Claim No: CA-003-2014

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF APPEAL

BEFORE CHIEF JUSTICE MICHAEL HWANG, JUSTICE ROGER GILES AND H.E. JUSTICE OMAR AL MUHAIRI

BETWEEN

CHRISTOPHER JAMES MCDUFF

Claimant/Respondent

and

KBH KAANUUN LIMITED

Defendant/Appellant

Hearing:	**22 July 2014**
Counsel:	Andrew Burns instructed by Everys Legal Consultancy for the Claimant/Respondent
	Bushra Ahmed (KBH Kaanuun Limited) for the Defendant/Appellant
Judgment:	**14 October 2014**

JUDGMENT

Summary of Judgment

The Appellant, a legal consultancy firm based in the DIFC, appealed against the judgment of H.E. Justice Al Madhani. The primary ground for the appeal was that the judge had misdirected himself in law in that he had considered the true reasons for the Respondent's (a former employee of the Appellant) termination, and not whether a reasonable employer would have terminated the employee under Article 60 (4) of DIFC Employment Law 2005.

The Court of Appeal held that the judge had not misdirected himself – Article 60 (4) provided that termination for misbehaviour existed in circumstances where: (i) the employee's conduct warrants termination; and (ii) a reasonable employer would have terminated the employee. Although the trial judge's reference to "the tests of fairness and reasonableness" at paragraph 46 of his judgment was not entirely apt, the finding that the 25 reasons listed in the letter of 25 July 2012, through which the Appellant had summarily dismissed the Respondent, were "not the true reasons behind the termination" had led to the conclusion that the breaches there listed could not be described as "misbehaviour for which a reasonable employer such as the Defendant would have terminated a contract." That finding was not an illicit venture into an incorrect test, rather the point being made was that the 25 instances were not matters of consequence to the Appellant, so a reasonable employer in its circumstances would not have terminated the Respondent. It was understandable that the trial judge had then gone on to consider the true reasons behind the Respondent's dismissal, although it may not have been necessary to consider whether the conduct underlying those reasons had warranted termination of his employment. Moreover, the judge had been justified in finding that the Appellant's inaction prior to the letter of 25 July 2012 citing numerous instances of alleged serious misconduct led to the conclusion that it had not considered that conduct fundamental. The judge had not erroneously conflated the contractual power of termination with termination at common law for repudiatory breach, as he had not addressed fundamental breach by the Respondent but rather whether the Appellant had considered the breaches to be fundamental to it/at a particular level of significance.

The Appellant also appealed the judge's finding that it had not been entitled to deduct the recruitment fee of 45,600 AED which it had paid to an agency with respect to the recruitment and employment of the Respondent on the grounds that the said deduction was precluded by Article 18 (1) of DIFC Employment Law 2005. The Appellant argued that Clause 9.6 of the Respondent's employment contract entitled it to deduct the amount it had paid to a recruitment agency in the circumstances. This was dismissed by the Court of Appeal which held that Article 18 (1) in providing that "a person shall not request, charge or receive directly or indirectly, from a person seeking employment a payment for – (a) employing or obtaining employment for the person seeking employment..." was not limited to prospective employees but also extended to employees. The words "a person seeking employment" identified the beneficiary of the prohibition, and the identity was not lost once the person became an employee. The Respondent had gained the identity of a person seeking employment and had retained that identity when employed, therefore Article 18(1) precluded the deduction.

ORDER

UPON hearing Counsel for the Appellant and Counsel for the Respondent on 22 July 2014

AND UPON reading the submissions and evidence filed and recorded on the Court file

IT IS HEREBY ORDERED THAT:

1. The Appellant's appeal is dismissed.

2. The Appellant shall pay the Respondent's costs within 14 days of the date of this order, the amount of which shall be assessed, if not agreed, by the Registrar.

