



IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

3 August 2020

CASE No: AIFC-C/SCC/2020/0002

NURSULTAN ALIYEV

Claimant

v

PROPORTUNITY MANAGEMENT COMPANY LTD.

Defendant

JUDGMENT

Justice of the Court:

Justice Charles Banner QC



ORDER

1. **The Claim is dismissed.**

JUDGMENT

Introduction

1. By this claim, the Claimant, Mr. Nursultan Aliyev, seeks damages totalling KZT 199,089.50 and other relief against the Defendant, Proportunity Management Company Limited ("**Proportunity**"), arising out of what he says was an employment contract between him and Proportunity which was terminated without the notice period prescribed by law and without payment of a portion of accrued salary. The basis of the claim, and the damages and relief sought, are described in more detail below.
2. Proportunity is a registered participant in the Astana International Finance Centre ("**AIFC**").
3. Contracts of employment with AIFC participants are governed by the AIFC Employment Regulations (AIFC Regulations No. 4 of 2017, as amended in July 2019) ("**the Employment Regulations**"). The claim is founded upon alleged breaches of the Employment Regulations.
4. Regulation 4 of the Employment Regulations provides:
 - " (1) These Regulations apply to an Employee of AIFC Bodies, AIFC Bodies' Organisations, the AIFC Participants, and to the Employee's Employer.
 - (2) These Regulations provide the applicable law for the Contract of Employment of the Employee.
 - (3) Any dispute arising under these Regulations shall be subject to the jurisdiction of the Court."
5. The reference to "the Court" in Regulation 4(3) is to the AIFC Court: see Schedule 1 of the Employment Regulations.
6. The AIFC Court was established pursuant to the Constitutional Statute of the Republic of Kazakhstan on the Astana International Finance Centre (Constitutional Statute No. 438-V ZRK of 7 December 2015) ("**the Constitutional Statute**"). Pursuant to Regulation 13(5) of the Constitutional Statute, on 5 December 2017 the AIFC Management Council approved the AIFC Court Regulations.
7. By Regulation 26(1)(b) of the AIFC Court Regulations, the Court has exclusive jurisdiction over (amongst other things) "any disputes relating to operations carried out in the AIFC and regulated by the law of the AIFC". The law of the AIFC includes the Employment Regulations.
8. It is therefore plain that the AIFC Court has jurisdiction over the dispute in the present case.
9. Regulation 30 of the AIFC Court Regulations provides for rules to be made for the practice and procedure to be followed in the AIFC Court. Pursuant to this provision, the AIFC Court Rules ("**the Rules**") were made in January 2018. Part 28 of the Rules relates to the Small Claims Court ("**SCC**"), which by Regulation 9 of the AIFC Court Regulations is a division of the Court of First Instance ("**CFI**"). Rule 28.2 provides:

“The SCC will hear and determine claims within the jurisdiction of the Court:

- (1) where the amount of the claim or the value of the subject matter of the claim does not exceed USD 150,000;
- (2) where the amount of the claim or the value of the subject matter of the claim does not exceed USD 300,000 and all parties to the claim elect in writing that it be heard by the SCC;
- (3) where the claim relates to the employment or former employment of a party and all parties elect in writing that it be heard by the SCC; and
- (4) such other claims as may be ordered or directed by the Chief Justice to be heard by the SCC from time to time.”

10. The amount of the claim in the present case is below USD 150,000. The case also relates to what is claimed to be the former employment of Mr. Aliyev, and both parties have elected in writing that it should be heard by the SCC. For either or both these reasons, the SCC is the division of the CFI required to determine the claim.

