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

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

KANIYA BIZHANOVA

Applicant

v

CENTER FOR SCIENTIFIC AND TECHNOLOGICAL INITIATIVES LTD.

Respondent

JUDGMENT

Justice of the Court:
The Rt. Hon. Sir Jack Beatson FBA

ORDER

Ms Kaniya Bizhanova ("the Applicant") is entitled pursuant to Rule 29.6(1) of the AIFC Court Rules 2018 to argue that the Judge erred in finding that she is only entitled to 7 days' notice of the termination of her contract and that she should have been given 30 days' notice. Permission to appeal on the remaining issues is reserved to the Court hearing the appeal.

JUDGMENT

I. *Introduction:*

1 This application, filed on 11 September 2023, by Ms Kaniya Bizhanova ("Ms Bizhanova") is for an extension of time in which to appeal and for permission to appeal against the judgment and order dated 24 March 2023 of Justice Charles Banner KC sitting in the Small Claims Court of the Astana International Financial Centre ("the SCC") in AIFC Court Case No. 28 of 2022. Ms Bizhanova claimed that her former employer, the Center for Scientific and Technological Initiatives Ltd. ("the CFSTI"), wrongly terminated her contract of employment as its Financial Director-Chief Accountant as of 26 July 2022 in a Norice of Termination and an Order both dated 3 August 2022. It had previously ordered the termination of the contract as of 21 July 2022 in an Order dated 21 July 2022.

2 The Judge found largely in favour of the CFSTI. He held that Ms Bizhanova's claim succeeded only to the extent that the CFSTI was liable to pay her the sum of 747 866,75 KZT and dismissed all other parts of her claim. The background to the case and the SCC's analysis and conclusions are contained in its judgment. The AIFC legislation that is relevant to this application are the AIFC Employment Regulations No. 4 of 2017, hereafter the "Employment Regulations", and the AIFC Court Rules 2018, hereafter the "Court Rules".

3 Regulation 15 and 60(2) of the Employment Regulations, respectively on probation and rights to minimum notice, are material to this application. Regulation 15 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."*

The material parts of Regulation 60(2) provide:

> "*Subject to subsection (5),*[1] *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; …*"

4 Part II of this judgment summarises the decision of the SCC. Part III explains the material parts of the regime for applying for permission to appeal against a decision, the time limits for so doing, and whether

[1] Subsection (5) provides that subsection (2) does not apply if the employment is terminated during the probationary period under section 15(2),

time should be extended in the present case. Part IV summarises the grounds Ms Bizhanova has advanced in support of her application and CFSTI's statement in opposition to it. Part V sets out my conclusion and the reasons for it.

II. ***The decision of the SCC:***

5 The judge stated at [4] that CFSTI resisted the claim in its entirety principally on the basis that it was entitled to terminate Ms Bizhanova's employment. This was either because:

(a) she had committed a repudiatory breach of contract by having failed properly to give notice of her sick leave for a significant period of 19 days during July 2022, entitling it to dismiss her without notice under regulation 61 of the Employment Regulations, or
(b) the termination happened during her three-month probation period under regulation 15(2) of the Employment Regulations which entitled it to dismiss her with one week's notice.

In relation to the period of sick leave in July 2022, Ms Bizhanova has provided two Medical Reports dated 7 and 26 July stating that she was temporarily unable to fulfil her duties and was released from work between 7 and 25 July 2022. Those reports, which are before me, state that between 7 and 14 July this was because of acute tonsillitis (ICD-10 Code J03.8) and between 14 and 25 July it was because of acute upper respiratory infection, iron deficiency anaemia and simple chronic bronchitis (ICD-10 Codes J06.9, D50.8 and J41.0).

