

## Questions and Answers: Stephenson Harwood Employment Seminar DIFC employment law vs. UAE labour law: the key challenges

Tuesday 25 November 2014

Stephenson Harwood Middle East LLP, in partnership with the Dubai International Financial Centre Authority, hosted an employment seminar targeting employers and employees alike to discuss the topical issue of DIFC Employment Law v UAE Labour Law. This was the first time a seminar had been organised which included a DIFC and UAE judge talking on comparative legal points. Below are the responses to some of the questions which were posed at the seminar.

|   | Question  | Answer  |
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| 1 | <i>Can we impose article 59A during probation period, despite knowing that the said employee is not performing as per expectations. What are the legal complications if the said employee appeals in court?</i>   | Yes, it depends on the circumstances giving rise to the dismissal but the employee is unlikely to succeed in the Courts if she/he is dismissed for cause during the probation period.   |
| 2 | <i>What about instances where commissions or performance bonuses form part of the package. Will the employer be obliged to include this on top of notice period and end of service benefit.</i>   | End of Service Benefit ("EOB") is calculated on the basic salary and does not include bonuses or allowances, whether the employee is entitled to a separate bonus payment on termination will depend on the employment contract.  |
| 3 | <i>Considering that the right to gratuity under 62 DIFC law is intrinsic to termination, whether or not for cause, wouldn't that create serious uncertainty in view of the current provision of 59a? Particularly considering the de facto discretion such article may give the employer.</i> | According to DIFC Employment Law, an employee is not entitled to EOB where the employee has been terminated for cause.  |
| 4 | <i>If your company is registered in DIFC can the employee contract be governed by UAE labour law or only by DIFC employment law?</i>  | The employment contract will be governed by DIFC Employment Law.  |
| 5 | <i>How is the gratuity calculated if the employee has finished one year of employment?</i>  | 21 days remuneration for each year of the first 5 years of service.<br><br>30 days remuneration for each additional year of service, provided that the total gratuity shall not exceed 2 years' remuneration.<br><br>DIFC Employment Law and UAE Labour Law are almost identical on this point. The only difference is that UAE Labour Law reduces EOB for employees who leave voluntarily. |
| 6 | <i>In court cases, do the court consider the 'offer letter' as a valid and binding agreement or only the 'employment contract'</i>  | UAE Labour Law:<br><br>Employment Contract is the principal document stipulating the employment conditions, however, the court may consider an offer letter if agreed upon by the parties as an agreement and it is   |

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|    |   | <p>advantageous to the employee. However, if it is in violation of the Labour Law, it will not be considered by the court.</p> <p>DIFC Employment Law:</p> <p>Whilst there is no DIFC Law provision on this point, it is a requirement for an employee to be provided with a written contract of employment under Article 13. Provided that the offer letter contains the minimum information as set out in Article 13 (2), the offer letter may amount to an employment contract, in particular where there is no other employment contract and the employee has commenced employment.</p>  |
| 7  | <i>Where an employee is caught drink driving outside working hours, what level of responsibility does the employer have as the sponsor?</i> | It is very unlikely that the liability will extend to the employer in these circumstances however, if the employee was using a company vehicle, the vehicle is likely to be impounded.   |
| 8  | <i>Is there a limit on the probation period in the DIFC unlike the UAE labour law?</i>  | <p>According to UAE Labour Law, an employee can be on probation period up to a maximum period of 6 months, during which the employee can be terminated without notice.</p> <p>DIFC Employment Law does not limit the probation period. However, it does provide for 1 week notice if the employee has been employed between 1 and 3 months and 1 month notice if the employee has been employed for more than 3 months but less than 5 years. If the employee has been employed for more than 5 years, the minimum notice period will be 3 months. However, the parties are not prevented from agreeing to shorter or longer period of notice.</p> |
| 9  | <i>What are key differences between a limited and unlimited contract</i>  | <p>DIFC Employment Law does not draw any distinction between limited and unlimited contracts.</p> <p>According to UAE Labour Law, where an employer terminates a limited contract he must compensate the employee by paying him 3 months' remuneration whereas if the employee resigns he must pay his employer 1.5 months' remuneration (or in both cases the remuneration for the balance of the contractual term if this period of time is shorter).</p>  |
| 10 | <i>In the DIFC if non-compete is enforced can the employee ask for garden leave payments though not a clause in the contract?</i>           | Yes, it will however be at the discretion of the employer. The employee has right to full salary during probation period. If the employer asks the employee to stay home during the probation period (garden leave), the employer must pay the employee's salary during such garden leave.   |
| 11 | <i>Can visa cost be recovered from the employee? Is that legal in the DIFC?</i>   | No they cannot as per the Judgment in McDuff.  |