Procedural background

11. Mr. Aliyev, who is a litigant in person (albeit a qualified lawyer), filed his claim on 3 July 2020. Within Section 2 of the Claim Form, entitled “Brief Details of Claim”, he set out details of what he said were the facts underpinning his claim, as well as the provisions of the Employment Regulations on which he relied. This was accompanied by a Statement of Truth, signed by Mr. Aliyev. The Brief Details of Claim referred to 12 documents, which were appended to the Claim Form.
12. Proportunity, which is represented by Ms. Gaussar Abduova, filed its defence on 10 July 2020, within the time limit prescribed by Rule 28.12 of the Rules. This was accompanied by a Statement of Truth by Mr. Arman Barmenbayev, Chief Executive Officer and Director of Proportunity.
13. Pursuant to Rules 28.15-28.23 of the Rules, after a Defendant in a SCC claim has filed and served a defence, the parties have an opportunity to request, within 7 days of the service of the Defence, a consultation conducted by the Registrar of the AIFC Court or a person appointed by the Registrar. The purpose of the consultation is “to allow the parties to attempt to resolve their dispute by agreement” (Rule 28.17). In the present case, the Defendant desired a consultation, but the Claimant did not. A consultation therefore did not take place.
14. Rules 28.24-28.25 provide:
 - “ 28.24 If no consultation is fixed by the Court or if the claim is not settled at the consultation, the Court will give directions for the preparation of the small claim for trial.
 - 28.25 The Court may:
 - (1) fix a date for the final hearing of the small claim;
 - (2) inform the parties of the time allowed for the final hearing;
 - (3) require the parties to give further information about their case; and
 - (4) order each party to file and serve on every other party statements of any witness or copies of any further documents on which they intend to rely at the hearing.”
15. Pursuant to these rules, on 20 July 2020 I directed that an oral hearing should take place using video conferencing (an in-person hearing being impossible due to the COVID-19 related restrictions) on 29 July 2020, to last no more than 2.5 hours. Although Mr. Aliyev in Section 5 of his Claim Form had sought a determination on the papers without an oral hearing, and Rule 28.39 enables the SCC to

deal with a claim without a hearing, I decided that a hearing was appropriate in this case. This was because, as elaborated below, the dispute between the parties is centred upon their competing factual accounts of what was, or was not, offered orally to Mr. Aliyev by Proportunity or its Director Mr. Yerbolat Sarsenbayev. It was therefore appropriate to hold a hearing so that the factual evidence could be tested orally and evaluated by the Court in that light.

16. The directions dated 20 July 2020 also required the parties to file and serve “any further information, including any statements of any witnesses and any other documents, together with a list of any witnesses who are to give oral evidence at the hearing” no later than 18:00 Nur-Sultan time on 24 July 2020. Pursuant to this, Mr. Aliyev filed two documents (extracts from Proportunity’s job advertisement and from a WhatsApp conversation) and Proportunity filed two written statements in the names of Mr. Sarsenbayev and Ms. Yelena Polichshuk.
17. On 28 July 2020 I gave directions for the timetable and conduct of the hearing. Given the central importance of the competing factual evidence to determining the dispute between the parties, I required pursuant to Rule 28.30 (having regard to the overriding objective in Part 1 of the Rules) that oral evidence should be taken on affirmation. For the same reason, I allowed each party a timelimited opportunity to cross-examine the witness(es) for the opposing party. I wish to stress that cross-examination of opposing witnesses is not an automatic right in SCC proceedings (see Rules 28.28 and 28.31) and my decision to allow it in the particular circumstances of this case should not be seen as setting a general precedent. Whether cross-examination is appropriate in the hearing of any particular SCC claim will turn on the application of the overriding objective in Part 1 of the Rules, together with the relevant provisions of Part 28, to the particular circumstances of the case.
18. The hearing took place as planned on 29 July 2020. At the outset, Ms. Abduova on behalf of Proportunity sought my permission to produce further documentation, amounting to multiple pages, which she described as correspondence which further supported Proportunity’s characterisation of Mr. Aliyev’s role. I ruled that this additional documentation should not be admitted. There was no convincing reason why this document had not been filed and served by the 24 July 2020 deadline prescribed in my directions dated 20 July 2020. Allowing this document belatedly to have been admitted would have necessitated an adjournment to allow Mr. Aliyev (a litigant in person, albeit legally qualified) to consider it before giving his evidence. The description of the document did not suggest that it added anything of great significance to the material already before the Court. For these reasons, I decided that admitting this document would be inconsistent with the overriding objective in Rule 1.6 of the Rules of dealing with cases justly (see in particular subparagraph (2), “ensuring that the parties are on an equal footing”, subparagraph (3) “ensuring that the case is dealt with expeditiously and effectively”, and subparagraph (4) “dealing with the case in ways which are proportionate”). I wish to stress in particular that, where a litigant in SCC proceedings seeks to submit documents after the Court’s deadline for written evidence has expired, and admitting those documents would require an adjournment to give the other party a fair chance to consider them, that is likely to frustrate the main objective of the SCC which is to provide a fasttrack, streamlined means of determining small claims. The Court will therefore require a great deal of persuasion that, in such circumstances, permission to file evidence out of time should be granted. ***The dispute between the parties***
19. Mr. Aliyev is qualified as a lawyer in Kazakhstan with over 6 years’ professional legal experience at various organisations in Almaty and Nur-Sultan.