6 The Judge stated at [8] that much of the argument before him focused on Ms Bizhanova's assertion that she was not provided with a written Contract of Employment within the two-month time scale provided for by regulation 11 of the Employment Regulations and that the version of the contract upon which CFSTI relied contained a false signature. He refused to appoint a joint handwriting expert to resolve the question of the authenticity of Ms Bizhanova's signature as she requested, and CFSTI did not oppose. He stated at [8] and [9] that the objective of the SCC is to provide a fast track streamlined means of determining small claims, that it is clear from Rules 28.27 and 28.28 of the Court Rules that appointing an expert would be exceptional, and that it was not necessary to appoint a joint handwriting expert for the determination of Ms Bizhanova's claim. His reasons were:

> "[10] *First, even if taking the purportedly signed written contract at face value, the burden of proof would be on the Defendant, if it wished to justify the dismissal of the Claimant without notice, to persuade the Court that the Claimant had committed a repudiatory breach of the contract: see Regulation61(2)(b) of the Employment Regulations. The Court is not satisfied that the Defendant discharged this burden of proof on the evidence presented. Although Regulation 34(1) of the Employment Regulations makes clear that the entitlement to sick pay is contingent on the employee giving the employer the notice provided for by Regulation 33, there is nothing in either of these regulations, or in Regulation 61, to indicate that the failure to give such notice is, of itself, sufficient not only to disentitle the employee to sick pay but also to amount to a repudiatory breach of contract so as to justify dismissal without notice. The Court therefore rejects the Defendant's assertion that it was entitled to dismiss the Claimant without notice. The Court also rejects the Defendant's associated assertion that the Claimant orally agreed to her dismissal in these circumstances. There is no clear evidence of such oral agreement and the Court is unconvinced, on the balance of probabilities, that such an important agreement would not have been recorded in writing in a form signed or otherwise agreed by both parties*."
>
> "[11] *Secondly, as both representatives confirmed at the hearing, it is undisputed that the termination happened during the first three months of the Claimant's employment. Regulation*

15 of the Employment Regulations is clear that an Employer may require an Employee to undergo a probationary period not exceeding three months during which the Employer may terminate the Contract of Employment with one week's notice. The dispute about whether and when the Claimant was provided with, and/or agreed, a Written Contract of Employment in this case goes nowhere on this point, because it is clear from Regulation 15 that it is entirely up to the Employer whether to include a probation clause in the Contract. Therefore, there are only two plausible possibilities on the facts of this case in light of the evidence presented to the Court: either (1) the Defendant included within the terms of the Employment Contract a three month probation clause pursuant to Regulation 15; or (2) if the Defendant so required, as it was entitled to do, the Claimant did not agree to such a clause in which case there was no Contract of Employment in the first place. The Court therefore finds on the balance of probabilities that, whatever the precise terms of the Employment Contract between the parties, as a minimum it would have included a three-month probationary period as provided for by Regulation 15 of the Employment Regulations. On that basis, the Defendant was able lawfully to terminate the Contract of Employment with one week's notice at the time when it purported to do so."

7 The Judge found at [12] that "*on this basis … the Contract of Employment in this case was lawfully terminated, irrespective of whether or not the purported signature on the Written Contract was a fraud as contended by the Claimant*". He dismissed the claim that CFSTI had acted unlawfully in terminating Ms Bizhanova's employment but ordered it to pay her damages of 336 666,75 KZT in respect of the one week's notice period to which she was entitled during her probationary period: see [13] and [18]. The Judge also ordered it to refund 411,200 KZT which it had deducted from her salary on the ground that she had made errors in her job in relation to procurement procedures because he found at [15] and [16] that CFSTI had not justified the deductions.

8 The total sum the Judge ordered CFSTI to pay Ms Bizhanova was thus 747,866,75 KZT. Paragraph 1 of the Order required CFSTI to pay this within 7 days. In its submission in opposition to the application for permission to appeal, CFSTI stated that it paid the specified sum to Ms Bizhanova on 30 March 2023. Paragraph 2 of the Order states that "*in all other respects the Claim is dismissed".* Paragraph 3 states that provided the defendant complies with paragraph 1 there shall be no order as to costs.