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| 12 | <i>Once an employer has dismissed an employee, is there a time frame after which the former employee can no longer file a case with the courts regarding the reasons of the dismissal?</i>                                       | Yes, a complaint by either the employer or the employee must be made to the labour office within one year from the date in which the amount or entitlement becomes due.  |
| 13 | <i>What is probation period under DIFC employment law?</i>   | <p>DIFC Employment Law does not set out any provisions of probation period, which are agreed contractually between the parties.</p> <p>However, the Law does provide for 1 week notice if the employee has been employed between 1 and 3 months (usually referred to as the probation period) and 1 month notice if the employee has been employed for more than 3 months but less than 5 years. If the employee has been employed for more than 5 years, the minimum notice period will be 3 months. The parties are not prevented from agreeing to shorter or longer period of notice.</p> |
| 14 | <i>If within the 3 months notice period / gardening leave the employer finds out the former employee is working for a competitor can the employer stop salary payments or does the employer have to go to DIFC courts first?</i> | Working for a competitor (whilst on gardening leave) will amount to a serious breach of the employee's employment contract. The employer can terminate immediately for cause and cease payments at that point. The employer should be able to substantiate that employee's misconduct (rather than simply suspect he is working for a competitor) before terminating for cause in case the employee pursues action with the Court denying the alleged misconduct.  |
| 15 | <i>What are the legal obligations of employer toward pension funds for UAE and GCC nationals?</i>  | Article 61 of the DIFC Employment Law states that the employee must be enrolled to the UAE pension scheme and the employee shall not be entitled to EOB.   |
| 16 | <i>Is the employee entitled to 21 days of only the basic salary or 21 days of full monthly salary as gratuity?</i>   | Gratuity is based on basic salary.   |
| 17 | <i>Do DIFC Judges refer to Dubai Laws or UK Laws if judge believes that there is a lack of provision in DIFC Employment Law?</i>   | Where there is a lacuna in the law, DIFC judges will look to English Law or other competent common law jurisdictions for guidance. However, there is no unfair dismissal regime within the DIFC and therefore issues will be considered from a common law perspective.   |
| 18 | <i>Larissa Zaplatinskaia, PhD<br/>What are the other differences, between limited and unlimited contract under DIFC employment law, apart from EOB?</i>  | There is no distinction between limited and unlimited contract under DIFC Employment Law.  |
| 19 | <i>What protection is there for the employer if the employee contacts your clients under DIFC law</i>  | None, there is no such provision in DIFC Employment Law. However, the employer can have a breach of contract claim if he had inserted a non-compete clause in the employment contract.   |

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| <p><b>20</b></p> | <p><i>Can an employer bring a case to DIFC courts if an employee on gardening leave or former employer speaks negatively or spreads false information about the firm and if so what evidence does the employer need to provide? email or witnesses or some other forms of evidence?</i></p> | <p>No, unless there is confidentiality provision in the employment contract which the employee would be bound by.</p>   |
| <p><b>21</b></p> | <p><i>Can an employee claim for damages if he/she has been terminated unfairly? what if proof of termination is not valid in the eyes of the court?</i></p>   | <p>Under DIFC Employment Law, there is no concept of unfair dismissal.</p> <p>The UAE Labour Law, however, imposes on the employer strict legal formalities to be followed when initiating a disciplinary process against an employee. Failing to comply with the formalities, the court might award the employee arbitrary dismissal compensation of up to 3 months' salary, based on the last pay received by the employee prior to dismissal.</p>  |
| <p><b>22</b></p> | <p><i>Can the court of cessation judgement be appealed under any circumstance? For example if critical documents were not submitted before the court?</i></p>   | <p>Court of Cassation judgment is not appealable for being issued by the highest seat of judicial authority, however, a case can be sought to be reopened through an Application to Review if it is discovered that one of the seven conditions for filing such application is that a critical document has been discovered by the applicant which was retained by his opponent and not known to the applicant. (Ref. Art. 169 (3) of the Civil Procedure Law, 1992)</p>  |
| <p><b>23</b></p> | <p><i>Is the notice period included in the calculation of time for the ESG? E.g. the employee has worked for 22 months but has a three month notice period. Would they be entitled to one year or two years ESG?</i></p>  | <p>Yes, notice period is included (the calculation should be based on the employee's start date and the last date of employment). In this case the employee would be entitled to 2 years of gratuity.</p>   |
| <p><b>24</b></p> | <p><i>Can we terminate an Emirati employee for continuous absence, in the case that they have a medical certificate before they are planning their next absence?</i></p>  | <p>Under DIFC Employment Law the maximum annual sick leave entitlement is 60 days after which the employer may terminate the employment immediately with written notice to the employee.</p> <p>According to UAE Labour Law (after fulfilling any probation period) the maximum annual sick leave entitlement is 90 days, however, only the first 15 days will be with full pay and the next 30 days with half pay (any following period will be without pay). Please note that it is not permitted to terminate an employee during his sick leave.</p> <p>There is no difference as the definition of 'Labor' is applied without exception of any nationality to the provisions of Article 83 of the Labor Law. However, in case of public sector employees it may be different as they are dealt with under a separate law.</p> |
| <p><b>25</b></p> | <p><i>Does an extended probation period count towards end of service?</i></p>   | <p>Yes, the calculation is based on the employee's start date and the last date of employment.</p>  |