20. On 29 March 2020, he applied by email for an advertised job vacancy as a lawyer at Proportunity. He attached his CV to the email. Shortly afterwards he was contacted on WhatsApp by Mr. Sarsenbayev, who as noted above is a Director of Proportunity. There followed an exchange between them on WhatsApp which culminated in Mr. Sarsenbayev holding a telephone interview with Mr. Aliyev on 30 March 2020.
21. What happened next is in dispute.
22. Mr. Aliyev says that after the interview, he was “invited to the position of lawyer at Proportunity” (at the hearing he confirmed this was by Mr. Sarsenbayev orally). He states in his Claim Form:
- “On April 01, 2020, Mr. Sarsenbayev asked me through the WhatsApp messenger to send him a passport to conclude an employment contract, which I immediately send (Document 8)”.
23. Document 8 is an extract from the WhatsApp exchange between Mr. Aliyev and Mr. Sarsenbayev. Mr. Sarsenbayev did indeed ask for Mr. Aliyev’s passport, but there is no reference in his messages to an employment contract. There is no documentary evidence before me of the offer. Mr. Aliyev says that, in this respect, Proportunity was in breach of Regulation 11 of the Employment Regulations, which provides in relevant part:
- “ (1) An Employee may only be employed under a Contract of Employment that is written in English and signed by both the Employer and Employee.
(2) Within 2 months after the start of the employment, the Employer must give the Employee a written copy of the Contract of Employment that has been signed by both the Employer and the Employee.”
24. Proportunity’s Defence accepts that the interview between Mr. Sarsenbayev and Mr. Aliyev took place. It says, however, that during the interview Mr. Sarsenbayev informed Mr. Aliyev that he was not suitable for the advertised position at Proportunity, but instead:
- “... made a proposal to [Mr. Aliyev] for a paid internship under his mentorship, without accepting him to work for Proportunity Management Company Ltd, to which he agreed.”
25. Mr. Aliyev’s pleaded case also refers to a proposal of an internship, albeit in materially different terms:
- “The first two working weeks (April 1 to April 14) were announced to me as an unpaid internship by Mr. Sarsenbayev, although this was not previously specified in the job description or in a conversation with Mr. Sarsenbayev. I had to agree to these conditions. Having successfully completed the internship imposed by Proportunity, my work as a lawyer in Proportunity was continued.”
26. Mr. Aliyev’s version of events, therefore, is that the internship offered was with Proportunity (who had converted their previous offer of immediate employment to an offer of an initial internship), and that at its conclusion after two weeks he was retained as an employee of the company.
27. Proportunity says that that its characterisation of the relationship, as an internship with Mr. Sarsenbayev personally throughout, is reflected by the fact that Mr. Aliyev’s remuneration was paid

from Mr. Sarsenbayev's personal bank account, as opposed to from Proportunity's bank account. Mr. Aliyev accepts in his Claim Form that, in April, "the salary came from Mr. Sarsenbayev's personal account". At the hearing, he said he did not know from which account the subsequent payments came from. Mr. Sarsenbayev's evidence was that they came from his personal account. In the absence of any contradictory evidence or any challenge in cross-examination to this aspect of his evidence, I accept that this was the case and proceed on the basis that all payments came from Mr. Sarsenbayev's personal bank account.

