
AZALINA ADHAM
v.
BURSA MALAYSIA BERHAD

Industrial Court, Kuala Lumpur
Augustine Anthony
Award No: 1087 Of 2023 [Case No: 4/4 - 2912/20]
11 May 2023

Case(s) referred to:

Ahmad Zahri Mirza Abdul Hamid v. AIMS Cyberjaya Sdn Bhd [2020] 3 MLRA 475; [2020] 2 MELR 421; [2020] 5 MLJ 58; [2020] 3 ILR 233; [2020] 6 CLJ 557; [2020] 5 AMR 1 (refd)
Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd [1996] 2 MLRA 1; [1997] 1 MLJ 587; [1997] 1 CLJ 23 (refd)
Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 1 MLRA 415; [1981] 2 MLJ 129 (refd)
Han Chiang High School Penang, Han Chiang Associated Chinese Schools Association v. National Union Of Teachers In Independent Schools, W Msia [1988] 2 MELR 637; [1988] 2 ILR 611 (refd)
Ireka Construction Berhad v. Chantiravathan Subramaniam James [1995] 1 MELR 373; [1995] 2 ILR 11 (refd)
K A Sanduran Nehru Ratnam v. I-Berhad [2006] 1 MELR 74; [2006] 1 MELR 114; [2006] 2 MLRA 467; [2006] 2 MLRA 778; [2007] 2 MLJ 430; [2007] 1 ILR 257; [2007] 1 CLJ 347 (refd)
M Vasagam Muthusamy v. Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor [2002] 3 MLRH 886; [2003] 5 MLJ 262; [2003] 5 CLJ 448 (refd)
M Vasagam Muthusamy v. Kesatuan Pekerja-Pekerja Resorts World Pahang & Anor [2005] 1 MELR 37; [2005] 2 MLRA 373; [2006] 1 MLJ 206; [2005] 4 CLJ 93; [2005] 5 AMR 552 (refd)
Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 2 MLRA 23; [1995] 3 MLJ 537; [1995] 4 CLJ 449; [1996] 1 AMR 049 (refd)
Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 1 MELR 4; [2002] 1 MLRA 188; [2002] 3 MLJ 129; [2002] 3 CLJ 314; [2002] 3 AMR 2898 (refd)
Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Anor [1998] 4 MLRH 774; [1998] 7 MLJ 359 (refd)

Legislation referred to:

Industrial Relations Act 1967, ss 20(3), 30(5)

Counsel:

For the claimant: Shankar Subramaniam (Juanita Chua with him); M/s Shanker, Arjunan & Chua
For the company: Ten Yee Phor (Norsuhaila Mat Nudin with him); M/s Ten & Colin



[Dismissed the claimant's claims.]

AWARD

Augustine Anthony:

The Reference

[1] This is a reference dated 19 November 2020 by the Honourable Minister of Human Resources pursuant to s 20(3) of the Industrial Relations Act 1967 ("The Act") arising out of the alleged dismissal of Azalina Binti Adham ("Claimant") by Bursa Malaysia Berhad ("Company") on the 15 February 2020.

[2] Pursuant to the direction of this Court, the parties in this matter filed their respective submissions dated 16 February 2023 (Claimant's written submissions), 8 March 2023 (Company's written submissions), 21 March 2023 (Claimant's written submissions in reply) and 21 March 2023 (Company's written submissions in reply).

[3] This Court considered all the notes of proceedings in this matter, documents and the cause papers in handing down this Award namely:

- (i) The Claimant's Statement of Case dated 3 February 2021;
- (ii) The Company's Statement in Reply dated 12 March 2021;
- (iii) The Claimant's Rejoinder dated 29 March 2021;
- (iv) The Claimant's Bundle of Documents - CLB1;
- (v) The Claimant's Document - CL2
- (vi) The Company's Bundles of Documents - COB1, COB2, COB3 & COB4;
- (vii) The Claimant's Witness Statement - CLW - WS (Datin Azalina Binti Adham);
- (viii) Company's Witness Statement - COWS 1 (Azman Bin Abdul Khalid);
- (ix) Company's Witness Statement - COW2-WS (Yong Hazadurah Binti Md Hashim);

Introduction

[4] The dispute before this Court relates to the claim by Azalina Binti Adham ("Claimant") that she was dismissed from her employment without just cause



or excuse by Bursa Malaysia Berhad ("the Company") on the 15 February 2020.

[5] The Company, Bursa Malaysia Berhad needs no introduction. The Company operates and regulates a fully integrated exchange which offers a comprehensive range of exchange related facilities. The Claimant commenced employment with the Company on the 1 June 2001 as a Manager, Business Development in the Business Development & International Affairs Department. The Claimant was confirmed in the appointed position on the 1 September 2001 due to her satisfactory completion of her probationary period. The Claimant having served in other position was then promoted as the Head of Investor Development on the 1 October 2010. In 2012, the Company created a new Division called Strategy and Transformation Division and the Claimant was identified as the most suitable candidate to head this division. It was the Company's position that the Head of the Strategy and Transformation Division being a senior management position would therefore be on a fixed term employment contract. The Claimant was made aware that should she accept this position, her permanent employment contract will be terminated and her employment will be converted to a fixed term contract of employment for the post of Head of the Strategy and Transformation Division. By a letter of conversion to a fixed term contract of employment dated 20 March 2012, the Claimant was offered the position of Head of the Strategy and Transformation for a fixed term period of 1 January 2012 until 31 December 2014 and the same was accepted by the Claimant on the 20 March 2012 (1st fixed term contract of employment). Before the expiration of this 1st fixed term contract of employment on the 31 December 2014, the Claimant was offered a new position as the Director, Strategy and Transformation for a fixed term contract period of 8 January 2015 until 7 January 2018 (2nd fixed term contract of employment) which the Claimant duly accepted on the 15 September 2014. The 2nd fixed term contract of employment commenced after a break of 8 days from the expiration of the 1st fixed term contract of employment.