Issued by:
Natasha Bakirci
Assistant Registrar
Date of Issue: 14 October 2014
At: 1pm

JUDGMENT

JUSTICE ROGER GILES:

1. The learned trial judge, H.E. Justice Ali Al Madhani, held that the Respondent employee had been wrongfully dismissed without notice by the Appellant employer, and was entitled to recover from the Appellant unpaid salary and holiday pay and salary for a notice period; that the Appellant was entitled to deduct only one of a number of amounts (which was admitted) from the money payable to the Respondent; but that the Appellant was entitled to recover from the Respondent a small amount as damages for negligence as an employee but not the much larger amount claimed.

2. In issue on appeal are wrongful dismissal and deduction of one of the amounts.

3. For the reasons which follow, in my opinion the appeal should be dismissed.

The employment and dismissal

4. The Appellant, KBH Kaanuun Ltd ("KBH") carries on the business of a legal consultancy firm based in the DIFC. In early 2012 it employed the Respondent, Mr Christopher McDuff, as a Senior Associate under an employment agreement dated 16 February 2012 ("the agreement").

5. The agreement provided for a three month probationary period, during which KBH could terminate it on one month's written notice (Clause 9.1). The employment was relevantly otherwise terminable –

   (a) after the probationary period, by KBH terminating the agreement on three months' written notice (Clause 9.2);

   (b) at any time, by Mr McDuff terminating the agreement on three months' written notice given on the first day of a month (Clause 9.3); and

   (c) at any time, by KBH pursuant to Clause 9.9 –

   > "9.9 The Firm may at any time terminate the Employee's employment forthwith without notice in writing and without prejudice to any rights or claims the Firm may have against the Employee if at any time the Employee shall commit any act which provides a basis for Article 60(4) of DIFC Employment Law to apply."

6. Mr McDuff's first working day was 25 March 2012. By agreement, the probationary period was extended so as to expire after 1 July 2012.

7. Towards the end of May 2012 Mr McDuff made contact with an employment agency with a view to other employment, and on 10 June 2012 he received an offer of employment from another firm.

8. On 1 July 2012 Mr McDuff gave written notice of his resignation "with effect 1 July 2012". The letter said that "[a]s a result my last day at [KBH] will be 30 September 2012", but expressed willingness "to negotiate a shorter time frame for my last day".

9. There was no agreement on a shorter time frame.

10. On 22 July 2012 KBH provided to Mr McDuff a Leaving Certificate recording a last day of 30 September 2012 and entitlement to three months' salary to that date totalling AED 114,000, but also making deductions of a number of amounts leaving a final payment to Mr McDuff of AED 8,955.

11. Mr McDuff did not accept that he should be paid only AED 8,955 for the next three months of employment. Negotiations to a different outcome were unsuccessful. The agreement provided that an employee's grievances should be "addressed to either the Director of Employment Standards or to the DIFC Courts" (cl 10.1), and on 25 July 2012 Mr McDuff commenced proceedings in the DIFC Courts seeking an interim injunction to compel KBH to pay the three months' salary.

12. At about this time KBH became aware that Mr McDuff proposed to undertake employment with another firm, although it did not know the identity of the firm. On 29 July 2012 it summarily dismissed Mr McDuff. Its letter of that date relevantly read –

> "Further to your resignation dated 1 July 2012, your employment with KBH is being terminated with immediate effect pursuant to clause 9.9, alternatively for breach/anticipatory breach of your Employment Agreement dated 16 February 2012, specifically Clauses 9.6 and 9.14.
>
> In particular, you have failed to perform your basic daily duties under your Employment Agreement despite being reminded and warned to do so. In particular, the following matters have raised serious concerns about not only your attitude to your work but your competence.
>
> 1. Failure to address the queries raised by Mark Vickeroy of Overtons in his email dated 24 June 2012;