III. *Part 29 of the AIFC Court Rules 2018:*

9 The regime governing appeals from AIFC Courts, including appeals from the SCC to the AIFC Court of First Instance ("the CFI"), is set out in Part 29 of the Court Rules.

10 Rule 29.10 provides that an application for permission to appeal must be filed within the period directed by the lower court or, where the lower court makes no such direction, within 21 days of the decision. In this case the lower court did not direct a time. Accordingly, time expired on 14 April 2023, almost five months before the application was filed on 11 September 2023.

11 Rule 29.12 provides that an application for an extension of time must give the reasons for the delay and the steps taken prior to the application being made.

12 Rule 29.6 provides that permission to appeal may be given where the appeal Court considers that (1) the appeal would have a real prospect of success or (2) there is some other compelling reason why the appeal should be heard. By Rule 29.7 success on an appeal depends on establishing that the decision of the lower Court was (1) wrong or (2) unjust because of a serious procedural or other irregularity in the proceedings in the lower Court.

13 Ms Bizhanova asked for her application to be resolved on paper, as is normal for applications for permission to appeal made to the appeal Court: see Rules 29.16 and 29.17 of the Court Rules. CFSTI has not requested an oral hearing and I am satisfied that this application can be fairly determined on the papers without such a hearing.

The application for an extension of time:

14 The application's opening words recognise that an application to extend time for seeking permission to appeal is required in this case. The reason for the delay is, however, only addressed in the last paragraph of section 2 of the claim/application form. Ms Bizhanova states: "*The good excuse is that I got sick during that period, and I was not able to submit my appeal*".

15 The medical sick leave certificate issued on 12 April 2023 attached as proof (Document 9) states that the diagnosis is ICD-10 code J06.9, that is, an unspecified acute upper respiratory infection. The certificate, however, only covers the period between 12 and 14 April 2023. Moreover, there is no statement as required by Rule 29.12 about the steps Ms Bizhanova took before 12 April or after the period covered by the sick leave certificate before making her application on 11 September 2023.

16 Given the inclusion of the need to deal with a case expeditiously as part of the overriding objective in Rule 1.6(3) of the Court Rules, I emphasise that this Court is likely to regard non-compliance with Rule 29.12 as fatal to an application for permission to appeal. However, in this case, CFSTI's detailed submission in opposition to the application for permission to appeal does not refer to Ms Bizhanova's failure to apply within the required time limit or claim that it has been prejudiced by her delay in doing so. In those circumstances, given the context of her sickness in 2022 (see [5] above), and since for the reasons given at [23] – [27] below, I have concluded that she has raised an arguable ground within Rule 29.6(1), notwithstanding the absence of any explanation for the delay after 14 April 2023, exceptionally I extend time.

IV. ***The application for permission to appeal and the opposing submission by*** **CFSTI*:***

17 Ms Bizhanova's submissions raise nearly all the questions she had raised before the Judge, even on points on which he had found in her favour such as that she had consented to the termination of her employment or in respect of the deductions made from her salary. She submitted that CFSTI:

(a) has still not given her a written copy of the Contract of Employment signed by the Employer for her to sign: § 1.
(b) provided her with a Contract of Employment for signing in the middle of July 2022 which contained clauses providing grounds for dismissal and other conditions that had not been discussed when she was hired (unnumbered paragraph between §5 and §6).
(c) only gave her notice of the termination of her employment on 3 August 2022 which notice stated that it was to have effect as from 26 July 2022 by mutual agreement. She maintained that this was in violation of Regulation 60(2)(b) of the AIFC Employment Regulations No 4 of 2017 (the "Employment Regulations") which require a minimum period of 30 days' notice if the period of continuous employment is at least 3 months but less than 5 years and that she had not agreed to the termination of her employment: §§4-5, 13. As he stated at [11] of his judgment, set out at [6] above, the Judge found that she had not agreed to the termination of her employment. I note that the notice dated 3 August 2022 purported to operate with effect from an earlier date, 26 July 2022.