[6] Due to a restructuring exercise carried out by the Company around the period of 2017, the Company created a new position of Chief Operating Officer (COO) and the Claimant was identified as the most suitable candidate for this position and upon the application made by the Claimant, she was then offered this position by the Company with a new fixed term contract period of 3 years commencing from 15 February 2017 to 14 February 2020 (the 3rd fixed term contract of employment). Thereafter on the 13 November 2019, the Company informed the Claimant that upon the expiration of the 3rd fixed term contract of employment, the Claimant would not be offered any new contract of employment.

[7] The Claimant now states that these fixed term contracts of employment were not genuine fixed term contract of employment as the Claimant's nature of work was not temporary or limited to a fixed term period. The Claimant claims that there were attempts by the newly appointed Chief Executive Officer in 2019 to remove certain long serving employees. The Claimant states that she has a legitimate expectation to continue in her employment until the



age of 60 in line with her age of retirement and the provisions of Minimum Retirement Age Act 2012. In the circumstances the Claimant states that she was dismissed without just cause or excuse and prays that she be reinstated to her former position in the Company without any loss of wages and other benefits. The Company maintains that the three fixed term contracts of employment offered to the Claimant were genuine fixed term contract of employment and the third fixed term contract of employment had come to an end through effluxion of time and as such the Claimant was not dismissed by the Company. The Company now prays that the Claimant's case be dismissed.

[8] The Claimant gave evidence under oath and remained the sole witness for her case. The Company's evidence was adduced through COW1 (Azman Bin Abdul Khalid, the Director, Group Human Resources Division of Bursa Malaysia Berhad who gave evidence of the Claimant's employment history including the three fixed term contract of employment) and COW2 (Yong Hazadurah Binti Md Hashim, who is the Head of the Corporate Governance and Secretarial Division of the Company who explained her role including her attendance at the Company's Board Committee meetings, Nomination and Remuneration Committee meetings that discussed the appointment of the Claimant to her fixed term contract of employment).

The Claimant's Case

[9] The Claimant's case can be summarised as follows:

- (i) The Claimant commenced employment with the Company on the 1 June 2001;
- (ii) The Claimant's last held position in the Company was Chief Operating Officer with a last drawn salary of RM52,800.00. The Claimant was also entitled to bonuses and other allowance;
- (iii) The Claimant held various positions in the Company during her employment which includes:
 - (a) Head, Business Development (June 2001 to September 2003);
 - (b) Head, Institutional Investors (September 2003 to December 2004);
 - (c) Head, Equities Marketing (January 2005 to December 2007);
 - (d) Head, Marketing Strategy & Planning (January 2008 to December 2009);
 - (e) Head, Investor Development (January 2010 to December 2011);



(f) Head, Strategy and Transformation (January 2012 to December 2014);

(g) Director, Strategy and Transformation (January 2015 to January 2018);

(h) Chief Operating Officer (February 2017 to February 2020);

(iv) In March 2012 the Claimant was informed that she would be placed under a fixed term contract for a period of 3 years wherein by this fixed term contract the Claimant will be made the Head, Strategy and Transformation;

(v) The Claimant thereafter remained in continuous service in the Company until her termination in February 2020;

(vi) By a letter dated 13 February 2017, the Claimant was appointed as the Chief Operating Officer (COO) of the Company and amongst other her duties were to strategize and drive the entire operational efficiencies and effectiveness, technology infrastructure as well as legal functions within the Company, in developing and driving global standards in service provisions and operations, supporting the Company's aspirations of being Asia's leading marketplace as well as in support of Malaysia's Capital Market Master Plan. The Claimant's duties were therefore central to the Company's operations;

(vii) The Claimant was confirmed in her position as COO by way of the Company's letter dated 9 August 2017;

(viii) The appointment of the Company's senior officers must be approved by the Board of Directors and the Securities Commission must be informed and the Commission must concur;

(ix) By a letter dated 13 November 2019 the Company informed the Claimant that her "fixed term" employment will expire on 14 February 2020 and that there will be no extension. The Claimant contends that this amounted to a dismissal from employment wherein no reasons were given for the said dismissal;

(x) The Claimant contends that she falls under the purview of the Minimum Retirement Age Act 2012 (MRAA) and that therefore she was entitled to work until the retirement age of 60 as provided for by the Act;

(xi) The Claimant contends that MRAA is a piece of Social Legislation, the purpose of which is to provide employment protection and stability;

(xii) The Claimant also contends that her terms of service provided for



a retirement age of 60 as stipulated in the MRAA;

