

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

31 October 2023

CASE No: AIFC-C/CFI/2023/0028

Aidana Aituarova

Appellant/Claimant

v

Private Company Smart Parking Technologies Ltd

Respondent/Defendant

JUDGMENT

Justice of the Court:

The Rt. Hon. Sir Stephen Richards

ORDER

The required extension of time is granted but the application for permission to appeal is refused.

JUDGMENT

1. This is an application for permission to appeal against a decision of the AIFC Small Claims Court (“the SCC”) in Case No. AIFC-C/SCC/2023/0009. In the proceedings before the SCC the Claimant sought various remedies in relation to what she contended was her unlawful dismissal by the Defendant. The SCC allowed her claim to the limited extent of ordering the Defendant to pay damages to her in compensation for the truncation of her statutory notice period under Regulation 60 of the AIFC Employment Regulations, but in all other respects the claim was dismissed. By this application the Claimant seeks to challenge various aspects of the SCC’s decision.
2. In addition to the Claimant’s application notice and supporting documents, the Court has received written submissions on behalf of the Defendant in accordance with Rule 29.13 of the AIFC Court Rules. The Claimant has requested an oral hearing but the Court is satisfied that the application can be fairly determined on paper without an oral hearing (see Rules 29.16-29.17).
3. The application requires an extension of time. An attempt was made to file it within the time limit laid down by Rule 29.10 but guidance was needed from the Court’s Registry, and additional time was taken, to get the application in order. The Claimant states that the delay was due to unfamiliarity with the AIFC Court’s jurisdiction. Such an argument carries limited weight now that the Court has been in operation for several years. In the particular circumstances, however, the Court considers it appropriate to grant an extension of time.
4. Rule 29.6 states 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.
5. In the proceedings below the Claimant challenged the Defendant’s reason for her dismissal. The SCC held that under Regulation 60 of the AIFC Employment Regulations the Defendant was entitled to terminate her employment without cause, subject to giving her the 30 days’ notice provided for by Regulation 60(2)(b): the Defendant therefore did not need to have any particular reason to dismiss her, and whether the stated reason was the actual reason for dismissal was immaterial to the Claimant’s claim for damages. The Claimant argues in her application notice that the Court had to investigate the reason for her dismissal because on the facts the termination was not a termination without cause. That argument cannot be accepted. The SCC was entitled to conclude that the reason for dismissal could not in the circumstances affect the claim for damages.

6. The Claimant complains next about the SCC's calculation of the damages for a shortfall of three days in the notice period provided for by Regulation 60(2)(b). The calculation was based upon the Claimant's annual salary under her employment contract. She contends that there was no legal ground for the Court to calculate it in that way and that the only relevant example in the AIFC Employment Regulations is Regulation 28, which provides that compensation in lieu of vacation leave is to be calculated using the employee's daily wage for the last day of employment. That, however, relates to a specific and different situation and does not provide the basis for a general rule displacing the approach of the SCC in this case. The Claimant has not established any arguable legal error in the SCC's approach and has not shown that the sum actually awarded as compensation was arguably wrong.
7. The SCC stated that the Claimant had abandoned her claim for reinstatement, referring specifically to her confirmation of that through counsel at the hearing. The Claimant contends that she did not abandon her claim for reinstatement and that "the Judge asked only will the Claimant continue to work for the Defendant after if the Court will order the reinstatement", to which the answer was that it was very hard to believe that after everything that happened between the parties they would have very good employment relations. The Court clearly understood, however, that her counsel had confirmed that the Claimant no longer pursued her claim for reinstatement. The written submissions on behalf of the Defendant also state that at the court hearing the Claimant through her counsel disavowed her former claim for reinstatement. Despite the Claimant's contention to the contrary, there is no sound basis for holding that the SCC's understanding of the position was wrong.
8. A further claim before the SCC was that when the Claimant moved to the Defendant, the Defendant's Mr Omarov promised by way of verbal agreement to transfer to her 3% of the shares in the Defendant company, Private Company Smart Parking Technologies Ltd. The Court found that the Claimant had not discharged the burden of proof on the issue. It stated that Mr Omarov gave clear and credible evidence, both in writing and orally at the hearing, to the effect that no such promise was made; that the Court did not have the benefit of evidence directly from the Claimant herself, either in writing or at the hearing, for which no explanation was provided; nor was there any convincing explanation for why she did not make a contemporaneous written record of the claimed promise. In her application notice the Claimant contends that "the promise was regarding another company – Parquor Ltd" and that the Court did not investigate this. That contention is unsustainable: the Claimant's claim form in the SCC alleged in terms (paragraphs 43 and 46) that the agreement related to shares in Private Company Smart Parking Technologies Ltd; and that was the allegation responded to by Mr Omarov in his written evidence and, as understood by the Court, in his oral evidence. There was simply no basis for pursuing an alleged promise relating to Parquor Ltd.
9. The Claimant also submits that it was inappropriate for the Court to place weight on the fact that she did not herself give first hand evidence: she had given all her evidence in the claim form and the Court should have informed her if it considered there to be a need for her to give first hand evidence. The Court was plainly entitled, however, to take into account the absence of direct evidence from the Claimant without informing her of a need to give such evidence. The Claimant was legally represented. The claim form set out her case, included a statement of truth signed by her lawyer and was accompanied by supporting documentation, but it was for the Claimant to decide what further evidence to produce in support of her case – just as the Defendant decided to adduce the written and oral evidence of Mr Omarov in support of the defence case.

10. The final complaint in the application notice concerns the SCC's rejection of the Claimant's claim that there was a verbal agreement between the parties that she would be paid a *per diem* allowance in respect of a business trip to San Francisco. Here, too, the Court took into account the fact that the Claimant did not give evidence whereas the Defendant through Mr Omarov gave clear and credible evidence that there was no such agreement and that in fact the Claimant's expenses on the trip were charged to the company credit card and her overnight accommodation was an apartment rented by Mr Omarov. The Claimant states that this was just assertion by Mr Omarov, without supporting evidence. The assessment of the evidence was, however, a matter for the Court, and the Court's conclusion on the issue is not open to successful challenge.
11. In conclusion, the conditions for the grant of permission to appeal (paragraph 4 above) are not met and the Claimant's application must be refused.

By the Court,

The Rt. Hon. Sir Stephen Richards

Justice, AIFC Court

Representation:

The Claimant/Appellant was represented by Mr Aibek Kabyshev, Associate at Akhmetova Law Firm Limited, Astana, Kazakhstan.

The Defendant/Respondent was represented by Mr Abilkhair Mergaliyev, Associate at Tukulov & Kassilgov Litigation, Astana, Kazakhstan