2. Failure to reply to Kaashif's [Mr Kaashif Basit, a member of the firm] email dated 24 July 2012 when he specifically asked you when you intended to revert on the queries at 1 above, which had been pending for one month;
3. Failure to take any steps for two weeks to draft the Points of Claim in the Orion Inquiry into Damages despite being specifically instructed to do so by 31 July at the latest;
4. Failure to reply to Kaashif's email dated 25 July 2012 as to the status relating to 3 above;
5. Failure to serve Justice Chadwick's Order dated 12 July 2012 on the Inquiry Defendants;
6. Failure to address the issue of service of the Order in 5 above and documents on the Inquiry Defendants despite being specifically asked by Kaashif to do so;
7. Failure to respond to the client's query dated 16 July 2012 as to timetable for the preparation of the Points of Claim in the Orion Inquiry into Damages;
8. Failure to comply with Practice Direction No 1 of 2012 in submitting documents to the Registry on time in CA 001/2012 resulting in a late filing fee being applied and stating the wrong CA case number on documents eventually submitted;
9. Failure to file with the Registry the skeleton in support of Application No 009/2012 in CA 001/2012;
10. Failure to report to the client of the status of the status of proceedings in CA 001/2012 – either prior to or after the appeal hearing on 9 July 2012;
11. Failure to prepare a Summary Statement of Costs for the hearing of Application No 009/2012 and/or CA 001/2012;
12. Failure to meet own internal deadlines in the Khorafi litigation;
13. Failure to commence enforcement proceedings in the Babu Pothen matter (P1104);
14. Failure to follow Kaashif's instructions in his email to you dated 24 July 2012 to liaise with Basem in relation to the Global Security Group matter (G1204);
15. Failure to progress the Qtelmedia/Sinead O'Sullivan matter (Q703) in particular not replying to the client's email query dated 22 May 2012;
16. Failure to do any follow up and/or any proper follow up with Edward Davies of Counsel, including failure to provide instructions, in preparation for the 10 July 2012 hearing in CFI 020/2010;
17. Failure to review and/or advance the matters set out in the Property Matters List;
18. Causing substantial material loss to the firm by failing to undertake proper handover from Natalie Jones and/or ensuring that timely payment of by filing fee for the claim by Mustafa al Hendi was made resulting in the firm having to absorb an additional USD 12,000 in filing fees on re filing;
19. Causing substantial material loss to the firm by failing to cap the fees payable to Stuarts in the Tadhamon litigation and acting negligently in preparation of evidence resulting in a liability to the firm of circa USD 34,000;
20. Failure to agree a cap, alternatively a revised fee in advance, with Jeffrey Gruder QC of Counsel for revised limited advice in relation to the Tafhamon matter,
21. Failure to follow instructions of the Partners in relation to seeking pre-approval before issuance of letters to clients and/or third parties;

22. Failure to pay attention to client correspondence in the Wheatley litigation leading to delay and client complaint;

23. Failure to deal responsibly with and promptly respond to emails from Kaashif in relation to time sensitive advice to Premier Oil on jurisdiction matters;

24. Failure to promptly discharge your obligations in on boarding new clients and managing property related matters;

25. Failure to properly or on time or at all record your chargeable time in the firm's electronic time recording system despite repeated reminders from the Practice Manager and instructions from the Partners.

The above is a non-exhaustive list of issues which when taken individually or collectively have made clear that you not only do not intend perform your basic duties during notice period but have caused substantial material loss to the firm. Investigation continues into further loss and damage that you may have caused to the firm during your period of employment and we reserve the right to raise additional matters in the legal proceedings initiated by you."

13. Attached to the letter was a second Leaving Certificate. It recorded a last day of 29 July 2012 and entitlement to salary to that date, similar deductions to those in the earlier Leaving Certificate, and a payment due from Mr McDuff to KBH of AED 64,588. It noted that the deductions were "[w]ithout prejudice to further deductions for [KBH's] claim for damages". The earlier Leaving Certificate had said nothing of breaches of duty or a claim for damages.

14. The proceedings brought by Mr McDuff were recast, and were litigated as a claim for wrongful dismissal and a counterclaim for negligence as an employee. Within the former came entitlement to make the deductions, and for the latter KBH relied on the twenty-five instances in the letter of 29 July 2012.

15. In the course of the proceedings KBH provided a third Leaving Certificate, adding a deduction and recording a payment due from Mr McDuff to KBH of AED 70,650.

Wrongful dismissal – the trial judge's reasons

16. At least on appeal KBH relied only on Clause 9.9 of the agreement; to repeat, it could terminate Mr McDuff's employment without notice if he "shall commit any act which provides a basis for Article 60(4) of DIFC Employment Law to apply".

