

EMPLOYMENT | MAY 2023

LEGAL UPDATE: DIFC COURTS PROVIDE GUIDANCE ON FLY-IN, FLY-OUT EMPLOYEES

The DIFC Courts have provided useful guidance to DIFC companies, whose employees have DIFC employment contracts but are not ordinarily based in the UAE. The Courts have held that they may not be entitled to protections under the DIFC Employment Law, including penalty clauses.

On 12 May 2023, the DIFC Court of First Instance issued judgment in the case of *Musaab Tag Elsir Abdelsalam v Expresso Telecom Group Limited*. HFW was representing Expresso in this case.

The DIFC Court of First Instance dismissed all of the claims brought by the Claimant against his former employer Expresso for payments in respect of unused annual leave, flight tickets, end of service benefits and penalties for late payment.

Background

The Claimant brought claims under three fixed term contracts of employment running consecutively between 2008 and 2014. The Claimant made various claims under each of the contracts. The Claimant also sought penalties for late payment of his entitlements under all three agreements.

Claims were initially brought in the DIFC Courts in 2019 but through a series of procedural errors by the Claimant, the matter only came to trial earlier this year.

Expresso resisted the claims on a number of different grounds. It was Expresso's position that the claims under the first two agreement were time barred. Expresso further argued that the claims failed on the basis of an absence of entitlement on contractual and factual basis and upon matters of law.

Some claims failed because they were time-barred

The Court found that indeed the claims under the first two agreements were time barred.

The Court did not find that a series of fixed term contracts constituted one period of employment. The trial judge, Justice Sir Jeremy Cooke, noted as follows:

"A direct application of the statutory provisions applicable to claims under the 2005 Law and/or the 2012 Law necessarily results in any cause of action accruing prior to 21 March 2013 being barred by effluxion of time. The causes of action giving rise to claims under Agreements 1 and Agreement 2 accrued well before that time."

The Court resisted attempts by the Claimant to rely on provisions of English law, and followed recent case law in confirming English law does not automatically apply in the DIFC Courts.¹ In relation to the Claimant's reliance upon the s.29-30 of the English Limitation Act (relating to acknowledgement of debt), he noted as follows:

"That is a statutory principle under English law which has no equivalent provision in any statute in the DIFC and it is not permissible to import into the statutory regime which is applicable in the DIFC a foreign provision of this nature."

Claims failed because Claimant was not based in the DIFC

During the Claimant's employment under the third agreement, the Claimant was predominantly based outside of the UAE (residing in Sudan) and had in fact only spent about 5 weeks in the UAE in total.

¹ *The Industrial Group Ltd v Abdelazim El Shekh El Fadil Hamed* [2022] DIFC CA 005

Significantly, the Judge found that despite the agreement being expressly governed by the laws of the DIFC, this did not in and of itself result in the application of the 2005 Employment Law or the 2012 Employment Law.

He noted as follows:

"It is what happened on the ground which counts and that does not fall within Article 4 of the 2005 or 2012 Law."

Penalty claims also rejected

The Court rejected the claims for penalties because of the existence of a dispute as to entitlement to any sums at all.

The Judge made a significant finding in relation to this. He found that since the Claimant's claim for penalties were not originally pleaded in the Claim Form and were only pleaded after the expiry of the 6-year limitation provision, the Claimant had lost the right to make a claim in respect of these.

Additionally, he held that when the 2019 Employment Law came into force, Article 1(4)(a) provided that a penalty pursuant to Article 19(2) "will be waived" by the Court in respect of any period during which "a dispute is pending in the court regarding any amount due to the Employee under Article 19(1)". As is made plain on the decision of the Court of Appeal in *The Industrial Group* case, the accrued rights to a penalty survives the new law coming into force, but thereafter there is no continuing right because of the terms of the 2019 Law.

All other claims were also dismissed.

Take-away points

Of course, the case should be very much considered on its facts and it is unlikely that there will be many more disputes on the application of the DIFC Employment Laws pre 2019.

Notwithstanding, employees and employers (with DIFC employment contracts) must take note that if they are not ordinarily based in the DIFC, then the DIFC Employment Law may not apply.

Further, fixed term contracts may be considered individually and even if they are consecutive, may not be determined to be a continuous period of employment under DIFC law.

The [Judgment](#) is available here. We await to see whether the case is referred to appeal.

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