



IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

26 May 2023

CASE No: AIFC-C/SCC/2023/0009

Aidana Aituarova

Claimant

v

Private Company Smart Parking Technologies LTD

Defendant

JUDGMENT

Justice of the Court:

Justice Charles Banner KC

ORDER

1. The claim is allowed to the limited extent that the Defendant shall pay damages to the Claimant in the sum of 276,164.38 KZT in compensation for the three-day truncation of her statutory notice period under Regulation 60 of the AIFC Employment Regulations.
2. In all other respects the claim is dismissed.
3. The Claimant's application for an award of costs is refused.

JUDGMENT

Introduction

1. By this claim, the Claimant, Aidana Aituarova, seeks various remedies against the Defendant Private Company Smart Parking Companies Ltd, in relation to what she contends was her unlawful dismissal as an Executive Director of the Defendant by notice dated 5th October 2022.
2. The Court has had the benefit of written pleadings and evidence from each party, which were elaborated orally at a video hearing held on 4th May 2023. The Court is grateful to counsel for both parties for the high quality of their submissions.
3. At the hearing, counsel for the Claimant called oral evidence from Mr Bakhtiyar Rakhmatullayev, a former employee of the Defendant. Counsel for the Defendant called evidence from Mr Amirkhan Omarov, Chief Executive Officer of the Defendant, from whom a signed 'affidavit'¹ dated 6th March 2023 had previously been submitted.
4. The Court is satisfied that both witnesses were credible and sought to give accurate evidence. A significant limiting factor in relation to Mr Rakhmatullayev's evidence, however, is that it was from the perspective of his own experience of employment with the Defendant which was itself terminated. The Claimant herself, who could have given first hand evidence about her own employment and the oral discussions about its terms which she claims she had with Mr Omarov, did not give evidence at the hearing. The Court's role in this case is to determine the disputed issues about the terms and termination of the Claimant's employment contract, not to make findings about the terms and termination of Mr Rakhmatullayev's employment contract.
5. The evidence of both witnesses was given informally pursuant to Rule 28.29 of the AIFC Court Rules ("**ACR**"). The Court refused previously unforeshadowed requests at the hearing by each counsel to cross-examine their opposing witnesses. It will only be in comparatively rare cases that cross-examination will be necessary in order to give effect to the Overriding Objective in Part 1 of the ACR. This was not one such case. Each party was able to comment on the evidence given by the other party's witness, and in the circumstances of this case (including those referred to in paragraph 4 above) that was more than sufficient to ensure a fair hearing.
6. Counsel for both parties confirmed their agreement at the hearing that the Claimant's contract of employment with the Defendant was governed by the AIFC Employment Regulations as

¹ I use inverted commas as the document does not appear to have been sworn, although nothing turns on that.

amended. Although reference was made in the Claim Form to the Labor Code of the Republic of Kazakhstan, counsel for the Claimant accepted at the hearing that the claim stands or falls by reference to the AIFC Employment Regulations.

The issues

7. It became clear at the hearing that, whilst the parties' pleadings raised a range of points, the issues of dispute which require resolution by the Court boil down to the following:
 - (1) Was the Defendant's termination of the Claimant's employment contract in accordance with the AIFC Employment Regulations, and if not what damages are applicable? (At the hearing, the Claimant through her counsel disavowed her former claim for reinstatement).
 - (2) Is the Claimant entitled to 3% of the shares in the Defendant based upon what she says are promises made to her by Mr Omarov?
 - (3) Is the Claimant entitled to a per diem allowance in relation to her business trip to San Francisco, USA, on behalf of the Defendant in July-August 2022?

The Court's findings

Issue 1: Was the Defendant's termination of the Claimant's employment contract in accordance with the AIFC Employment Regulations, and if not what damages are applicable?