17. Article 60(4) of DIFC Employment Law 2005 was part of an Article dealing with entitlement to an end of service gratuity. It provided –

"60(4) An employee is not entitled to a gratuity payment where the employee has been terminated for misbehaviour. A termination for such cause exists in circumstances where the employee's conduct warrants termination and where a

reasonable employer would have terminated the employee. An employer may dismiss an employee without notice in such circumstances."

18. The trial judge began his consideration –

> "46. In order to resolve the dispute between the Claimant and the Defendant, namely whether the termination was based on justifiable grounds, the Court shall take into consideration the reasons provided by the Defendant in the termination letter dated 29 July 2012 and will then question whether or not they are capable of justifying summary dismissal during the Resignation Notice Period in light of the tests of fairness and reasonableness as follows below."

19. After referring to the provisions of the agreement and to Article 60(4), the trial judge relevantly expressed his reasons as follows –

> "54....Article 60(4) shall be the reference to identify what kind or level of conduct the employee must commit to be deprived of the right to minimum notice. Article 60 (4) refers to misbehaviour which would lead a reasonable employer to have terminated the employee, which effectively leads us to the test of reasonableness.
>
> 55. The Defendant has provided the very long list of 25 alleged breaches on the Claimant's part, which no doubt are serious in light of what was expected from an expert lawyer such as the Claimant and could give grounds for instant termination.
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> 56. However, my finding after reading the submissions and both parties' evidence is that the reasons provided by the Defendant in the termination letter are not the true reasons behind the termination.
>
> 57. I say that for the reason that the Defendant was during all material times aware of those breaches and took no serious action against the Claimant. If the reasons provided by the Defendant in the termination letter were true, the Defendant should have taken serious action, such as instant dismissal, at the time when the incidents occurred or should have at least provided him with a warning. The only warning I have seen during the probation period is with reference to filling out the time sheet.
>
> 58. Furthermore, once the Claimant had submitted his resignation letter on 1 July 2012, the Defendant made no mention of the breaches recorded in the latter termination list beyond reminding him of Clause 9.14 of the Agreement which explained the "bad leaver policy" and referred to Clause 9.15 which deals with deduction of any amount owed to the Defendant as mentioned in the email sent from the Defendant on 1 July 2012 at 1:30pm.
>
> 59. The Claimant was even provided with the First Leaving Certificate dated 22 July 2012 stating that his last day of employment would be 30 September 2012 and that his salary would be paid in respect of July, August and September at the rate of AED 38,000 per month, which amounted to AED 114,000, and which showed that after various deductions he would actually receive AED 8,955.
>
> 60. Not until 29 July 2013 did the Defendant decide to terminate the Claimant's contract, which suggests that the breaches listed in the termination letter were never considered to be fundamental to the Defendant during the course of the Claimant's employment. Therefore, in the given circumstances, these breaches cannot be described as misbehaviour for which a reasonable employer such as the Defendant would have terminated a contract.

61. In my view, there are two other reasons why the Defendant terminated the Claimant's employment during the three months' notice period without Notice, roughly one month after his resignation.

62. The first reason is in relation to the Claimant's resignation and his finding of alternative work with another law firm. The Defendant has articulated that they were shocked by the Claimant's resignation and his connection with another law firm. The Defendant made it clear in their submissions that the Claimant's intention had always been to use them as a "stepping stone" into the legal market in Dubai. This reflected very poorly on the Claimant's credibility as he had misled the Firm regarding his true intentions and commitment.

63. According to the applicable Employment Law and the Agreement, there is nothing unlawful in the Claimant seeking alternative employment and therefore resigning, as long as he provides the required notice. The Claimant's movement to another firm, therefore, cannot be regarded as a breach that warranted instant dismissal.

64. The second underlying reason is that when the Claimant commenced the proceedings against the Defendant, in the latter's submission, it seemed that by pursuing instant litigation during the notice period the Claimant had cynically attempted to avoid his legal obligations to the Defendant pursuant to the Agreement and in accordance with the DIFC Employment Law.