(d) provided the Court with a Contract of Employment that was not signed by her and that her signature on its last page *"was likely forged"* but the SCC rejected her request to appoint a handwriting expert: §14.

18 The application form also referred to the deductions unlawfully made from her wages at § 6, her claim that she had not been given a written itemised pay statement contrary to Regulation 1 of the Employment Regulations at §7, and at §8 that she suffered moral harm, was left without a livelihood and experienced feelings of humiliation, discomfort and resentment.

19 The remedy Ms Bizhanova seeks in section 3 of the Application Form is that this Court set aside paragraph 2 of the Order dismissing all aspects of the claim save for the damages reflecting one week's wages and payment of the sums wrongfully deducted from her wages. She asks the Court to:

(a) recognise CFSTI's Orders dated 21 July and 3 August 202 as breaches of the Employment Regulations,
(b) oblige CFSTI to sign a contract of employment with her for one year starting from 3 May 2022,
(c) order CFSTI to pay her a total of 9,032,844 KZT reflecting:
(i) 3,032,844 KZT wages in respect of the period between 22 July and 14 October 2022,
(ii) 5,000,000 KZT for non-pecuniary damage, and
(iii) 1,000,000 in respect of her lawyer's fee.

20 CFSTI's written submission in opposition to Ms Bizhanova's application repeats nearly all the points it had raised before the Judge, including arguments which the Judge rejected. For example, it repeats its arguments that (a) it was entitled to dismiss Ms Bizhanova without notice because she had committed a repudiatory breach, and (b) that Ms Bizhanova had orally agreed to the termination of her employment so that it was by consent. As seen in the extracts from the judgment set out earlier, the Judge rejected those arguments. CFSTI's written submission also maintains that Ms Bizhanova did sign the contract given to her by its former legal consultant, Ruslan Polatbekov, but did not return it then, and only did so later and that its employees had no reason to believe that the contract returned was not signed by Ms Bizhanova. As stated at [6] and [7] above, the judge considered that it was not necessary for him to resolve this issue.

21 CFSTI has, however, neither applied for permission to appeal against those matters on which the judge rejected its case or made no decision, either in a Respondent's Notice under Rule 29.29 of the Court Rules or in its written submission. Moreover, its submission does not advance arguments explaining why it considers that the Judge's decisions on those matters to be wrong. Rule 29.30 provides that the requirements of Rules 29.23 -29.27 apply to an application to appeal in a Respondent's Notice as if the respondent were the appellant. The absence of a Respondent's Notice containing an application to appeal against the matters on which the judge rejected CFSTI's case or made no finding and submissions supporting an appeal by it on these matters means this Court is unable to consider whether those points would have a real prospect of success or that there is some other compelling reason why an appeal on them should be heard.

V. My decision:

22 The crux of the Judge's reasoning for deciding that it was not necessary to ascertain whether the signature on the written Contract of Employment was a fraud was that, whether or not it was a fraud, CFSTI was entitled to terminate the contract lawfully. He stated at [11], set out at [6] above that, in the light of the evidence before the Court there were only two plausible possibilities. The first was that CFSTI

included within the terms of the contract a three-month probation clause pursuant to Regulation 15. The second is that, if CFSTI required a probation clause, as it was entitled to do, and Ms Bizhanova did not agree to such a clause, there was no contract of employment in the first place. He stated that on both these possibilities, CFSTI was entitled to terminate the contract lawfully.

23 I have concluded that, as it is undisputed that Ms Bizhanova worked for over two months for CFSTI between 3 May 2022 and 7 July 2022, and that CFSTI accepted her work, there was a third plausible possibility which would have made it necessary for the Court to ascertain whether the signature on the written Contract of Employment was Ms Bizhanova's. Although the judge was correct to state at [11] 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. But, if the signature on the written Contract of Employment which Ms Bizhanova states she was given in mid-July and had not seen before then and which Mr Polatbekov states in his written explanation was only provided to Ms Bizhanova on 11 July 2022 is not hers, the contract that arose as a result of the rendering and acceptance of her work from 3 May 2022 was not on the terms including the probation clause of the written Contract of Employment. There is no finding that Ms Bizhanova knew the employer wanted to include a probation clause before 11 July. In those circumstances, absent a determination that the signature was Ms Bizhanova's which the judge did not make, it is arguable that her Ms Bizhanova's work from 3 May 2022 and CFSTI's acceptance of it gave rise to a contract between them without a probationary period specified in it as required by Regulation 15(1).