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| 26 | <i>In order to get the full amount of the end of service benefit I need to be employed with my company for a period of 5 years. Is it a notice period inclusive of that period, meaning that I should only resign after 5 years or if I resign after 4.9 years my notice period of 1 month will be included in 5 years</i>  | Notice period is included; the calculation should be based on the employee's start date and the last date of employment.   |
| 27 | <i>Have any injunctions been issued by the DIFC court in connection with restrictive covenants such as non-compete?</i>   | The DIFC Court has applied English Law principles (and not given the injunction) meaning in future it is unlikely that a non-compete injunction will be given, unless the covenant is very clearly defined in scope and it is reasonably necessary to protect the employer's legitimate business interests.  |
| 28 | <i>After fifth year of service is end of service benefit calculated on last salary? Does last salary apply to all years of service?</i>   | Yes, the gratuity will be based on the last received basic salary before termination. This salary will be the basis for calculating the gratuity for the whole period, on the condition that the total amount does not exceed 2 years' salary.   |
| 29 | <i>What are the terms of leaves payment under probation period, under DIFC employment law? (Including sick leave payment)</i>   | According to DIFC Employment Law, an employee is entitled to a minimum paid vacation leave of 20 working days per annum (excluding national holidays) to be accrued pro-rata for employees who have been employed for at least 3 months. Sick leave payment shall be paid to the employee at the rate of their daily salary (irrespective of the length of their employment). However, the employer may terminate the employee for excessive sick leave (if more than 60 days in any 12 month period). |
| 30 | <i>If an employee resigns and in the process of serving his notice period crosses 1 yr will he be entitled to end of service?</i>   | Yes.   |
| 31 | <i>Under the DIFC law, art61 do not apply to GCC or UAE national. What kind of article do you find in an employment contract for a GCC/UAE national. A reference to the pension scheme?</i>   | Yes, according to Article 61 of the DIFC Employment Law, UAE and GCC nationals should be enrolled in the UAE pension scheme and they shall not be eligible to receive EOB.   |
| 32 | <i>Are employees, who are on secondment and are on a pension scheme back in their home country which is alimented by the home company, entitled to end of service benefits if they resign during their secondment in the DIFC? If so is only the time of employment in the DIFC relevant or their entire employment period with the company in various locations?</i> | They will likely be entitled to EOB for the period of continuous employment within the DIFC provided the continuous employment is for one year or more.  |
| 33 | <i>Is there a precedence in DIFC of enforcing non-compete clause?</i>   | No, in the only known case the DIFC Court declined to enforce it. See answer to Q 41 above.  |
| 34 | <i>Is any ban imposed on the employee failing to complete his/her contract within the DIFC?</i>   | The employer may apply for a ban, in general terms it is unlikely that the DIFC Court would grant it for a "regular" breach of contract. However, depending on the nature of the breach (if it is of a serious nature i.e employee commits and criminal offence and flees) then an   |