65. This too cannot qualify as a breach that warrants instant dismissal. The Claimant commenced proceedings because in the Agreement it was provided at Clause 10.1 that "any grievances the Employee may have can be addressed to either the Director of Employment Standards or to the DIFC Courts"

66. The Claimant was told that he would be paid only AED 8,000 [sic] out of his 3 months' salary as there was disagreement with regards to the final settlement between himself and the Defendant, so he chose to follow the grievance procedure referred to at Clause 10.1 of the Agreement. Regardless of whether the Claimant was right or wrong on the merits, no breach in this action is found to have been committed by the Claimant as he was merely exercising the contractual legal right.

67. I have decided that the 25 breaches in the termination list were not the actual causes of the termination and that the actual causes were in fact (i) the Claimant finding alternative employment and (ii) the commencement of proceedings against the Defendant which do not qualify as misbehaviour warranting instant dismissal (without notice) in accordance with Clause 9.9 of the Agreement. The Defendant is therefore in breach in terminating the contract without notice."

Wrongful dismissal – the appeal

20. KBH's primary submission was that the trial judge had misdirected himself in law. It took his Honour to have found in para 55 that the twenty-five instances had been made out and were breaches of Mr McDuff's duty as an employee, and also that they were conduct warranting termination. It said that the trial judge should then have asked himself whether, faced with that conduct, a reasonable employer would have terminated the employee; but

that he had not, but had asked himself a different question, namely, what were the true reasons for the termination. KBH indirectly disputed the true reasons, see below, but submitted that they could not displace a finding that Mr McDuff's conduct was such as to warrant termination by a reasonable employer.

21. For the present I will assume conduct on Mr McDuff's part warranting termination, a matter to which I will return. KBH implicitly invited us to find that Mr McDuff's conduct was such as to warrant termination by a reasonable employer (more correctly, in the words of the Article, that a reasonable employer would have terminated Mr McDuff).

22. Article 60(4) expresses the cumulative requirements first, that the employee's conduct warrants termination and secondly, that a reasonable employer would have terminated the employee. The second is in strong terms, that a reasonable employer would have terminated the employee, and it is not enough that a reasonable employer could have terminated the employee. Ordinarily, if an employee's conduct warrants termination it would be reasonable for the employer to terminate the employee. Something more must be involved in deciding whether a reasonable employer would have terminated the employee.

23. The construct of "a reasonable employer" must be given content. It is not a hypothetical employer remote from the particular circumstances and armed only with knowledge of the conduct warranting termination. It is an employer in the circumstances of the actual employer, and the question is whether that hypothetical employer would, as a positive conclusion, have terminated the employee. Thus, for example, if the actual employer has known of the relevant conduct for some time and has done nothing, it should be asked whether a reasonable employer who had known of the relevant conduct for some time and had done nothing would have terminated the employee.

24. This does not mean, as was submitted by Mr McDuff, an importation of the test for unfair dismissal under the law of England and Wales, by which it is asked whether the employer had a genuine belief on reasonable grounds after reasonable investigation that the employee has misconducted himself and whether termination was within the range of reasonable responses: see for example British Home Stores Ltd v Burchell (1980) ICR 303; Iceland Frozen Foods Ltd v Jones (1982) ICR 17; and J Sainsbury plc v Hitt (2003) ICR 111. That test stems from legislation in quite different terms, applying the concept of fairness fleshed out by whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason. For Article 60(4), whether a reasonable

employer would have terminated the employee does not call for an investigation of the employer's beliefs and how they were arrived at. The conduct warranting termination is a given, and knowledge of it must be attributed to a reasonable employer in the circumstances of the actual employer. The hypothetical employer is not allowed a range of reasonable responses; it must be found that it would have terminated the employee.

25. Despite some looseness of expression, on a proper understanding of the trial judge's reasons I do not think he misdirected himself.