28. Proportunity also stresses that "all negotiations" were between Mr. Aliyev and Mr. Sarsenbayev, with no participation at any stage by Mr. Barmenbayev, Proportunity's CEO. This too is factually uncontroversial: on Mr. Aliyev's Claim Form, his references to written and oral discussions about his role during the months of March, April and May 2020 mention Mr. Sarsenbayev but no other active protagonist on Proportunity's side. Proportunity submits that this further supports the conclusion that what was offered to and accepted by Mr. Aliyev was an internship with Mr. Sarsenbayev personally as opposed to a contract of employment with Proportunity.
29. As noted above, following my directions on 20 July 2020, Proportunity filed two written statements, each signed and dated 24 July 2020. One of these statements is from Mr. Sarsenbayev, who wrote:
- "After the failure of the interview with the company, I offered [Mr. Aliyev] an internship with me, to which he agreed. I confirm that I paid him from my personal funds because he was doing work to help me, not the company."
30. The other statement was from Ms. Polichshuk, Manager of the Commercial Real Estate Sales and Purchase Department at Proportunity. She wrote:
- "Nursultan Aliyev did come to the office, but did not carry out any activities in the interests of the Proportunity Management Company Ltd. He carried out exclusively the instructions of our employee Mr. Sarsenbayev Y.B.."
31. I heard oral evidence from both Mr. Sarsenbayev and Ms. Polichshuk, for the Defendant, as well as from Mr. Aliyev, the Claimant. Mr. Sarsenbayev and Ms. Polichshuk gave their evidence in Russian, with the use of a court interpreter. Mr. Aliyev gave his evidence in English.

The remedies sought by the Claimant

32. If Proportunity's factual account of what was offered and accepted (namely, an internship with Mr. Sarsenbayev personally) is correct, then there was no contract of employment between Mr. Aliyev and the company. Mr. Aliyev's claim against Proportunity would therefore fail. It would not be necessary for the Court to consider the question of what remedy or remedies to grant Mr. Aliyev.
33. If, however, Mr. Aliyev's factual account of what was offered and accepted (namely, employment with Proportunity) is correct, then it would become necessary to consider the heads of damages that Mr. Aliyev seeks from Proportunity. As to this, Mr. Aliyev says:
- 1) He was dismissed without notice on 12 June 2020, by Mr. Sarsenbayev, on behalf of Proportunity. Regulation 60(2)(a) of the Employment Regulations requires not less than 7 calendar days' notice to be given to an employee if their period of continuous

employment is less than 3 months (as here on Mr. Aliyev's own case).¹ Mr. Aliyev therefore claims 5 working days' worth of pay that would have been due to him if he had been given the prescribed notice, which he calculates to be 49,772 KZT.

- 2) He was not paid his salary for the period from 1 to 12 June 2020, which amounted to 99,545 KZT.
- 3) He was also due compensation in lieu of leave accrued under Regulations 27 and 28 of the Employment Regulations but not taken in the sum of 47,772.5 KZT. However, when I pointed out to Mr. Aliyev at the hearing that under Regulation 27(2) that vacation leave accrues pro rata for an Employee "who has been employed for at least 90 days in a year", and that the period he contends he was employed by Proportunity was less than 90 days, he indicated that he no longer pursued this remedy.
- 4) Proportunity failed to comply with its duty under Regulation 63 of the Employment Regulations to "enrol the Employee in the Employee's Kazakhstan pensions scheme in accordance with the legislation of Kazakhstan". There was no attempt to quantify this head of the claimed damages either in the Claim Form or in any other of the material provided to the Court before the hearing.

34. Proportunity's Defence is silent on these four matters. When I asked Ms. Abduova at the hearing for clarification of Proportunity's position in this respect, she did not elaborate beyond restating the company's denial that Mr. Aliyev had a contract of employment with it.

35. Mr. Aliyev's claim form seeks the following further remedy from the Court:

"(5) Take measures regarding Proportunity by the AIFC authorized bodies for non-compliance with the AIFC regulations, in particular the AIFC Employment Regulations."

36. The rationale for this was expressed to be that:

"According to [Regulation] 66(1)(b) of the AIFC Employment Regulations, the Board has a power to make rules necessary or convenient to be prescribed for giving effect to AIFC Employment Regulations, and there are no limits on the fines and other penalties that may be imposed for a breach of these Regulations."

37. This aspect of the relief which Mr. Aliyev seeks from the Court is misconceived. Regulation 66(1) imposes a discretionary power on the Board of the AIFC Authority to make rules. It does not confer any powers on the AIFC Court where no relevant rules have been made. I therefore do not consider this aspect of the claim any further.

