IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

6 May 2022

CASE No: AIFC-C/CFI/2022/0009

ARMAN KUATOV

Claimant

v

PRIVATE COMPANY SERGEK DEVELOPMENT LTD

Defendant

JUDGMENT

Justice of the Court:

Justice Sir Stephen Richards

ORDER

The application for permission to appeal is refused.

JUDGMENT

1. By an order and judgment dated 14 March 2022 in Case No. AIFC-C/SCC/2021/010 the AIFC Small Claims Court (Justice Patricia Edwards) dismissed a claim by Arman Kuatov relating to an Employment Agreement between him and the defendant, Private Company Sergek Development Ltd.

2. By an application form dated 5 April 2022 the claimant applied to the AIFC Court of First Instance for permission to appeal that decision. Short written submissions in opposition to the application were filed by the defendant.

3. The claimant has asked that the application be determined on paper. I am satisfied that there is no need for an oral hearing (see Rule 29.17 of the AIFC Court Rules).

4. Rule 29.6 of the AIFC Court Rules 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.

5. The claimant's case on the present application is limited to the contention that the decision of the lower Court was wrong on one issue, concerning the termination of the Employment Agreement, which was dealt with at §§37-45 of the Court's judgment. No complaint is made about the conclusions reached on the other issues considered in the judgment or about any procedural matters.

6. With regard to the termination issue the judge recorded that the claimant sought an order requiring the defendant to terminate the Employment Agreement (§37). She found that the effect of clause 2 of the Agreement was that the Agreement was concluded initially for one year of work, commencing on 12 June 2020, but was automatically extended for a further year as neither party had sent a notification of termination before the end of the first year (§§38-39). She noted that the

contract might terminate before the expiry of that period if either party chose to terminate following a material breach by the other, but that had not happened (§40). None of that is the subject of criticism by the claimant.

7. At §41 the judge referred to a letter of 23 July 2021 in which the claimant said to the defendant: "*I ask you to terminate the employment contract with me on my initiative on July 23, 2021 …*". She said that it was not entirely clear on what basis the claimant sought to terminate. Clause 10.4 of the Agreement provided: "*In the event of termination of this Agreement on its own initiative the Employee shall be obliged to notify the Employer in writing not later that 1 (one) calendar month in advance, and during this period, the Employee shall: reimburse losses, if they were caused to the Employer by the Employee; pay all kinds of debts to the Employer; finish the work started*". The judge observed that the claimant did not give a month's notice nor was there any suggestion of doing any of the things listed in the clause (§42).

8. In his application for permission to appeal the claimant argues that the basis of termination was clear, that prior to the letter of 23 July 2021 he had ascertained that none of the obligations listed in clause 10.4 was outstanding on his side, and that he therefore asked to terminate the contract without a delay of one calendar month; and he says that in any event the month required by clause 10.4 had long passed by the time of the proceedings, yet the defendant did not declare any outstanding debts and at the same time did not terminate the Agreement. In my view, however, there is no arguable error in the judge's reasoning and she was plainly correct to find in the circumstances that the letter of 23 July 2021 was not effective to terminate the Agreement.

9. At §43 the judge stated that, alternatively, the parties could agree earlier termination and that this was what the claimant appeared to be contemplating by his letter of 23 July 2021 and a follow-up letter of 4 October 2021. Termination by agreement was addressed in clause 10.5 which provided that the party who wished to terminate was to send a notice to the other, who "*shall be obliged to inform the other Party about the decision made in writing within three working days*", and that "*The date of termination of the Employment Agreement by agreement of the parties shall be determined by agreement between the Employee and the Employer*". Although the defendant did not respond to the claimant's first request, it could have simply declined (i.e., as I read the judgment, it could have responded with a simple refusal to terminate). The defendant did eventually respond on 12 October 2021, stating that the claimant needed to come to work and give explanations to the defendant about the situation. The judge described this as a request to the claimant to meet to discuss possible termination. She went on to say that the claimant did not do so but proceeded to commence the litigation; no agreement to terminate was reached.

10. In his application for permission to appeal the claimant says that his letters were directed at termination on his initiative pursuant to clause 10.4, not termination by agreement pursuant to clause 10.5. In relation to clause 10.5 he argues in any event that the defendant could not simply decline the claimant's request and that the defendant's response of 12 October still violated the requirements of the clause. The claimant also states that his performance under the contract was on a remote basis, and he takes issue with the defendant's insistence that he should come to the office to give explanations in person with regard to the request to terminate. As a reason for his refusal to meet at the office, he says that on arrival at the office he would be subjected to moral or physical pressure and that he would be threatened (a suggestion strongly disputed by the defendant). None of the claimant's arguments, however, meet the essential point in the judge's reasoning that the parties did not in the circumstances reach an agreement to terminate; and the judge's conclusion on that point does not appear to me to be arguably wrong.

11. At §44 the judge stated that accordingly the Agreement remained in force: the parties to a contract of employment have mutual obligations to be ready, willing and able to work, and to be ready, willing and able to pay wages; non-performance of one obligation excuses performance of the other, but it does not mean that the contract ceases to exist.

12. In his application for permission to appeal the claimant asserts that the judge failed to notice that his letter of 23 July 2021 indicated that he was unwilling to work for the defendant. The judge's point, however, was that an unwillingness to work does not of itself bring the employment contract to an end, which is a correct statement of the legal position. The claimant argues further that the defendant's failure to terminate the Employment Agreement restricted his freedom to work and violated Article 24 of the Constitution of the Republic of Kazakhstan, and that the judge's conclusion in §44 that the Agreement remained in force was unlawful and violated his civil rights and freedoms. It is not clear whether the case was argued in that way before the judge, but there is in any event no substance to it: this was an ordinary employment contract, freely entered into by the claimant; the relevant question was whether it had been terminated, and the judge's conclusion that it had not been terminated was neither arguably wrong nor unlawful nor in violation of the claimant's civil rights and freedoms.

13. At §45 the judge noted that an agreed termination did not appear beyond contemplation, and she expressed the hope that the parties could resolve this between themselves. On the face of it, such a resolution has now been achieved. The claimant has sent the defendant a further written notice, dated 29 March 2022, requesting termination of the Employment Agreement on 30 April 2022

pursuant to clause 10.4; and the defendant has supplied this Court with the defendant's written internal order, dated 19 April 2022, giving effect to that termination. But it is not necessary for this Court to reach any concluded view on the effect of those documents, which post-date the decision of the lower Court and cannot affect the correctness of that decision.

14. For the reasons summarised above, I am satisfied that an appeal in this case would have no real prospect of success. Moreover, this is plainly not a case where there exists some other compelling reason why an appeal should be heard. It follows that the claimant's application for permission to appeal must be refused.

By the Court,

Representation:

The Claimant was not represented

The Defendant was represented by:

1. Mr. Daniel Muzapbar, Korkem Telecom LLP;
2. Mr. Askar Issayev, Korkem Telecom LLP.