26. In para 46 the trial judge first referred to "the tests of fairness and reasonableness". This was not entirely apt: Article 60(4) could be said to include a test of reasonableness, but is not expressed in terms of fairness. However, the trial judge had earlier set out Article 60(4) in terms, and in para 54 came to a test of reasonableness. The finding that the reasons in the letter of 29 July 2012 were "not the true reasons behind the termination" (para 56) then led to the conclusion that the breaches there listed "cannot be described as misbehaviour for which a reasonable employer such as the Defendant would have terminated a contract" (para 60). This effectively used the language of the second requirement expressed in Article 60(4), with the addition of "such as the Defendant" placing the reasonable employer in the circumstances of KBH.

27. The finding that the letter of 29 July 2012 did not express the true reasons for the termination was not an illicit venture into an incorrect test. Assuming conduct on Mr McDuff's part warranting termination, the point being made was that the twenty-five instances were not matters of consequence to KBH ("were never considered to be fundamental to the Defendant during the course of the Claimant's employment": para 60), so that a reasonable employer in KBH's circumstances would not have terminated Mr McDuff.

28. The trial judge found the two reasons why KBH terminated Mr McDuff's employment, and said that neither of those would have warranted instant dismissal (para 67). Going on to consider the true reasons for the dismissal is understandable, as a correlative to the twenty-five instances not being matters of consequence to KBH: it was natural then to ask why Mr McDuff was terminated. It may not have been necessary to consider whether Mr McDuff's conduct underlying those reasons warranted termination of his employment, although it may have been part of KBH's case that that conduct warranted termination (see the

alternatives in the first paragraph of the letter of 29 July 2012). But there was no error in doing so affecting the application of the Article 60(4) test of reasonableness.

29. It follows that I do not accept KBH's subsidiary submission that the trial judge took into account irrelevant considerations, namely that it was aware of the breaches and took no serious action (para 57); that it did not mention the alleged breaches prior to 29 July 2012 (para 58); and that it provided the Leaving Certificate dated 22 July 2012 (in context, without saying anything about the alleged breaches) (para 59). They were relevant to his finding that the twenty five instances were not matters of consequence to KBH.

30. I return to whether the breaches of duty in the letter of 29 July 2012 were found to have been made out. I do not think the trial judge made such a finding. In para 55 he referred to the alleged breaches as serious, and meant that if made out they would be serious. The breaches were in issue at the trial, and there is no consideration of the evidence in the trial judge's reasons as would be expected if findings were made. Moreover, when addressing the counterclaim the trial judge put aside twenty-three of the twenty-five instances without finding whether or not they had been made out, held that one (instance 18) had been made out and had caused loss to KBH, and held as to the other (instance 19) that he was not satisfied that Mr McDuff "has committed any sort of negligence that would have lead to" the damages claimed. In my view, although not so expressing himself, for the purposes of Article 60(4) the trial judge assumed the breaches of duty alleged by KBH, and did not find it necessary to determine whether or not they had been made out because of his conclusion that they could not be described as misbehaviour for which a reasonable employer such as KBH would have terminated a contract.

31. KBH's submissions included that six of the alleged breaches of duty had been admitted by Mr McDuff and that one had been found against him. It is correct that one was found against Mr McDuff, as earlier mentioned, although it was found for the purposes of the counterclaim and without any regard to whether it alone warranted termination of Mr McDuff. It is not entirely accurate to say that the six were admitted; failures to act were admitted, but Mr McDuff contended that they were due to his being on compassionate leave and to KBH's failure to have someone else to fill the gap. No finding was made. Had I accepted KBH's primary submission, a new trial would have been necessary in order that factual findings could be made to which Article 60(4) could then have been applied.

32. I have said that KBH indirectly disputed the true reasons. It submitted that the trial judge fell into error in his consideration of its action in relation to the alleged breaches. In para 57 the trial judge said that KBH "was during all material times aware of those breaches and took no serious action against [Mr McDuff]", and he saw as significant the Leaving Certificate dated 22 July 2012 without mention of the breaches. But, KBH said, a number of the instances in the letter of 29 July 2012 post-dated 22 July 2012 (e.g. instances 2, 4, 14; some are unclear); others were sufficiently proximate to 29 July 2012 that taking Mr McDuff to task prior to that date was not to be expected; and in any event a course of conduct fell for consideration, and it was entitled to regard breaches immediately prior to 29 July 2012 as the last straw when earlier neglect of duty had been tolerated. KBH referred to Omilaju v Waltham Forest London Borough Council (2005) ICR 481, in which it was recognised that constructive dismissal could be found in a series of acts the last of which led the employee to resign where that act, although not of itself unreasonable, contributed to the series. It said that an employer could similarly dismiss on a last straw basis.