Findings

38. The absence of any written record of what was offered to and accepted by Mr. Aliyev means that I have to make inferences from the evidence presented to me.

¹ The reference in Regulation 60(2)(a) is to "7 days"; the definition of "Day" in Schedule 1 of the Employment Regulations is "a calendar day".

39. In my judgment, the evidence supports the conclusion that, on the balance of probabilities, the role that Mr. Aliyev was offered and accepted, and which he undertook, was an internship with Mr. Sarsenbayev personally and not a contract of employment with Proportunity.
40. The principal considerations which have led me to this view are as follows:
- 1) If Mr. Aliyev was offered a contract of employment with Proportunity, then (particularly as he is a lawyer) I would have expected him to have sought prompt written confirmation of that offer, which he did not do. When this was put to him at the hearing, his answer was unconvincing. He said that he did not seek written confirmation because of the COVID-19 related lockdown in force at the time in Kazakhstan. The lockdown would not, however, have prevented written confirmation being sought and provided by email or WhatsApp messenger, which were the principal means by which he communicated with Proportunity and Mr. Sarsenbayev around the time of his application and interview.
 - 2) There is also no evidence (other than his bare assertion in oral evidence) that, after Mr. Aliyev had been in position for two months he asserted his right under Regulation 11(2) of the Employment Regulations² to a written copy of the claimed contract of employment. He was plainly aware of this right since he now relies upon it in this claim. On his own case, problems had already arisen in relation to his relationship with Proportunity by the time the two month period had expired (see e.g. the references in his Claim Form to the unilateral imposition of an initial two week internship period and a subsequent reduction in his remuneration). I would expect in those circumstances that a qualified lawyer, aware that he had a legal right to a written copy of his contract of employment which had not yet been provided to him, would have promptly requested his employer in writing to comply with that requirement. Mr. Aliyev did not offer any convincing explanation for not having done so.
 - 3) As noted at paragraph 27 above, the payments to Mr. Aliyev came from Mr. Sarsenbayev's personal account and not Proportunity's corporate account. I consider that this is a particularly compelling indicator that his role was with Mr. Sarsenbayev personally and not with Proportunity.
 - 4) It is common ground that all the negotiations in late March about the role that Mr. Aliyev was to take up were between him and Mr. Sarsenbayev (see paragraph 28 above). There was no meaningful involvement by anyone else at Proportunity. This is consistent with, and supports, Proportunity's case that the role which Mr. Aliyev took up was an internship with Mr. Sarsenbayev personally.
 - 5) Mr. Sarsenbayev had a credible and persuasive answer to my question to him at the hearing as to why, if he had judged Mr. Aliyev to be inadequately experienced for the advertised vacancy at Proportunity, he nonetheless offered him an internship: in summary, the role at Proportunity required considerably more knowledge and experience (which he considered Mr. Aliyev did not have) given its more demanding nature, whereas the personal internship offered Mr. Aliyev a lower-level opportunity to improve his skillset. Mr. Aliyev's questioning of Mr. Sarsenbayev on this point focused on the fact that the two men were of a similar age and number of years' experience – his point being that it was inherently improbable that one would be offered, and accept, an internship with the other

² Regulation 11(2) provides: "Within 2 months after the start of the employment, the Employer must give the Employee a written copy of the Contract of Employment that has been signed by both the Employer and the Employee."

– but Mr. Sarsenbayev gave a powerful riposte noting that he had in his time as a lawyer gained experience of some 200 court cases whereas Mr. Aliyev only had experience of around 10 court cases. It was clear to me from his evidence that Mr. Sarsenbayev is a highly intelligent, articulate and successful individual who has so far achieved greater professional standing than Mr. Aliyev. I therefore do not find anything inherently incredible about Mr. Sarsenbayev offering Mr. Aliyev a personal internship with him, or with Mr. Aliyev accepting that offer.