(xiii) The Claimant states that there was no genuine purpose for the fixed term contract as the Claimant's responsibilities were not temporary or for a fixed period. The nature of the Company's business and the nature of the Claimant's work are such that there was no genuine purpose for the fixed term contract;

(xiv) At the time of dismissal of the Claimant from employment, the Claimant had served the Company for almost 19 years;

(xv) The Claimant contends that the only purpose for the fixed term contract was to attempt to avoid liability under the Industrial Relations Act, 1967;

(xvi) The Claimant further contends that during her employment, the Company has treated her as a permanent employee;

(xvii) The Claimant contends that the Company had a change of top management when a new Chief Executive Officer was appointed in February 2019 and a new Chairman in March 2019. There was an attempt by the new management to remove certain long serving employees at that point in time and there was no genuine purpose for the dismissal of the Claimant from her employment;

(xviii) The Claimant now states that her dismissal from employment with the Company was without just cause or excuse and prays that she be reinstated to her former position in the Company without any loss of seniority, wages or other benefits.

The Company's Case

[10] The Company's case can be summarised as follows:

(i) The Company does not dispute the Claimant's commencement date of employment with the Company;

(ii) The Company denies that the Claimant was dismissed from her employment with the Company but instead contends that the Claimant's fixed term contract of employment came to an end on the 14 February 2020 through effluxion of time;

(iii) The Company states that the nature of the Claimant's fixed term employment contract was such that it had a fixed tenure of operation wherein the designated date of expiration of the fixed term employment contract was 14 February 2020;

(iv) The Company further states that at no time could either party have reasonably believed that the fixed term employment contract would be automatically renewed;



(v) The Company admits that the Claimant was engaged by the Company as a permanent employee and later converted her employment to fixed term employment contract when she opted to accept the offer of a higher position within the Company;

(vi) The Claimant was engaged on three (3) separate or different periods by virtue of three (3) separate and distinct fixed term employment contracts. The Claimant's employment history clearly shows that though the Claimant was initially employed as permanent employee but later opted for fixed term contract of employment with higher position;

(vii) The Company contends that it is the established policy in the Company, similarly adopted by other GLCs, that the appointment of all the senior management personnel (G1) is made on a fixed term employment contract basis which included the Claimant's position;

(viii) The Company states that in the beginning of 2012, Strategy & Transformation Division was created and the Claimant was identified as the most suitable person to head the division wherein the Company had offered the position of Head, Strategy and Transformation to the Claimant;

(x) The Company had made it very clear to the Claimant that the position of Head, Strategy and Transformation was a senior management personnel (G1) and therefore would be on a fixed term employment contract basis. The Claimant was fully aware that should she accept the offer as the Head, Strategy and Transformation, her permanent employment with the Company and the terms and conditions thereof would have to be terminated and converted to a fixed term employment contract;

(xi) By a Letter of Conversion to Fixed Term Service Contract from Permanent Employment dated 20 March 2012, the Company offered the Claimant an employment on fixed term employment contract basis (the 1st fixed term contract of employment) as the Head, Strategy and Transformation for a term of three (3) years commencing from 1 January 2012 until 31 December 2014;

(xii) The Claimant accepted the above offer and in light of the acceptance by the Claimant, the Claimant was paid her actual accrued and unused annual leave of nineteen (19) days as at 31 December 2011 of RM10,766.65 and retirement benefits as at 31 December 2011 of RM73,722.00 and that her permanent employment with the Company was formally terminated on 1 January 2012;

(xiii) The Claimant was fully aware that after the conversion of her permanent employment to fixed term employment, she was employed on a fixed term basis and that any new offer of another fixed term



employment contract is subject to the application to and approval of the Company;

(xiv) Upon the expiry of the 1st fixed term employment contract the Company paid the Claimant a gratuity payment equivalent to two (2) months' salary for every completed year of service;

(xv) Further upon the application to and approval from the Nomination and Remuneration Committee (NRC), the Company had offered the Claimant a new fixed term employment contract (2nd fixed term contract of employment) with a new position as Director, Strategy & Transformation for a fixed term of three (3) years commencing from 8 January 2015 until 7 January 2018 which the Claimant accepted and further agreed to abide at all times by the Rules and Regulations of Bursa Malaysia;

(xvi) Later due to a restructuring exercise undertaken by the Company in year 2017 the position of Chief Operating Officer (COO) was created. As the Claimant was identified as the most suitable candidate to hold the position, the Company had therefore offered her the position of COO by another new fixed term employment contract (3rd fixed term contract of employment) dated 13 February 2017 for a period of three (3) years commencing from 15 February 2017 to 14 February 2020 which the Claimant accepted and further agreed to abide at all times by the Rules and Regulations of Bursa Malaysia;

(xvii) Prior to the commencement of the 3rd fixed term employment contract, the 2nd fixed term employment contract was mutually terminated on 14 February 2017 and in consideration thereof the Company paid the Claimant a Gratuity Payment equivalent to two (2) months' salary for every completed year of service under the 2nd fixed term employment contract;

(xviii) Around the end of 2019 the Company had undertaken a restructuring exercise and in light of the same, the job functions, duties and responsibilities of the Chief Commercial Officer (CCO) and COO had been significantly reduced and diminished and the Company had decided to abolish both positions and not to offer a new fixed term employment contract to both the CCO and COO (the Claimant);

