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CASE FOCUS

Case No The Industrial Group Ltd v Abdelazim El Shikh El Fadil Hamid, DIFC 029/2018 on 6 April 2022

Jurisdiction DIFC

Court DIFC Court of First Instance

Recommended by Outer Temple Chambers

WHAT HAPPENED?

Mr El Fadil Hamid was the finance director of The Industrial Group Ltd (TIG). Initially, he had a good relationship with the company's chairman whom the Court found dominated its affairs. As part of that relationship, Mr Hamid often paid the chairman's personal expenses from his own bank account, on the understanding that in due course he would be reimbursed for the payments by the company. In January 2018, Mr Hamid decided he wanted to retire but from then the parties' relationship deteriorated. He gave 90 days' notice of his resignation on 29 April 2018 but on 8 May, was summarily dismissed for alleged misconduct for arranging payment of the reimbursements to himself. Both parties began DIFC Court proceedings. The company claimed group funds had been dishonestly transferred to Mr Hamid's personal bank account. The company also made a complaint to the Dubai Police. The employee claimed he had been wrongly dismissed and was entitled to an end of service gratuity which TIG refused to pay as well as damages for abuse of process and malicious prosecution. The police complaint had resulted in the employee's passport being confiscated, and other severe adverse consequences for him. There was an extensive review of the relevant documents by a Dubai Court expert, who concluded the employee was entitled to the reimbursement payments which had been made to him. That aspect of the DIFC Court

proceedings was determined in the employee's favour before trial and the remaining issues were the employee's counterclaims against TIG for damages as a result of the difficulties he had faced.

WHAT WAS DECIDED?

In the DIFC the test for the lawfulness of a summary dismissal was covered in Article 59A of DIFC Law No. 4/2005 (the previous Employment Law) and is now found in the current Employment Law in Article 63(1) of DIFC Law No. 2/2019. The first stage of the test is whether 'the conduct of one party warrants termination' which replicates this part of the common law test for summary dismissal found in jurisdictions like England and Wales. The second is 'whether a reasonable employer would have terminated the employment on that ground' and is an objective test which is unrelated to the employer's beliefs or understanding. This differs from the applicable common law test (whether a reasonable employer could have terminated the employment on that ground). The DIFC Courts decided that although there was a technical breach of the company's authorisation policy (some of the payments made had not been specifically approved in writing by the Chairman), as there were physical documents which established his entitlements to payment in the possession of TIG from January 2018 the first stage of the test was not satisfied and even if it had been, the second stage of the test had not been met. A reasonable employer in the same position as TIG would not have proceeded in the same way. TIG had unfairly developed a hostile, unbalanced case against the employee and had deliberately excluded him from the review process of his claims in order not only to dismiss him summarily but also had his passport confiscated by pursuing a

criminal complaint against him that he was guilty of embezzlement which had ended up with his conviction for that crime. As a result, the summary termination was not lawful, and the employee was entitled to receive his end of service gratuity. In addition, as this had not been paid within the prescribed time, he was also entitled to a penalty payment which under the previous Employment Law DIFC Law No. 4/2005 by the time the case was determined was over 7.5 million AED. (The calculation method for these late penalty payments changed with the current DIFC Employment Law, DIFC Law No. 2/2019 due to concerns that amounts awarded under the previous law were too high. However, even under the current regime late penalty payments can be substantial.) Also considered was damages for TIG's alleged abuse of process and malicious prosecution of the employee. The torts of abuse of process and malicious prosecution torts are not the subject of comparable provisions in the DIFC Law of Obligations (DIFC Law No. 5/2005). Given the findings of fact, it seems likely that the elements of these causes of action were made out under English law. TIG argued DIFC Law No. 5/2005 operated as a code and as a result precluded these claims. While the employee argued that, as the DIFC Courts were courts of common law and there was no specific DIFC Law which precluded the actionability of these torts in the DIFC, they ought to be regarded as actionable there too. The Court concluded that these causes of action were not actionable in the DIFC because the waterfall provision in Article 8(2) of DIFC Law No. 3/2004 (the DIFC Law on the Application of Civil and Commercial Laws in the DIFC which covers what law applies where an area is not covered under DIFC law) meant that it was the DIFC law which applied as the jurisdiction most closely connected to the facts and people involved. The absence of recognition of either tort in DIFC Law No. 5/2005 was therefore fatal to this aspect of the employee's case. However, if this case was to arise in the Abu Dhabi Global Market (ADGM), whose Courts apply the law of England and Wales more generally, the result would be different. The discussion of the issue in the reasons for judgment suggested that in the Court's view this aspect of the case was not as fully argued as it might have been. In particular, DIFC Laws like the Law of Contract (DIFC Law No. 6/2004) have generally not been regarded as codes, but as setting out the general rules in respect of which clarity has frequently been obtained by reference to the laws of England and Wales. The very existence of the DIFC Courts and their inherent right to control abuse of process may provide a basis for an argument that such conduct was actionable and subject to formal disciplinary processes. This decision may be appealed and if it is, this aspect may be more fully explored.

WHY'S IT SIGNIFICANT?

This case highlights two significant aspects of DIFC law - the need for employers, if considering summary termination of employment, to carefully review

their proposed action not only based on their own assessment of the position, but also from the likely standpoint of objective third parties. This includes proceeding fairly and also being seen to do so, as this is the standard applied by the Court in these matters. The second point is that DIFC Law No. 5/2005 does not automatically provide for a tort known to the common law, unless this decision is varied on appeal.

Case No TCC 11988/2018 on 10 March 2022

Jurisdiction Turkey

Court Turkey Constitutional Court

Recommended by Esin Attorney Partnership

The municipality where an employee worked switched to a fingerprint system for shift tracking. The employee claimed fingerprint recording for shift tracking violated their right to private life and filed a lawsuit with the administrative court to have the fingerprint system cancelled.

The Court considered the issue within the context of processing personal data within the scope of the right to respect for private life. They decided the system was unlawful as there was no legal basis for this type of shift tracking.

However, the Court of Appeal decided the shift tracking system was not a violation of the law, as public personnel had to work during their shifts and administrative bodies had to supervise these shifts.

The employee then appealed to the Constitutional Court which considered the application within the scope of the right to request protection of personal data under Article 20 of the Turkish Constitution.

They pointed out that the State has positive obligations to prevent the unlawful intervention of third parties with citizen's fundamental rights and freedoms. They said restrictions on rights and freedoms must have a lawful basis, rely on legitimate causes under the Constitution and comply with the needs of a democratic society and the principle of proportionality, according to Article 13 of the Turkish Constitution. The Court referred to Turkey Law No. 6698/2016 on the Protection of Personal Data (LPPD) and stated in this case, fingerprint data (i.e. sensitive personal data) of an individual could be processed based on the explicit consent of the individual or in cases expressly stipulated in the laws, without seeking explicit consent. They must do so in line with Article 13 of the Turkish Constitution. The employee had not given their explicit consent for processing of this data. The Court then considered if there was legislation stating fingerprint data could be processed for shift tracking purposes but there was not.

WHY'S IT SIGNIFICANT?

The judgment is significant as it highlights biometric data processing must be done with the data subject's explicit consent or the processing must be clearly specified in legislation.



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