- 6) In response to questions from Ms. Abduova and the Court at the hearing about the details of the work he claims he did for Proportunity, Mr. Aliyev's answers were vague and lacking in detail. By contrast, the oral evidence of Mr. Sarsenbayev was detailed and convincing in describing the non-Proportunity work that Mr. Sarsenbayev said Mr. Aliyev did for him personally. One example given was in relation to a dispute relating to tobacco importation for a company in Almaty which is one of Mr. Sarsenbayev's personal clients outside the sphere of his work at Proportunity. I asked Mr. Aliyev whether he accepted that he had done work for Mr. Sarsenbayev in relation to this non-Proportunity matter and, in my view tellingly, he said that he had.
- 7) Ms. Polichshuk's written evidence, which was not challenged, was that she had not encountered any work done by Mr. Aliyev for Proportunity. In oral evidence she convincingly explained that, as Manager of Proportunity's Sales Department, she would inevitably have encountered his work if he had been employed by Proportunity (rather than Mr. Sarsenbayev personally) given that her role was central to the transactional side of the company's real estate investment business.
- 8) As noted at paragraphs 22-23 above, in his claim form Mr. Aliyev described the WhatsApp message from Mr. Sarsenbayev to him on 1 April 2020 as asking for a copy of his passport "to conclude an employment contract", but in fact this is a material gloss on what the WhatsApp message actually said. Mr. Sarsenbayev asked for a copy of the passport but there is no reference to an employment contract. This unwarranted embellishment has led me to approach Mr. Aliyev's evidence with a degree of caution.
- 9) The documentary evidence submitted by Mr. Aliyev on 24 July 2020 pursuant to my first directions order included a WhatsApp exchange between him and Mr. Barmenbayev, who as I already mentioned, is Proportunity's CEO. There were two passages in this document (which was translated into English prior to the hearing) that, read in isolation, arguably gave the impression that Mr. Barmenbayev was giving professional instructions to Mr. Aliyev (and thus gave some support to Mr. Aliyev's case that he was employed by Proportunity as opposed to being Mr. Sarsenbayev's personal intern). I was, however, persuaded by Mr. Sarsenbayev's response when I put this to him at the hearing. The first passage concerned messages at 13:45 and 13:46 on 26 May 2020, in which Mr. Barmenbayev asked Mr. Aliyev to print certain documents. Mr. Sarsenbayev's response was that (a) there was nothing in the exchange indicating that this was legal work falling within the advertised job description of a lawyer at Proportunity which Mr. Aliyev had applied for and which he claims he was offered and accepted, and (b) it was not such work. I agree with part (a) of his answer and accept part (b). The second passage concerned a message at 13:03 on 28 May 2020 in which Mr. Barmenbayev requested to be provided with certain categories of contracts. Mr. Sarsenbayev said in oral evidence at the hearing that this was a request made by Mr. Barmenbayev (his friend and business partner) on his behalf and at his request. Albeit with some initial hesitation, I accept this explanation on the balance of probabilities, given in particular the context of the other factors described in subparagraphs (1)-(8) above.

Conclusion

41. I have found that there was no contract of employment between Mr. Aliyev and Proportunity. I accept Proportunity's contention that Mr. Aliyev was recruited as an intern by Mr. Sarsenbayev personally. Mr. Aliyev's claim against Proportunity under the Employment Regulations therefore fails.
42. As Ms. Abduova for Proportunity acknowledged in her closing submissions, there remains a potential question as to whether Mr. Aliyev's internship with Mr. Sarsenbayev was itself a contract of employment to which the Employment Regulations applies and whether, if so, Mr. Aliyev might have a claim against Mr. Sarsenbayev. The parties did not invite me to express a view on this and I do not do so. I asked Mr. Aliyev at the hearing whether, in the event that I accepted Proportunity's characterisation of his role as Mr. Sarsenbayev's intern, he would wish to apply for Mr. Sarsenbayev to be added as a defendant to these proceedings. He declined, saying that he was only interested in a claim against Proportunity. In any event, the dismissal of this claim against Proportunity would not preclude a separate claim being brought by Mr. Aliyev against Mr. Sarsenbayev, in relation to which no court fee would be chargeable. There would therefore be no need to keep the current proceedings alive even if Mr. Aliyev did wish to pursue a case against Mr. Sarsenbayev.
43. The claim is therefore dismissed.

By the Court,

Representation:

The Claimant was represented by himself.

The Defendant was represented by Ms. Gaussar Abduova, Counsel (instructed by Mr. Arman Barmenbayev, Director, Proportunity Management Company Ltd.).