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Employment & Benefits

# Permanent Employment - No Longer a Dream for Foreigners: *Ahmad Zahri Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd [2020] 1 LNS 494*

## Introduction

The Federal Court, the apex court in the land, recently delivered a ground-breaking decision confirming that it is possible for foreigners to gain permanent employment in Malaysia.

The judgment deals mainly with the question of whether the employee's fixed term contract is, in reality, a permanent contract. In arriving at its decision, two key issues were raised:

1. Whether a contract of employment renewed successively without application by the employee and without any intermittent breaks in between is a permanent contract; and
2. Whether the need for a work permit by a foreigner is a material consideration when determining whether a contract of employment is a genuine fixed term contract.

To put it succinctly, the questions above were answered "yes" and "no", respectively.

## The Brief Facts

The Appellant ("**Employee**") received an employment contract from AIMS Data Centre 2 Sdn Bhd ("**ADC**") for a fixed term of one year. According to this contract, the Employee would be entitled to participate in a performance bonus scheme. Thereafter, the Employee's contract was renewed four consecutive times for a year each without any application by the Employee for the said renewals.

On the fourth renewal, the Employee received a renewal contract as an employee of a different entity, being AIMS Cyberjaya Sdn Bhd ("**Employer**"), who is the Respondent in the legal proceedings, instead of ADC. This is on the basis that ADC was subsequently consolidated into the Employer. Under the fourth renewal contract, all terms and conditions of the existing contract remained the same, except for the Employee's title which was re-designated from "Consultant" to "Vice President, Product & Solutions" due to the Employer's then corporate structure.

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On the fifth renewal, the Employer offered to renew the contract for a year but sought to change the terms of the contract by excluding the performance bonus scheme. The Employee did not agree to this.

In response to this, the Employer renewed the Employee's contract for three months from 1 October 2013 to 31 December 2013, and excluded the performance bonus scheme. The Employee declined to accept this contract.

The Employee was then notified in writing of the two months' notice of the expiry of his contract from 1 November 2013 to 31 December 2013. He was also informed that the Employer had decided to grant him an early release from his employment with effect from 19 October 2013.

## The Preceding Court Decisions

The Industrial Court and the High Court found in favour of the Employee. The Court of Appeal, however, found in favour of the Employer.

The basis of the Court of Appeal's judgment was that the Employee being a foreigner was a relevant factor in determining whether the Employee was a permanent employee.

Specifically, the Court of Appeal's decision was based on the notion that since the terms of the contract was subject to compliance of any legal requirements necessary for the Employee to be able to provide services in Malaysia, including the legal requirement to obtain a work permit from the Immigration Department, it cannot be said that a foreigner who requires a work permit to work in Malaysia can be a permanent employee. In other words, because the employment hinges on the requirement to obtain a work permit, such an employment cannot be deemed as permanent in nature since work permits are only issued for a fixed period of time.

## The Federal Court Decision

### Who is the Employer?

The Employer argued that the Employee was previously employed under ADC, and thus, there was a break in the renewal of his employment. This break was relied on to argue that there were no continuous renewals of the contract. The Federal Court, however, disagreed and lifted the corporate veil to determine that the Employer was in fact the true employer, notwithstanding the corporate consolidation.

This allowed the Employee to forward the argument that the successive renewals of the contract were evident of the fact that the contract was essentially a permanent contract dressed as a fixed term contract.

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In arriving at its decision, the Federal Court affirmed the decision of *Hotel Jaya Puri v National Union of Hotel Bar and Restaurant Workers* and held that in industrial relations cases, the Courts would more readily lift the corporate veil to reveal the true employer in order to achieve social justice and ensure that the employees are not adversely affected.

This is consistent with section 30(5) of the Industrial Relations Act 1967 which provides that the Industrial Court shall act according to “*equity, good conscience and the substantial merits of the case without regard to technicalities and legal form*”. The Federal Court further analysed and concluded that this position is consistent throughout the Commonwealth.

The Federal Court went on to provide a non-exhaustive list of circumstances where it would lift the corporate veil and find a group of companies to be the common employer in the context of employment law. They are as follows:

- (a) where there is “*functional integrality*” between the entities;
- (b) where there is unity of establishment between the entities;
- (c) where there exists a fiduciary relationship between the members of the entities and / or there is an established extent of control between them;
- (d) where there was essential unity of group enterprise; and
- (e) whenever it is just and equitable to do so and / or when the justice of the case so demands.

#### **Was the contract a permanent contract?**

Having lifted the corporate veil and determined that the Employer was indeed the true employer, the Federal Court went on to consider whether it was a permanent contract. To determine whether an employment contract is truly a fixed term agreement or merely disguised as one, the Federal Court considered the following factors:

- (a) the intention of parties;
- (b) the Employer’s conduct during the course of employment;
- (c) the nature of the Employer’s business;
- (d) the nature of work which the Employee was engaged to perform.

Taking these factors into consideration, the Federal Court held that the Employee’s contract, initially commencing with ADC before being terminated by the Employer, was not one-off, seasonal or

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temporary in nature. Instead, the employment was on-going, continuous and without a break from 2009 to 2013. Thus, it was in fact a permanent employment contract.

#### **Does the need for a work permit for a foreigner negate the possibility of permanent employment?**

Here lies the key point in the decision. The Federal Court considered whether the need for a work permit (which is necessary to be able to work in the country legally) would prevent the Employee from gaining permanent employment. The Federal Court affirmed its previous decision in *Assunta Hospital v Dr. A. Dutt* where it was stated,

*“... whether Dr. Dutt can get an extension of his visit pass so as to be able to stay in this country or the issue of work permit in order to be able to take up the appointment **are not matters that can influence the court** ...*

*If ... the workman is unable to obtain ... the work permit, the employer would not be in contempt of the order. It is for the workman to make the order effective.”*

Surprisingly, this case was not referred to in the Court of Appeal's decision which took the position that the fact that an employee is a foreigner is a relevant factor in determining whether the said employee is a permanent employee.

The Federal Court went a step further and noted that the Industrial Relations Act 1967 does not distinguish between citizens and non-citizens. Further reference was made to Article 10 of the International Labour Organisation Migrant Workers (Supplementary Provisions) Convention 143 of 1975 as well as Article 8(1) of the Federal Constitution in holding that migrant workers should enjoy equality of treatment in respect of rights arising out of employment.

With this, the Federal Court affirmed the position in *Assunta Hospital v Dr. A. Dutt* and reversed the Court of Appeal's decision.

### Key Takeaways

1. The threshold to lift the corporate veil appears to be lower in employment disputes as compared to civil disputes;
2. The factors in determining whether an employee is a fixed term employee are: (i) the intention of parties; (ii) the employer's conduct; (iii) the nature of the employer's business; and (iv) the nature of work which the employee is engaged to perform; and
3. The requirement for a work permit or the citizenship of an employee **is not a relevant consideration** when determining whether an employee is a permanent employee.

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