33. The last straw principle does not directly translate to the present case. The question was not whether later instances of misconduct finally caused KBH to dismiss Mr McDuff although they were not of themselves significant; indeed, it was not whether they alone warranted termination and a reasonable employer would have terminated. There was a question of fact: did KBH's inaction in the face of many instances of misconduct, where action could have been taken and would have been expected, led to the conclusion that it did not consider that conduct (using the trial judge's word) fundamental? If regard to earlier conduct lead to that conclusion, later conduct of the same kind was also not fundamental.

34. There is some force in the first of the submissions. In para 57 the trial judge appears to speak of all the alleged breaches, and not all could have been or should necessarily have been taken up with Mr McDuff prior to 22 July 2012 or 29 July 2012. However, it is significant that KBH took no action up to and at the time of the Leaving Certificate dated 22 July 2012, when (if they occurred) there would have been significant failures in his duties by Mr McDuff. It is also of importance that the trial judge found other reasons for the summary dismissal, the existence of the other reasons giving dismissal on 29 July 2012 a different complexion from that which it may have borne had there been no available reason other than cumulative breaches of duty eroding tolerance to the point of dismissal.

35. On one view, a new trial would be necessary in order that findings be made as to breaches of duty and their nature and seriousness. That was not sought. On my understanding, we

were left to decide whether the finding that KBH did not consider the breaches in the letter of 29 July 2012 to be fundamental was factually unsound. In my view, the breaches of duty alleged for the period leading up to 22 July 2012 (if they occurred) were sufficiently numerous and significant, including a comparison with the later breaches alleged, that the trial judge's reasoning to his finding remains intact. The finding should not be displaced.

36. I go then to the remaining submissions on behalf of KBH.

37. First, it was submitted that the trial judge erred in conflating the contractual power of termination, importing Article 60(4), with termination at common law for repudiatory breach. It was said that the error came when he referred in para 60 to the breaches listed in the letter of 29 July 2012 as not being "considered to be fundamental to [KBH]", and that he wrongly invoked the common law concept of fundamental breach. I do not think that he did. His Honour was not addressing fundamental breach by Mr McDuff, but whether KBH considered the breaches to be fundamental to it; that is, at a particular level of significance to it. This was not invocation of a common law test (and in any event the common law concept is a not inappropriate way of giving meaning to Article 60(4) in its first requirement of conduct which warrants termination).

38. Secondly, KBH submitted that there was inconsistency in that the trial judge had found the one breach of duty against Mr McDuff. As I have said, his Honour did not characterise that breach as fundamental, and he made the finding for the purposes of the counterclaim. I do not think there is inconsistency.

39. Thirdly, KBH submitted that the trial judge erred in law by failing to weigh Mr McDuff's credibility against that of KBH's witnesses when considering the true reasons for Mr McDuff's dismissal. The submission is misconceived. There was no question of competing credibility in coming to the finding as to the significance of the alleged misconduct to KBH, or in coming to the conclusion as to the true reasons for dismissal. Mr McDuff could not give evidence of KBH's state of mind. The submission did not identify any relevant occasion for weighing credibility, and should not be accepted.

Deduction – the trial judge's reasons

40. One of the deductions in the Leaving Certificate dated 22 July 2012 was "Recruitment Fee AED 45,600". The claim to the deduction was continued in subsequent Leaving Certificates.

41. This was an amount paid by KBH to a recruitment agency with respect to the recruitment and employment of Mr McDuff. KBH claimed to be entitled to deduct it pursuant to cl 9.6 of the agreement –

> "9.6 If prior to the end of twelve (12) months from the Start Date the Employee gives notice of termination pursuant to clause 9.2 and 9.3 above, the cost of all the benefits set out under clause 6 and any recruitment fee incurred by Firm will be repayable in full and deducted from any sums owing to the Employee".