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|           |  | employment ban is likely to follow.   |
| <b>35</b> | <i>What happens if visa not cancelled owing to dispute with DIFC employer but employee needs to start new employment with another DIFC employer? Can he still work for new employer. Can new employer do anything?</i> | The employee/new employer would have to apply to the DIFC Court to have the Visa cancelled if he previous employer refused to cancel it.  |
| <b>36</b> | <i>Is the gratuity calculation same as Dubai for DIFC?</i>   | Yes. The only difference is when an employee leaves voluntarily, then the UAE Labour Law would apply a different calculation.   |
| <b>37</b> | <i>What is the limitation period for filing a case of unfair dismissal before Dubai courts?</i>  | A complaint by either the employer or the employee must be made to the labour office within one year from the date in which the amount or entitlement becomes due. However, the employer must initiate the disciplinary procedure within 30 days of discovering the misconduct.   |
| <b>38</b> | <i>If an employee has resigned and serving notice period which takes him over the 1 year is he eligible for gratuity</i>   | Yes.  |
| <b>39</b> | <i>In Article 62, only stipulate "a number of days" but doesn't specify if the days should be calculated as working days or calendar days. Which one should be taken for calculation?"</i>                             | Article 62 stipulates that the daily rate for the employee's basic wage shall be calculated based on the number of days in a year. Therefore in short it is calendar days.  |
| <b>40</b> | <i>Is there a right of appeal in the courts?</i>   | Yes.  |
| <b>41</b> | <i>Do you need to seek permission from the ministry of labour before terminating an Emirati?</i>   | Not expressly required. However, as per Article 3 of the Ministerial Resolution No. 176 of 2009, there are certain conditions that need to be fulfilled which if not done, would render the termination invalid. There is requirement of 30 days' notice by the employer to notify the Ministry of Labour before termination of a UAE national. |
| <b>42</b> | <i>If not based in a free zone can an employee opt into DIFC jurisdiction</i>  | No, an employee can't opt into a different jurisdiction for employment cases.   |
| <b>43</b> | <i>Can probation period be extended by mutual agreement between employer and employee? Will such extended period be valid in the DIFC/UAE courts?</i>  | Probation period can only be extended for a maximum period of 6 months in accordance with UAE Labour Law.<br><br>Probation period under DIFC Employment Law is contractual, the parties are free to mutually extend the probation period.   |
| <b>44</b> | <i>For Bushra If the employer is paying pension - is the employee still eligible to receive end of service gratuity??</i>  | No, the employer can choose to participate in the pension scheme or receive EOB.  |
| <b>45</b> | <i>Is it legal for the employer to not give one month notice period to the employee and give one month salary in lieu of notice? What legal rights does the employee have in such a case?</i>                          | Yes, payment in lieu of notice is allowed both under DIFC Employment Law and UAE Labour Law.  |

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| 46 | <i>If an employment contract says that the employee confirms that he will not seek to receive EOSG will that be a bar to the employee seeking to claim such benefit at the end of employment?</i> | Unless the employee has opted for a pension scheme, he will be entitled to EOB.   |
| 47 | <i>Regarding UAE national/GCC national forfeiture of pension - does this mean the whole pension contributions would be forfeited?</i>   | As per the pension regulations a deduction of maximum 25% can be deducted according to Article 54 of the Law No. 9 of 1999 regarding Pension & Social Security.   |
| 48 | <i>What is the legal retirement age as per DIFC and UAE employment law in general? Is it different for men and women..?</i>   | <p>DIFC Employment Law does not state the retirement age, however for UAE and GCC Nationals it is likely to be subject to the provisions of the UAE Labour Law/Federal Law.</p> <p>UAE Labour Law:<br/>Earlier the retirement age was 60, however, it was increased to 65 in 2010 with a view to value the experienced human resources in the country. It is same for both male and female.</p> |
| 49 | <i>Under DIFC law, are there any allowances for paternity and maternity leave?</i>  | <p>DIFC Employment Law does not provide for paternity leave.</p> <p>According to Article 37 of the DIFC Employment Law, maternity leave should be a minimum of 65 working days.</p>   |
| 50 | <i>Are employees entitled to reduced working hours during Ramadan under DIFC law?</i>   | Yes, a Muslim employee who observes the fast during Ramadan shall not be required to work in excess of 6 hours each day.  |

If you have any questions about the seminar or other Middle East employment issues, please contact:



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