8. The Claimant's first submission was that the reason given by the Defendant for the termination of her employment, namely a reduction in the number of staff, was not the actual reason for her dismissal.
9. Under Regulation 60 of the AIFC Employment Regulations, however, the Defendant was entitled to terminate the Claimant's employment without cause, subject to giving her the 30 days' notice period provided for by Regulation 60(2)(b). The Defendant therefore did not need to have any particular reason to dismiss her. As the Claimant has abandoned her claim for reinstatement and is seeking only damages, any failure to provide her with the requisite notice period can be compensated by an award of damages equating to her daily contractual pay multiplied by the number of days' notice denied to her.
10. The Defendant submitted that it could have terminated her contract without notice pursuant to Regulation 61(2)(d) – not on the basis of the reason that it gave her at the time (which does not fall within the list of grounds for termination without cause under Regulation 61(2)), but on the basis that, so it alleged, she had failed to comply with her duties under her employment contract. The Court rejects this submission. It is not open to the Defendant to rely after the event on a reason for dismissal which substantially differs from what was said to the Claimant at the time. Otherwise, the statutory requirement under Regulation 62 for a statement of reasons for dismissal would be rendered meaningless.
11. The Court concludes that:
 - a. Whether the stated reason was the actual reason for dismissal is immaterial to the Claimant's claim for damages, because under Regulation 60 the Defendant did not

need to have any reason for dismissing her provided that it gave her the statutory notice period, and any deficiency in the notice period can be compensated in damages; and

- b. The Defendant's after the event attempt to rely on a ground for dismissal without notice under Regulation 61 fails.
12. The next submission made by the Claimant under this heading is that she was not given the full 30 days' notice period. She submits that this period ran from 6th October 2022, the day after the notice of termination on 5th October 2022, and excluded public holidays on 5th and 6th November,² meaning that the period terminated on 7th November 2022 and not 4th November 2022 which was the final day of the notice period provided by the Defendant. The Defendant did not dispute that this was the applicable notice period in the event that (as the Court has found) Regulation 60, as opposed to Regulation 61, applies.
 13. There was therefore a shortfall of 3 days from the statutory notice period. The Court will award the Claimant damages in the sum of 3 days' pay under her employment contract, in compensation for this shortfall. That amounts to 276,164.38 KZT, based upon the annual salary of 33,600,000 KZT of the 5th January 2022 employment contract as re-amended on 1st July 2022.
 14. The Claimant's third and final submission under this heading is that the termination was expressed to relate only to her initial employment contract dated 1st November 2020 and not her subsequent employment contract dated 5th January 2022. The Court rejects that submission. It is clear that the 5th January 2022 contract was intended to govern the employment relationship from that date. There is no basis for concluding that, from that date, there were two free-standing employment relationships between the parties under two separate contracts.
 15. It is also plain that the Defendant intended to, and did, terminate the Claimant's employment altogether. In any case, this aspect of the Claimant's case goes nowhere given her confirmation through counsel at the hearing that she no longer pursues her claim for reinstatement.

Issue 2: Is the Claimant entitled to 3% of the shares in the Defendant based upon what she says are promises made to her by Mr Omarov?

16. The Claimant contends that when she moved to the Defendant, Mr Omarov through her promised to transfer her 3% of the shares in the company.
17. The Claimant accepts that there was no written agreement. She contends that there was a verbal agreement to this effect.
18. This is denied by the Defendant. Mr Omarov gave clear and credible evidence, both in writing and orally at the hearing, to the effect that no such promise was made.

² In this respect, at the hearing the Claimant's Counsel relied upon Regulation 28(1) which requires that "if an Employee's employment is terminated, the Employer must pay the Employee an amount in lieu of vacation leave accrued but not taken". The Claimant's reliance on this provision in relation to 5th and 6th November 2022 was not contested by the Defendant's counsel.

19. The Court did not have the benefit of evidence directly from the Claimant herself, either in writing or at the hearing. No explanation was provided for this. Nor was any convincing explanation given for why she did not make a contemporaneous written record of the claimed promise of equity. If, according to the Claimant's counsel at the hearing, "*the option for equity was her number one reason to move to the company*", it would be surprising that she did not seek written confirmation or at least take her own contemporaneous written note. The Court acknowledges that the Claimant is not a lawyer, but she is on her own case a sophisticated professional, and as such she can be expected to have appreciated the importance of having a written record of what was on her case such a significant part of her employment package.
20. As noted above, Mr Rakhmatullayev's oral evidence was directed at his own situation rather than the Claimant's situation. In any case, taking his evidence at face value, the Court does not accept that it is indicative of any contractual obligations being entered into. His evidence was that, when he joined the company, Mr Omarov said to him that there would be options or bonuses "*depending on the growth of the company*" which "*will be discussed later*"; and that he was told by the Defendant "*start right now and we will come back to the question of bonuses*". On that basis, it would appear that the prospect of a future arrangement for equity and/or bonuses was held out, but there was no formal commitment giving rise to any contractual or other legal obligations.
21. For these reasons, the Court finds that the Claimant has not discharged the burden of proof on this issue. This part of the claim is therefore rejected.