42. The trial judge held that KBH was not entitled to deduct the recruitment fee, for two reasons.

43. The first reason was that deduction was precluded by Article 18(1) of DIFC Employment Law 2005, which provided –

> "18(1) a person shall not request, charge or receive, directly or indirectly, from a person seeking employment a payment for –
>
> (a) employing or obtaining employment for the person seeking employment; or
>
> (b) providing information about employers seeking employees."

44. His Honour did not accept that Article 18 (1) was limited to a payment from a prospective employee, and held that it extended to a payment when an employee was leaving.

45. The second reason was expressed by his Honour –

> "103. In any event, as it has been decided above that the termination by the Defendant was the effective incident that brought the Agreement to an end and not the Claimant's resignation; the Defendant cannot rely on Clause 6.9 [sic:9.6] and demand a refund of the said benefits on the basis that they fall under the definition of Clause 6 of the Agreement.
>
> 104. It cannot also be argued that the submission of the Notice by the Claimant itself is a sufficient cause to apply Clause 6.9 regardless of how the employment was truly terminated, as the wording in Clause 6.9 provides "if prior to the end of twelve (12) months from the Start Date the Employee gives notice of termination pursuant to Clause 9.2 and 9.3 above, the cost of all benefits set out under Clause 6 and any recruitment fee incurred by the Firm will be repayable in full and deducted from any sums owing to the Employee." In my opinion this suggests that the Clause shall apply if the party who brings the contract to an end is the employee by giving notice leading to the termination of the Agreement. This, however, is not the situation in this case where the notice was not effective due to the Defendant's intervention by terminating without notice, and this Clause therefore cannot apply."

Deduction – the appeal

46. A short answer as to the deduction is that KBH's grounds of appeal and submissions challenged the trial judge's application of Article 18(1), but did not challenge his alternative reasoning that Clause 9.6 applied only when the employment was brought to an end by notice given by the employee. This remained the case even when Mr McDuff's skeleton argument pointed out the alternative basis for the trial judge's decision.

47. It is appropriate nonetheless to address KBH's challenge to the application of Article 18(1). It submitted that at the time of deduction Mr McDuff was no longer a person seeking employment, and so Article 18(1) did not apply. It said that there was no public policy against recovery of costs of employment from an employee who chose to terminate employment (which, however, was not this case).

48. In my opinion, the trial judge was correct in his application of Article 18(1). The clear purpose is that a person seeking employment should not have to pay a recruitment agency's fee to the recruitment agency or anyone else, relevantly to the person engaging the recruitment agency to find an employee. The prohibition is wide, see the words "directly or indirectly". The words "a person seeking employment" identify the beneficiary of the prohibition, and the identity is not lost once the person becomes an employee. Were that so, the protection of the prohibition could be readily evaded by providing in the employment agreement that the recruitment agency's fee should be deducted from the first month's salary, or upon termination of employment (including termination by the employer).

49. Mr McDuff gained the identity of a person seeking employment and retained that identity when employed, so that Article 18(1) precluded the deduction.

An addendum

50. KBH's skeleton argument invited the Court "to take note of [Mr McDuff's] conduct following the trial", and asserted some matters of conduct uncomplimentary to Mr McDuff. None could have been relevant to the issues on appellate review, and no attempt was made to substantiate them by evidence. This brought a response on Mr McDuff's behalf expressing concern that the matters had been added "in an unreasonable attempt to prejudice the Court". It is regrettably necessary, but I propose to leave it as sufficient, to say that KBH should not have asserted or invited attention to the conduct.

Conclusion

51. I propose orders that the appeal be dismissed and, there being no reason why the general rule should not apply (RDC 38.7), that KBH pay Mr McDuff's costs.

CHIEF JUSTICE MICHAEL HWANG:

52. I agree with the Judgment of Justice Roger Giles and have nothing further to add.

H.E. JUSTICE OMAR AL MUHAIRI:

53. I agree with the Judgment of Justice Roger Giles and have no further comments.

N Bakirci

Issued by:
Natasha Bakirci
Deputy Registrar
Date of Issue: 14 October 2014
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