(xix) The CEO and the Director, GHR had on 13 November 2019 met up with the Claimant personally and informed her of the Company decision not to offer her a new fixed term employment contract and that her fixed term employment contract with the Company will automatically expire on 14 February 2020. The Company states that during the said meeting the Claimant was offered the position of Division Head of Corporate Strategy in the new restructured organization but the Claimant had turned it down;

(xx) By a letter dated 13 November 2019 the Company formally



informed the Claimant that the Company would not offer her a new employment contract upon the expiry of her 3rd fixed term employment contract, thereby giving three (3) months' notice of termination to the Claimant as required under the Clause "termination of services";

(xxi) The Company states that the 3rd fixed term employment contract had automatically expired on 14 February 2020;

(xxii) The Company denies that the Claimant was entitled to work until the retirement age of sixty (60) as provided for under the Minimum Retirement Age Act, 2012 ("MRAA") or that the Claimant was within the ambit of the MRAA;

(xxiii) The Company states that the Claimant's three (3) fixed term employment contracts (each for a different period, different position and different remuneration package befitting a genuine fixed term employment contract) are genuine fixed term employment contracts which the Claimant was fully aware of;

(xxiv) At all material times the Claimant had not objected and/or protested to being placed on a series of fixed term employment contracts;

(xxv) Upon the expiry or termination of each of the three (3) separate and distinct fixed term employment contracts the Claimant was adequately compensated by a gratuity payment which is consistent with the terms of genuine fixed term employment contracts;

(xxvi) By a letter dated 27 February 2020 the Company paid all the payments due to the Claimant in accordance with the terms and conditions of the 3rd fixed term employment contract;

(xxvii) The Company contends that there was no dismissal as Claimant's genuine fixed term employment contract had expired through effluxion of time;

(xxviii) Further the position of COO was abolished after the restructuring undertaken by the Company towards the end of 2019 hence her position was no longer required and no longer existed and there was no replacement made to fill her position;

(xxix) In the alternative, the Company contends that even if there was a dismissal from employment, the dismissal was carried out with just cause or excuse on ground that the Claimant's position had ceased to exist upon the restructuring of the organization;

(xxx) The Company denies that there was an attempt by the new management to remove certain long servicing employees as alleged by the Claimant;



(xxxix) The Company prays that the Claimant's claims be dismissed.

The Law

Role And Function Of The Industrial Court

[11] The role of the Industrial Court under s 20 of the Industrial Relations Act 1967 is succinctly explained in the case of *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 2 MLRA 23; [1995] 3 MLJ 537; [1995] 4 CLJ 449; [1996] 1 AMR 049. His lordship Justice Mohd Azmi bin Kamaruddin FCJ delivering the judgment of the Federal Court had the occasion to state the following:

"As pointed out by this Court recently in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 1 MLRA 412; [1995] 2 MLJ 753; [1995] 3 CLJ 344; [1995] 2 AMR 2145, the function of the Industrial Court in dismissal cases on a reference under s 20 is two-fold firstly, to determine whether the misconduct complained of by the employer has been established, and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal. Failure to determine these issues on the merits would be a jurisdictional error..."

[12] The above principle was further reiterated by the Court of Appeal in the case of *K A Sanduran Nehru Ratnam v. I-Berhad* [2006] 1 MELR 74; [2006] 1 MELR 114; [2006] 2 MLRA 467; [2006] 2 MLRA 778; [2007] 2 MLJ 430; [2007] 1 ILR 257; [2007] 1 CLJ 347 where his lordship Justice Mohd Ghazali Yusoff, JCA outlined the function of the Industrial Court:

"[21] The learned judge of the High Court held that the Industrial Court had adopted and applied a wrong standard of proof in holding that the respondent has failed to prove dishonest intention and further stating that the respondent has not been able to discharge their evidential burden in failing to prove every element of the charge. He went on to say that the function of the Industrial Court is best described by the Federal Court in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd and Another Appeal* [1995] 1 MLRA 412; [1995] 2 MLJ 753; [1995] 3 CLJ 344; [1995] 2 AMR 2145 where in delivering the judgment of the court Mohd Azmi FCJ said (at p 352):

On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under s 20 of the Act (unless otherwise lawfully provided by the terms of the reference), is to determine whether the misconduct or irregularities complained of by the management as the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal"



[13] It will not be complete this far if this Court fails to make reference to the decision of the Federal Court in the case of *Goon Kwee Phoy v. J & P Coats (M) Bhd* [1981] 1 MLRA 415; [1981] 2 MLJ 129 where His Lordship Raja Azlan Shah, CJ (Malaya) (as HRH then was) opined:

"Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that Court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the Court is the reason advanced by it and that Court or the High Court cannot go into another reason not relied on by the employer or find one for it."