Issue 3: Is the Claimant entitled to a per diem allowance in relation to her business trip to San Francisco, USA, on behalf of the Defendant in July-August 2022?

22. The Claimant's counsel accepted at the hearing that there is no basis in the Claimant's written contract of employment or in the AIFC Employment Regulations for this part of the claim. There was, instead, a "*verbal agreement*" between the parties that she would be paid a per diem allowance. In this respect too, however, the claim faces the difficulty that the Claimant herself did not give evidence, whereas the Defendant through Mr Omarov gave clear and credible evidence at the hearing that there was no such verbal agreement, and that in fact the Claimant's expenses whilst on the business trip to San Francisco were charged to the company credit card, and her overnight accommodation was an apartment rented by Mr Omarov.
23. The Court finds that the Claimant has not discharged the burden of proof on this issue.

The parallel proceedings in the Bostandyk District Court

24. The Court was informed by the Defendant at the hearing that, on 11th April 2023, the Bostandyk District Court dismissed a claim by the Claimant for unlawful termination of a separate employment contract that she had with the Defendant's sister company, Smart Parking Technologies LLP. That contract was governed by the law of the Republic of Kazakhstan and not by the AIFC Employment Regulations. Counsel for the Defendant accepted that the Bostandyk District Court's ruling was not binding on this Court in the present proceedings, but submitted that its findings insofar as they related to similar points at issue in the present case were relevant considerations for this Court to take into account. Counsel for the Claimant accepted this, albeit he indicated that the Claimant intended to appeal. Counsel for the Defendant

submitted that such an appeal would be out of time. That is not, however, a matter for this Court to decide.

25. Ultimately, for the reasons outlined earlier in this judgment, the Court has been able to determine the disputed issues in this claim based upon the evidence presented by the parties. The findings of this judgment are consistent with the ruling of the Bostandyk District Court in relation to the claim under the LLP employment contract, but the Court has not found it necessary to rely on the Bostandyk District Court's judgment. It is therefore preferable to leave open the question of the approach that the AIFC Court should take to a judgment of the Courts of the Republic of Kazakhstan in a dispute between the same or related parties in a similar or related matter. This question would be better decided in a case in which it would make a difference to the outcome, and with the benefit of full written and oral submissions on what is on any view a point of significant general importance. Accordingly, whilst the agreement of counsel for the parties as to the correct approach is noted at paragraph 24 above, the Court expresses no view either way on this occasion.

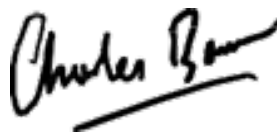
Conclusions

26. The claim is allowed to the limited extent that the Defendant shall pay damages to the Claimant in the sum of 276,164.38 KZT in compensation for the three-day truncation of her statutory notice period under Regulation 60 of the AIFC Employment Regulations.

27. In all other respects the claim is dismissed.

28. The Claim Form also seeks an order for costs against the Defendant. The overwhelming majority of the claim has, however failed. Further, there is no basis for concluding that the Defendant has acted unreasonably, so as to justify an award of costs pursuant to ACR Rule 26.9. The application for costs therefore fails.

By the Court

A handwritten signature in black ink, appearing to read 'Charles Banner', written over a horizontal line.

Charles Banner KC,
Justice, AIFC Court



Representation:

The Claimant was represented by:

1. Mr. Aibek Kabyshev, Associate at Akhmetova Law Firm Limited, Astana, Kazakhstan.

The Defendant was represented by:

1. Mr. Abilkhair Mergaliyev, Associate at Tukulov & Kassilgov Litigation, Astana, Kazakhstan.