

## EMPLOYMENT LAW : IF A FIXED TERM EMPLOYMENT CONTRACT IS RENEWED SUCCESSIVELY, IS IT IN REALITY A PERMANENT EMPLOYMENT?

### A. INTRODUCTION

In Malaysia companies / employers generally use two types of employment contract, i.e. (1) permanent contract of employment and (2) fixed term contract of employment.

For the longest time, there has been uncertainty on the question as to whether an employee under a fixed term contract which the company renews successively should be treated as a permanent employment or otherwise. In other words, is such employment contract a permanent contract disguised as a fixed term contract?

Recently, the Federal Court i.e. Malaysia's Apex Court, had in the case of **Ahmad Zahri Mirza Abdul Hamid V Aims Cyberjaya Sdn Bhd [2020] MLJU 595** ("Aims Cyberjaya") revisited this question of law and ended this conundrum.

### B. PRE-AIMS CYBERJAYA

Prior to the case of Aims Cyberjaya, the Court has taken different approaches for fixed term contracts that were renewed continuously. This can be seen in the following cases:-

Briefly, in the case of **Nasha'at Muhy Mahmoud V Malaysian Airlines System Berhad [2014] 1 ILJ 458**, where the Claimant was employed under a fixed term contract, the Claimant's contract was renewed for 5 times successively. On the expiry of the last renewed term, the company did not renew the contract further because there were sufficient local pilots to serve the company.

The Court held that the contract of employment given to the Claimant was a genuine fixed term contract despite the fact it was renewed successively without fail.

The same approach also was used by the Court in the case of **Noor Asilah bt Abdull Rahman v Columbia Asia Sdn Bhd [2019] 3 ILJ 9** and **Thavaratnam A/L Thambipillay v Om Education Sdn Bhd [2010] ILJU 242**.

However, in the case of **TNB Properties Sdn Bhd v Choo Poh Hong & Anor [2017] MLJU 2349**, the Court held that the employment contract of the employee was not a genuine fixed term contract as the Company had continuously extended the employee's contract for several times even after the completion of the project which was under the employee's control.

The same approach also has been adopted in **Lim Im Tee v Ansell Industrial & Speciality Gloves Malaysia Sdn Bhd [2019] ILJUU 00187**.

### **C. FEDERAL COURT DECISION IN AIMS CYBERJAYA**

In May 2020, the question as to whether an employee whose fixed terms contract has been renewed successively is a permanent employee or otherwise has been answered by our apex Federal Court in the case of **Ahmad Zahri Bin Mirza Abdul Hamid V Aims Cyberjaya Sdn Bhd**.

#### **i. Issues**

The main issue before the Federal Court, is as follows: -

“Issue : Does a contract of employment which is renewed successively without application by the employees and without any intermittent break in between, is in reality a permanent employment”

#### **ii. Brief Facts**

Briefly, the facts of Aims Cyberjaya are as follows: -

1. The Claimant/Appellant received a contract for consultancy services for a fixed term from 1.10.2009 to 30.09.2010 and on the same day, the Claimant also received a letter of appointment as VP Product Development of Aims Data Centre (ADC) commencing on 1.10.2009.
2. The Claimant's contract has been renewed successively for 4 times (12 months each) extending his term of employment until 30.09.2013.
3. The Company then further renewed Claimant's contract for 3 months from 30.09.2013 until 31.12.2013.
4. In total, the contract was renewed 5 times.
5. On 18.10.2013, the Company gave the Claimant 2 month notice of the expiry of his contract.

### iii. Federal Court's Decision

In deciding whether the contract of employment is a genuine fixed term contract or it is in fact permanent employment dressed up as several fixed term contracts, the Court laid down 3 considerations, which are: (1) Intention of Parties, (2) Employers' subsequent conduct during course of employment, and (3) Nature of the employers' business as well as nature of works.

#### 1ST CONSIDERATION: THE INTENTION OF PARTIES

The Federal Court refers to two distinct cases **Penang Han Chiang Associated Chinese Schools V Lee Gaik Suan [2005] ILJU 50** ("Penang Han Chiang High School") and **Hasni Hassan v Menteri Sumber Manusia & Anor [2012] MLJU 1799** where the genuineness of the fixed term contract depends on the intention of employers in holding the employees under such contract.

In the case of Han Chiang High School, it was decided that, whilst there might initially be a genuine necessity for the school to use fixed term contract, "*there did not appear to be such a need when it had been successfully established as some of the teachers had taught for more than twenty (20) years and had their contracts renewed unfailingly during those years*". To this end, the Industrial Court found that "*the system of fixed term contracts in the school was employed not out of genuine necessity, but as a means of control and subjugation of its teaching employees.*"

While in the case of Hasni Hassan, the Court of Appeal, in the Judicial Review Application against the Honorary Minister's decision not to refer the dispute to the Industrial Court, suggested that the fixed term contract in that matter was used to elevate the performance of senior management in return for higher incomes. As such, there was no ulterior or sinister motive on part of the Company.

#### 2ND CONSIDERATION: EMPLOYERS' SUBSEQUENT CONDUCT DURING THE COURSE OF EMPLOYMENT

The conduct of the employer during the course of employment and the total duration of service with employer is also a factor to be considered. In the case of **Sime UEP Development [1996] 1 ILR 256**, the clerk has been working for the company for 4 years "*on a contract that was renewed annually*". To this end, the Industrial Court decided that "*an employee cannot be considered to be employed for a temporary or one-off job if he was not employed for a particular project and he had been involved in various projects during his tenure.*"

In the case of **Holiday Villages [2008] 6 MLJ 302**, the Court held that the employee was on a permanent employment contract as he was given a new contract without the need to re-apply and he was able to continue in employment even after the alleged expiry of his penultimate fixed term contract without an extension.

### 3RD CONSIDERATION: NATURE OF EMPLOYER'S BUSINESS AND THE NATURE OF WORK WHICH AN EMPLOYEE IS ENGAGED TO PERFORM

The Court also made reference to the case of **Charles Aseervatham Abdullah v The Zenith Hotel Sdn Bhd [2018] 2 LNS 2349** where true character of fixed term contract is examined through the nature of work that the employee is engaged to perform.

After taken into consideration of 3 principles above, the Federal Court held that the Claimant's contract of employment was not one-off, seasonal or temporary employment. It was on ongoing, continuous employment without break from 2009 to 2013.

As such, the Federal Court answered the issue in the affirmative.

### D. CONCLUSION

Finally, there is a clear guideline by the Federal Court, which will shed some light and resolve some of the issues in relation fixed term contract.

With this guideline from the Federal Court, it is pertinent for employers / companies in Malaysia to review their employment policies to avoid any exposure to possible unlawful dismissal claims by employees.

Whilst for employees, following this decision, the mere description of a contract as a fixed term contract is not conclusive as to whether such employees are indeed employed for a fixed term. The Court will determine the nature of the employment based on the 3 guidelines set out above.

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