Burden Of Proof

[14] Whenever a Company has caused the dismissal of the workman, it is then incumbent on part of the Company to discharge the burden of proof that the dismissal was with just cause or excuse. This Court will now refer to the case of *Ireka Construction Berhad v. Chantiravathan a/l Subramaniam James* [1995] 1 MELR 373; [1995] 2 ILR 11 in which case it was stated that:

"It is a basic principle of industrial jurisprudence that in a dismissal case the employer must produce convincing evidence that the workman committed the offence or offences the workman is alleged to have committed for which he has been dismissed. The burden of proof lies on the employer to prove that he has just cause and excuse for taking the decision to impose the disciplinary measure of dismissal upon the employee. The just cause must be, either a misconduct, negligence or poor performance based on the facts of the case.

Burden Of Proof In Cases Where The Dismissal From Employment Is Disputed By The Company.

[15] The case of *Weltex Knitwear Industries Sdn Bhd v. Law Kar Toy & Anor* [1998] 4 MLRH 774; [1998] 7 MLJ 359 is relevant on the role of this Court when the dismissal itself is disputed by the Company. In this case his lordship Dato' Haji Abdul Kadir Bin Sulaiman J opined:

Next is the burden of proof on the issue of forced resignation raised by the first Respondent. The law is clear that if the fact of dismissal is not in dispute, the burden is on the company to satisfy the court that such dismissal was done with just cause or excuse. This is because, by the 1967 Act, all dismissal is *prima facie* done without just cause or excuse. Therefore, if an employer asserts otherwise the burden is on him to discharge. **However, where the fact of dismissal is in dispute, it is for the workman to establish that he was dismissed by his employer.**



If he fails, there is no onus whatsoever on the employer to establish anything for in such a situation no dismissal has taken place and the question of it being with just cause or excuse would not at all arise:

[Emphasis Is This Court's]

[16] In view of the above case and based on a dispute between the parties here on whether the Claimant's contracts of employment were genuine fixed term contracts of employment or otherwise and where the Company denies dismissing the Claimant from her employment, it is now incumbent upon the Claimant to prove her case that she was indeed dismissed by the Company from her employment. The burden of proof thus had now shifted to the Claimant to prove that she has been dismissed by the Company from her employment before this Court can proceed to determine whether that dismissal if proven amounts to a dismissal without just cause or excuse.

Standard Of Proof

[17] In the case of *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 1 MELR 4; [2002] 1 MLRA 188; [2002] 3 MLJ 129; [2002] 3 CLJ 314; [2002] 3 AMR 2898 the Court of Appeal had laid down the principle that the standard of proof that is required to prove a case in the Industrial Court is one that is on the balance of probabilities wherein his lordship Justice Abdul Hamid Mohamad, JCA opined:

"Thus, we can see that the preponderant view is that the Industrial Court, when hearing a claim of unjust dismissal, even where the ground is one of dishonest act, including "theft", is not required to be satisfied beyond reasonable doubt that the employee has "committed the offence", as in a criminal prosecution. On the other hand, we see that the courts and learned authors have used such terms as "solid and sensible grounds", "sufficient to measure up to a preponderance of the evidence," "whether a case... has been made out", "on the balance of probabilities" and "evidence of probative value". In our view the passage quoted from *Administrative Law* by HWR Wade & CF Forsyth offers the clearest statement on the standard of proof required, that is the civil standard based on the balance of probabilities, which is flexible, so that the degree of probability required is proportionate to the nature of gravity of the issue. But, again, if we may add, these are not "passwords" that the failure to use them or if some other words are used, the decision is automatically rendered bad in law."

Issues To Be Decided By This Court

[18] Although the Claimant's counsel and Company's counsel agree on the issues to be decided by this Court, the wordings as contained in the submissions of the parties require some explanation in order to bring clarity on the issues before this Court for its determination.

Paragraph 12 of the Claimant's submissions has this to say:



"There are two parts to this case. The first, as stated above is whether the Company could rely on the expiry of the fixed terms contract to justify the cessation of the Claimant's services. The second part to this case is whether the Company's pleaded reason for the dismissal, ie, that the Claimant was redundant, is justified. We will address both these reasons individually".

Paragraph 3 of the Company's submissions states:

3.1 Yang Arif, the issues to be determined in this case are:

3.1.1 whether the employment contract between the Claimant and the Company was a genuine fixed term employment contract and, if so, whether the fixed term employment contract had come to its natural end by effluxion of time;

3.1.2 if it was not a genuine fixed term contract, whether there was a dismissal and, if so, was it done with just cause and excuse."

[19] This Court after giving due consideration to the submissions of the parties could safely point out that the first and primary issue for this Court to decide would be whether the contract of employment between the Claimant and the Company were genuine fixed term employment contracts and if so, whether the last fixed term employment contract had come to its natural end by effluxion of time. It only becomes incumbent on part of this Court to proceed further to determine whether there was a dismissal of the Claimant from her employment and whether that dismissal amounts to one without just cause or excuse in the event that this Court makes a finding and rules that the contracts of employment between the Claimant and the Company were not genuine fixed term contracts of employment.

