan Tengri Capital would satisfy the judgment by 9 February 2024. He says that has not happened. He therefore asks the Appeal Court to revisit the costs order.
20. This is not an appeal point but rather a matter that needs to be raised with the court below.
21. I am satisfied that the appeal would not have a real prospect of success nor is there some other compelling reason why the appeal should be heard. In the result this application for leave to appeal must be dismissed.



By Order of the Court,

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

Representation:

The Appellant was represented by Mr. Islambek Nurzhanov, independent external lawyer, Astana, Kazakhstan.

The Respondents were jointly represented by Ms. Aidana Tokina, independent Legal Consultant, Kazakhstan.