24 On that scenario, the 1-week notice specified in Regulation 15(2) would not apply. The matter would be governed by the minimum notice provisions in Regulation 60(2). The question is whether it is arguable in the sense that there is a real prospect of successfully arguing that the 30-day notice period in Regulation 60(2)(b) applies rather than the 7-day notice period in Regulation 60(2)(a). Ms Bizhanova maintains that it does: see [17(c)] above.

25 Given that CFSTI only gave notice of the termination of Ms Bizhanova's employment on 3 August 2022, albeit stating that the notice was to have effect as from 26 July, I have concluded that, for the reasons in the next two paragraphs, it is arguable that Regulation 60(2)(b) applies, and the period of notice required was 30 days and not 7 days.

26 First, I consider it arguable within Rule 29.6 of the Court Rules that Ms Bizhanova was in the continuous employment of CFSTI between 3 May and 3 August 2022. This is a period of exactly 3 months, which falls within Regulation 60(2)(b), rather than a period of *"less than 3 months"* which would fall within Regulation 60(2)(a). This is because Ms Bizhanova remained in CFSTI's continuous employment while she was absent from work between 7 and 25 July due to her sickness. As the judge stated at [10] of his judgment, set out at [6] above, although the entitlement to sick pay under Regulation 34 is contingent on the employee giving the employer the notice required by Regulation 33, there is nothing to indicate that the failure to give such notice disentitles the employee to sick pay or amounts to a repudiatory breach or ends the employment.

27 Secondly, the judge held that Ms Bizhanova she did not consent to the dismissal operating with effect from 26 July 2022. In the absence of her consent, it is clearly arguable that the notice operated from 3 August 2022, the date on which it was given. Were it possible for a party to provide that notice is to have effect from an earlier date than the one on which it was in fact given, it would be possible to circumvent the minimum notice periods specified in Regulation 60. I observe that even in cases of termination of a contract as a result of a repudiatory breach, the termination generally operates from the date the

innocent party accepts the breach as discharging the contract: see for example *Heyman v Darwins* [1942] AC 356.

28 For these reasons, and in circumstances where the judge considered that it was not necessary to determine whether the signature on the written contract was Ms Bizhanova's, I have concluded that there is a real prospect of success within Rule 29.6(1) in maintaining that the Judge erred in finding that Ms Bizhanova is only entitled to 7 days' notice of the termination of her contract and that she should have been given 30 days' notice. Permission to appeal limited to that question is therefore granted. Ascertaining whether the signature on the written contract was Ms Bizhanova's is likely to depend on the question that the judge considered that it was not necessary to determine. If so, the court hearing the appeal will have to consider whether the most practical way of doing so is to order the appointment of a handwriting expert, and, if it does, whether to remit consideration of the report of the expert to the SCC.

29 I do not consider that, at this stage, any reason within Rule 29.6 of the Court Rules has been shown in respect of the other matters raised by Ms Bizhanova. Permission to appeal on those issues is not granted but is reserved to the Court hearing the appeal pursuant to Rule 29.22(2) of the Court Rules.

By Order of the Court,

The Rt. Hon. Sir Jack Beatson FBA
Justice, AIFC Court

Representation:

The Claimant was represented by Ms. Gulsim Kakisheva, advocate, Aktobe regional bar association, Astana, Kazakhstan.

The Defendant was represented by Mr. Tolegen Orashev, Chief Executive Officer, Center for Scientific and Technological Initiatives Ltd., Astana, Kazakhstan.