The Law On Genuine Fixed Term Contract

[20] The primary duty of this Court when dealing with the issue of whether an employment contract is a genuine fixed term employment contract was clearly stated in the case of *M Vasagam Muthusamy v. Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor* [2002] 3 MLRH 886; [2003] 5 MLJ 262; [2003] 5 CLJ 448 where his lordship Justice Faiza Tamby Chik J had opined:

"The applicant contended that the Industrial Court had not applied the correct test in making its decision by first asking itself whether there was a dismissal and secondly that if there was a dismissal, whether the dismissal was with just cause or excuse. I am of the opinion that the Industrial Court had correctly addressed the issue in this case by determining first whether or not the contract in question was a genuine fixed term contract (see pp 3 and 4 of the said award). If the Industrial Court made a finding that it was not a genuine fixed term contract but was really a contract of employment, then only would the Industrial Court be required to ask whether there was a dismissal or



not and that if so whether it was with just cause or excuse. In the instant case, since a finding was reached that the contract concerned was indeed a genuine fixed term contract, the question of there being a dismissal or not does not arise. Once it was established that there is a genuine fixed term contract, the dissolution of the contract upon reaching the expiry date of the fixed term would clearly spell the end of the worker's tenure with the relevant company."

[21] His lordship Justice Abdul Kadir Sulaiman JCA delivering the judgment of the Court of Appeal in the case of *M Vasagam Muthusamy* [[2005] 1 MELR 37; [2005] 2 MLRA 373; [2006] 1 MLJ 206; [2005] 4 CLJ 93; [2005] 5 AMR 552 (*supra*)] further explained the consequence of the non renewal of a genuine fixed term contract of employment in the following manner:

"Having analysed the evidence before him, at p 450, the learned chairman of the second respondent came to this conclusion:

That being the case, that it was a genuine fixed term contract of employment, in normal circumstances such a contract automatically comes to an end of itself, in the absence of express renewal. In normal parlance, there is neither a resignation nor a termination and the letter of notice not to renew the Claimant's contract in exhibit CLA-30 was not a letter of termination. It was simply a letter of non-renewal.

The learned Chairman of the second respondent found that the appellant's contract of employment with the first respondent was a genuine fixed term contract and therefore the first respondent has a right to not renew the said contract upon expiry. This is a pure finding of facts based on the evidence before it....."

[22] Having stated the primary duty of this Court to determine whether the Claimant was employed under genuine fixed term contracts of employment that had come to an end through effluxion of time or otherwise, it is now incumbent upon this Court to make a finding of fact on whether the Claimant's contracts of employment with the Company were genuine fixed term contracts of employment. Only upon deciding on this primary issue will this Court go any further to determine on the other issues of whether there was a dismissal and a dismissal without just cause or excuse.

Evaluation Of Evidence And The Findings Of This Court

[23] The Claimant gave evidence that she commenced employment with the Company on the 1 June 2001 as a Manager, Business Development in the Business Development & International Affairs Department. The evidence before this Court is undisputed that the Claimant was confirmed in the appointed position on the 1 September 2001 due to her satisfactory completion of her probationary period. The Claimant further gave evidence that she has served in various other position in the Company. The Claimant was then



promoted as the Head of Investor Development on the 1 October 2010.

[24] It is undisputed that the Claimant was a permanent employee of the Company enjoying a security of tenure of her employment. The Claimant gave evidence that in March 2012, the Claimant was informed that she would be placed under a fixed term contract of employment for a period of 3 years. Since the Claimant had wanted to progress in her career with the Company, the Claimant was left with no choice but to consider accepting the fixed term contract of employment which she did accept thereafter.

[25] This Court will now proceed to analyse the contemporaneous documents presented in this Court and compare the same with the evidence of the Claimant and the Company's witness namely COW1 and COW2 to ascertain the circumstances that led to the acceptance of this fixed term contract of employment by the Claimant and whether this acceptance of the fixed term contract of employment was something that was forced upon the Claimant by the Company without giving the Claimant any choice.

[26] COW1 gave evidence that in beginning of 2012, the Company has created a new division within the Company known as the Strategy and Transformation Division. A complex working paper dated 29 February 2012 was produced by the Company in this Court to show the proposed appointment and remuneration package for the position of the Head of this Strategy and Transformation Division. The objective of this working paper was to seek the consideration of the Chief Executive Officer for the appointment of the Head of this Division and the criteria for the suitability for the position. The Claimant was proposed as the suitable candidate for this position. It was also established by the Company through its witness COW1 that the proposed candidate will assume a position in the management committee and it is the Company's established policy that all management committee members are employed on a fixed term contract of employment. COW1's evidence was further supported by the evidence of COW2 that the Company since 2004 had offered key management officers fixed term contract of employment and that it had been the practice since then.

[27] Now this Court will deal with the contract of employment documents between the Claimant and the Company in relation to the position offered by the Company to the Claimant as Head, Strategy and Transformation Division (1st fixed term contract of employment). On the 20 March 2012, the Company offered the Claimant the position as the Head, Strategy and Transformation Division for a fixed term contract period of 1 January 2012 to 31 December 2014 with a basic salary of RM25,500.00 per month. It was plainly stated in this letter that upon the acceptance of this offer, any or all prior oral or written negotiations or understandings between the Claimant and the Company concerning the Claimant's appointment or employment with the Company will be superseded. The terms of this contract of employment is plain and obvious in that it will at all times be construed by the parties signing this contract of employment to be a genuine fixed term contract of employment with a specific duration of the contract period.



