

No Concept of Unfair dismissal in the DIFC

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By way of background, Ms Al Herz and Mr Lutfi were both employed and subsequently dismissed by the DIFC Authority (“DIFCA”). A key factor which impacted on the employees’ relationships with the DIFCA and appeared to influence its decision to dismiss the individuals was that Ms Al Herz and Mr Lutfi married on 27 July 2011.

In particular, given their respective senior positions in the DIFCA, it was determined that a potential conflict of interest had arisen in the workplace pursuant to the marriage and that certain internal policies had been breached. Both individuals pursued claims against the DIFCA arising out of the termination of their employment and although the claims were heard at separate hearings, both cases were heard before Deputy Chief Justice Sir Anthony Colman.

Hana Al Herz and DIFCA

Ms Al Herz was dismissed on 31 January 2012 because the DIFC Authority had determined that her conduct “had not been in line with the DIFCA Code of Values and Ethics and the DIFCA Employee Policies and Procedures”. Consequently, Ms Al Herz was dismissed in accordance with the notice provisions contained in her contract of employment with the DIFCA.

As there is no statutory protection against unfair dismissal in the DIFC Employment Law No.4 of 2005 (as amended) (the “Law”), Ms Al Herz’s primary claim was that notwithstanding the absence of a concept of unfair dismissal within the Law, her dismissal should be deemed unfair on the basis that DIFCA had acted in breach of the following implied terms:

- good faith;
- reasonableness; and
- a requirement that DIFCA does not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties.

In rejecting her claim, Justice Colman set out the following key points:

1. There is no concept of unfair dismissal or constructive dismissal in the DIFC;
2. Employers are entitled to dismiss employees in accordance with the express notice provisions set out in the contract of employment. It is not possible or appropriate to imply terms into employment contracts, which fetter the right of an employer to terminate the employment contract in accordance with the express contractual notice provisions; and
3. Only where an employer purports to dismiss an employee for “cause” (as defined in the Law) will the Court assess whether the dismissal was conducted in accordance with the employer’s disciplinary procedure.

In dismissing the notion that the concept of unfair dismissal should effectively be introduced via terms being implied into the employment contract, Justice Colman stated that “if any such principle of unfair dismissal is to be introduced, it should be by legislation and not by judicial innovation”.

As a side note, Ms Al Herz had also brought a claim for discrimination on the grounds of marital status and a claim for end of service gratuity. The Court also dismissed Ms Al Herz’s claim for discrimination on the basis that the decision to dismiss her was not because of or on the grounds of her marriage. The end of service gratuity claim was dismissed on the grounds that she was not entitled to such a payment on the basis that she was a UAE national who had been enrolled by the DIFCA into the statutory UAE pension scheme.

Marwan Ahmad Lutfi and DIFCA

Mr Lutfi was dismissed on 4 December 2011 because the DIFCA had determined that there had been a failure to comply with the DIFCA’s policies and procedures. In particular, following his marriage to Ms Al Herz, the DIFCA determined that Mr Lutfi’s continuing employment was in breach of its policy which provided that “employment of relatives is generally not allowed” and specifically, that relatives should not work within the same department and/or have direct or indirect supervision for each other. Mr Lutfi was paid in lieu of his three month notice period and received all other contractual entitlements on termination.

Mr Lutfi presented similar claims to those set out by Ms Al Herz above, which were considered by Justice Colman. In dismissing Mr Lutfi’s claim that the dismissal was unfair, Justice Colman referred to passages from the Hana Al Herz judgment and confirmed that the DIFCA’s “express power to terminate was not fettered by any implied terms”.

In addition, Justice Colman dismissed Mr Lutfi’s claim for end of service gratuity for reasons similar to those set out in the Hana Al Herz judgment. Justice Colman also dismissed Mr Lutfi’s claim for defamation as being untenable insofar as there was no evidence of any damage to his reputation arising from the manner in which he was dismissed.

The two judgments are unambiguous and absolute insofar as they confirm that employers may dismiss employees in accordance with the express contractual notice provisions and no additional obligations should be implied on employers in this respect. They are certainly positive judgments for DIFC employers and further reduce the ability of employees to pursue claims arising from the termination of their employment.