[28] The Claimant accepted the offer contained in the 1st fixed term contract of employment on the 20 March 2012. The Claimant also admitted in this Court that she was not forced to sign the acceptance of this 1st fixed term contract of employment and all the terms and conditions contained therein. Together with the acceptance of the 1st fixed term contract of employment, the Claimant also agreed and accepted the terms of conversion to fixed term contract of employment from her previous permanent employment on the 20 March 2012 and unequivocally stated by the acceptance of this conversion, the Claimant will have no further claims against the Company in respect of the benefits accruing to the Claimant for her past service in the Company under her permanent employment and agreed to the new terms contained on her fixed term contract of employment. By signing all these documents which are plain and obvious reflecting the unmistakable intention of the parties and the Claimant in particular and further accepting the cash benefits accrued to the Claimant which consist of annual leave as at 31 December 2011 and retirement benefits as at 31 December 2011, surely the Claimant cannot now say that she was not aware of the kind of contract of employment she was entering into by accepting the position in the 1st fixed term contract. This Court having considered all the evidence before this Court is convinced that the 1st fixed term contract of employment was a genuine fixed term contract of employment. It is also the evidence before this Court that upon the expiry of the 1st fixed term contract of employment the Claimant was paid the gratuity payment as agreed upon by the Company with the Claimant a payment consistent with the Claimant's position in the 1st fixed term contract of employment.

[29] The Claimant was then offered the 2nd fixed term contract of employment as the Director, Strategy and Transformation for a period 3 years commencing from the 8 January 2015 until 7 January 2018 after a short break from the 1st fixed terms contract of employment. This is a new position and the position comes with a substantial increase in the Claimant's remuneration. The Claimant's starting salary was a substantial increase from that of the 1st fixed term contract of employment. The Claimant's starting salary was RM40,000.00 per month. The Claimant accepted this 2nd fixed term contract of employment and all the terms and conditions contained therein. There was also no evidence that the Claimant was forced to accept this 2nd fixed term contract of employment. The remuneration package too was very attractive befitting the new position as the Director, Strategy and Transformation. Having perused all the evidence before this Court, this Court now concludes that the 2nd fixed term contract of employment was also a genuine fixed term contract of employment with an agreed expiry date.

[30] It is undisputed and unchallenged evidence of COW2 before this Court that around the period of 2016, before the expiry of the Claimant's 2nd fixed term contract of employment, the Company has undergone a restructuring exercise and as a result of this restructuring, the Company created a new position of chief operating officer (COO). The position of the COO comes with heavy responsibilities which include efficiently and effectively maintaining the exchange operations, building and maintaining infrastructure required to support new market and product development activities and to be



the first line of defence against market failure.

[31] The candidate for the position of COO must be a person of sterling performance and capabilities who needs to possess admirable general mental ability with a personality to predict job performance with outstanding leadership quality, who understands performance risks, organisational fit, who is a motivator with values and in line with these requirements, the Claimant's Hogan Assessments that measures all these qualities required for the position of COO favoured the Claimant the most. Having considered all the above selection criteria, the Claimant was preferred as the most suited person for the position of the COO and the Claimant's decision to take the Hogan Assessment also indicated that the Claimant was keen to be the COO in line with her desire for career progression.

[32] As the Claimant was the most suited person for the position of the COO, the Claimant was offered the position of COO by the Company by its letter dated 13 February 2017. This offer for the position of COO was for a period of 3 years on a fixed term contract of employment commencing on the 15 February 2017 to 14 February 2020 (the 3rd fixed term contract of employment). Although the Claimant's fixed term contract of employment here was offered before the expiry of the 2nd fixed term contract of employment, it was made known to the Claimant in no uncertain terms that the 3rd contract of employment will supersede the Claimant's 2nd fixed term contract of employment.

[33] The evidence before this Court shows that the Claimant accepted the offer of the COO pursuant to the 3rd fixed term contract of employment with an increased basic salary of RM48,000.00 per month, with all the terms and conditions stated there in and by her conduct had also caused the termination of the 2nd fixed term contract of employment voluntarily. The Claimant after the termination of the 2nd fixed term contract of employment was paid all benefits accrued under the 2nd fixed term contract of employment including the prorated gratuity payment, all of which are not disputed by the Claimant.

[34] To this Court's mind, the Claimant being the COO and having shown remarkable aptitude, leadership qualities and various impeccable qualities befitting her position and in line with the Hogan Assessment measures cannot be said or seen as a person who is not aware of the consequence of her action when accepting and agreeing to all the terms and conditions of her three fixed term contracts of employment. Surely the Claimant is fully aware of the all her actions when engaging with the Company in relation to her career advancement in the Company and in entering into new and successive fixed term contracts of employment which immensely benefited her in terms of the remuneration packages.

[35] This Court now finds that the words used in the three fixed term contracts of employment between the Claimant and the Company were plain and unambiguous and clearly shows that the three fixed term contracts of employment were genuine fixed term contracts of employment and it was the intention of the parties namely the Claimant and the Company that these



contracts were indeed to be construed, recognised and accepted as genuine fixed terms contracts of employment and not otherwise and this Court must respect the intention of the parties at the time of entering into these three genuine fixed term contracts of employment. This Court finds support for the findings made herein by referring to the instructive passages in the judgment of his lordship Justice Gopal Sri Ram JCA in the Court of Appeal case of *Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd* [1996] 2 MLRA 1; [1997] 1 MLJ 587; [1997] 1 CLJ 23:

"That the role of the Court in upholding agreements adverted to by Lord Wright is not confined to documents drafted by laymen and includes those prepared by lawyers was recognised by Gibbs J (as he then was) in *Australian Broadcasting Commission v. Australasian Performing Right Association Ltd* [1973] 129 CLR 99. He said (at p 109):

It is trite law that the primary duty of a Court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are unambiguous the Court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The Court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust.

We find the opinion expressed by Gibb J in the foregoing passage to coincide with what we apprehend to be the true legal principles that govern the interpretation of contracts. For that reason we would gratefully adopt his honour's views as our own.

It boils down to this. Where a contract is couched in unambiguous language, the Court must give effect to it. But where the terms of a contract are ambiguous then the Court may imply a term in order to uphold the transaction. See, *Luggage Distributors (m) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 1 MLRA 225; [1995] 1 MLRA 496; [1995] 1 MLJ 719; [1995] 3 CLJ 520; [1995] 2 AMR 969.'

[36] The 3rd fixed term contract of employment was to expire on the 14 February 2020. The Company by its letter dated 13 November 2019 had duly notified the Claimant pursuant to the terms of the 3rd fixed term contract of employment that the Claimant's fixed term contract of employment will expire on the 14 February 2020 and the Company will not be offering the Claimant any new employment contract upon the expiry of the 3rd fixed term contract



of employment and this was further reiterated by the Company by its letter on the 28 November 2019. In view of these two letters giving the Claimant notice of the expiry of her 3rd fixed term contract of employment, the 3rd fixed term contract of employment came to an end through effluxion of time on the 14 February 2020 and clearly there was no dismissal of the Claimant from her employment with the Company as alleged by the Claimant.

[37] This Court's also finds that the Company had convincingly proven through its witnesses that the position of the COO ceased to exist after the expiration of the Claimant's 3rd fixed term contract of employment due to the Company embarking on a restructuring exercise of the Company around the period of 2019 where it was resolved that the position of COO would no longer exist effective 1 January 2020 and it would be impossible for the Claimant to seek to continue in a position that will no longer exist after the 14 February 2020.

[38] The learned counsel for the Claimant has articulated in his submissions that the 3 fixed term contracts of employment and particularly the 3rd fixed term contract of employment were not genuine fixed term contracts of employment and that the Claimant was at all times a permanent employee of the Company who had the legitimate expectation to continue in her employment with the Company until the age of 60 years in view of the minimum age of retirement as stipulated in the MRRA wherein the 3rd fixed term contract of employment has also made reference to the MRAA. In support the learned counsel for the Claimant referred this Court to the case of *Han Chiang High School Penang, Han Chiang Associated Chinese Schools Association v. National Union of Teachers In Independent Schools, W Msia* [1988] 2 MELR 637; [1988] 2 ILR 611 and the recent judgment of the Federal Court in the case of *Ahmad Zahri Mirza Abdul Hamid v. AIMS Cyberjaya Sdn Bhd* [2020] 3 MLRA 475; [2020] 2 MELR 421; [2020] 5 MLJ 58; [2020] 3 ILR 233; [2020] 6 CLJ 557; [2020] 5 AMR 1.

[39] With respect this Court is unable to agree with the learned counsel for the Claimant's arguments in support of the Claimant's case that the Claimant was a permanent employee of the Company. The cases cited by the learned counsel for the Claimant differs markedly in facts from the case before this Court. The fixed term contracts of employment of the Claimant here were not successive and automatic renewal without the application of the Claimant. There were intermittent breaks between the three fixed term contracts of employment of the Claimant with the Company. The nature of the Claimant's job in all the three fixed term contract of employment were distinctly different from one another where the Claimant was chosen for these jobs in the Company upon the creation of these new jobs. The Claimant too had to undergo a specific assessment as mentioned above in the preceding paragraphs to determine the suitability of the Claimant for the position of COO offered by way of the 3rd fixed term contract of employment. The facts of this case clearly proves that the Claimant was at all material times was offered positions in the Company under a genuine fixed term contract of employment.

[40] The Claimant through her evidence has also raised the issues of



victimisation and unfair labour practices carried out by the Company wherein the Claimant had testified that in 2019 there was a change of management and the new management made attempts to remove certain long serving employees of the Company which necessarily included the Claimant. However this Court is not convinced that there were such *mala fide* acts on part of the Company to remove the Claimant by the new management team as alleged. This Court is also not able to see any evidence of unfair labour practices carried out by the Company as the Claimant's departure from the Company was for reasons which were nothing other than the expiry of the Claimant's genuine 3rd fixed term contract of employment through effluxion of time on the 14 February 2020.

[41] Pursuant to s 30(5) of "The Act" and guided by the principles of equity, good conscience and substantial merits of the case without regard to technicalities and legal forms and after having considered the totality of the facts of the case, the evidence adduced and by reasons of the established principles of industrial relations and disputes as stated above, this Court finds that the Claimant had failed to prove on the balance of probabilities that the Claimant was dismissed from her employment with the Company and as such the issue of dismissal of the Claimant without just cause or excuse does not arise and need not be determined by this Court.

[42] The Claimant's claims against the Company hereby dismissed.

