

IN THE INDUSTRIAL COURT OF MALAYSIA
CASE NO: 20/4-1359/19

Between

NOORBERI BIN YUSOFF

And

MMC GAMUDA KVMRT (T) SDN. BHD

AWARD NO. : 1194 OF 2020

Before : Y.A. PUAN RAJESWARI KARUPIAH

Venue : Industrial Court of Malaysia,
Kuala Lumpur

Date of Reference : 23.07.2019

Date of Receipt of
Order of Reference : 29.07.2019

Date(s) of Mention : 27.08.2019, 14.10.2019

Date(s) of Hearing : 04.03.2020, 05.03.2020

Date of Submission
(Claimant) : 30.06.2020

Date of Submission
(Company) : 01.07.2020

Representation : The Claimant Representing Himself

Ms. Teoh Alvare & Ms. Teh Jovayne
Messrs. Zul Rafique & Partners
Counsel for the Company

REFERENCE

This is an order of reference by the Honourable Minister of Human Resources, Malaysia pursuant to **Section 20(3)** of the Industrial Relations Act 1967 (“the Act”) for an award in respect of a dispute arising out of the non-renewal of the contract of employment of **Noorberi Bin Yusoff** (“the Claimant”) by his employer **MMC Gamuda KVMRT (T) Sdn. Bhd** (“the Company”).

AWARD

[1] The parties to the dispute are **Noorberi Bin Yusoff** (“the Claimant”) and **MMC Gamuda KVMRT (T) Sdn. Bhd** (“the Company”). The dispute which has been referred to the Court by the Honourable Minister is over the termination of the Claimant’s contract of employment with effect from 14.05.2019.

BACKGROUND FACTS

[2] The Claimant was in civil service with the Government of Malaysia for 25 years before he took up his employment in the Company effective from 15.05.2017. The Claimant’s basic salary in the Company was RM 22,000.00 per month. He was entitled to a Hand Phone Allowance of RM 250.00 per month and Site Allowance of RM 350.00 per month.

[3] The Claimant’s employment contract dated 05.05.2017 (“the Contract”) stipulated that he was being engaged as **Head of Environmental** for the **KVMRT SSP Line Underground Works Project** (“the Project”).

[4] **Clause 3** of the Claimant's Contract (p.1 COB-1) speaks of the duration of the Claimant's employment and for the sake of clarity it is reproduced below: -

"Clause 3 Duration of Contract

3.1 *You shall be employed in the abovementioned position for a period of two (2) years commencing on 15 May 2017 and expiring on 14 May 2017 ("hereinafter referred to as "the Fixed Term").*

3.2 *The Company shall have the option to extend this Contract for a further period of two (2) years or to be determined at the sole discretion of the Company (hereinafter referred to as "the Handing-over Period") upon the same terms and conditions herein for the purpose of facilitating the hand-over of your duties and functions to your replacement prior to your departure from the Company.*

3.3 *In the event that the Project is completed prior to the expiry of the Fixed Term, the Fixed Term shall expire on the date of such completion of the Project and the Company shall have no obligation to continue your employment or no obligation to pay any compensation for the balance of the Fixed Term.*

3.4 *There is no agreement express or implied, between the Company and you, for continuing or long-term employment beyond the Fixed Term (or where applicable the Handing-over Period) of this Contract. The employment relationship between the Company and you is completely, and in all respects, at will. Therefore, the subject to Clause 12 below, the Company and you, each shall have the absolute right to terminate this Contract at any time."*

[5] In sub-clause 12.1 of the Contract it is stated that the Contract may be terminated by either party giving the other prior written notice of two (2) months or by paying salary in lieu of such notice. It is further mentioned that notice is not required and termination of the Contract will be without compensation upon the expiry of the Fixed Term or the Handing-over Period, whichever is applicable.

[6] By a letter dated 10.11.2017, the Company had confirmed the Claimant in his post with effect from 15.11.2017.

[7] By a letter dated 30.01.2018, the Claimant was granted a discretionary bonus for the year ending in 2017 totalling RM 27,730.00.

[8] Through a letter dated **24.01.2019**, the Company had notified the Claimant that the Project was restructured by the Ministry of Finance in 2018 that resulted in a major reduction in the contract value of the Project and that the balance of the work of the Project requires major de-scoping, in order to remain profitable. The Claimant was also notified by this letter that he was not going to receive any salary adjustment or discretionary performance bonus for the year ending 2018 based on his performance. The Claimant was therefore advised to work out a performance improvement plan with his team leader, so that he can show an improved performance in the year 2019.

[9] From 27.02.2019 to 09.04.2019, the Claimant went on hospitalisation leave due to a medical condition arising from prolapsed spinal disc.

[10] Through its letter dated 22.03.2019, the Company had notified the Claimant that the Contract will not be extended upon its expiry on 14.05.2019.

[11] Being dissatisfied with the decision of the Company to end the Contract, the Claimant filed a representation under Section 20(3) of the Act to seek reinstatement to his former post in the Company without any loss of salary and benefits.

THE CLAIMANT'S PLEADING AND EVIDENCE

[12] The Claimant was representing himself in the case. He had filed a Statement of Case but did not file a witness statement. His evidence in Court was based on his Statement of Case dated 17.09.2019 and appendices thereto. It is the Claimant's pleaded case that he was dismissed from service through the Company's letter dated 22.03.2019 and that his dismissal is without just cause or excuse. The Claimant averred that pursuant to **sub-clause 3.2** of the Contract, the Company **has the option to renew his employment for a further period upon the expiration of the initial term of 24 months.**

[13] The Claimant contended that his service was confirmed by the Company after 6 months, and he was paid annual bonus for his performance in 2017. The Company did not however grant him salary adjustment or bonus for the year ending 2018 despite him achieving **94%** in the performance appraisal that was conducted by his immediate superior. Furthermore, the Claimant was not allowed to carry out performance appraisal of the officers under him in the Safety and Health Department, in 2017 and 2018.

[14] According to the Claimant, he was dissatisfied about his treatment in the Company. He then voiced out to the Deputy Director of the Project, one Mr. Yeoh Hin Kok on **06.06.2017** about the working environment in the Safety and Health Department and other matters which he deemed to be unfair and discriminatory. This was according to the Claimant captured in the Claimant's note titled as "Talking Points" (*Appendix 8, Statement of Case*).

[15] The Claimant contended that he was not given any show cause letter for misconduct during his tenure in the Company. He was also not subjected to any form of disciplinary action by the Company.

[16] The Claimant further contends that he was not given early notice or consulted about his termination from service. Consequent to his termination of service by the Company, the Claimant stated that he endured financial as well as emotional burdens. The Claimant has therefore pleaded that this Court holds his termination from service by the Company to be without just cause and that he be awarded compensation for his loss of employment.

[17] During cross-examination, the Claimant confirmed that he had accepted the Contract and its terms in entirety and did not seek any clarification from the Company as to the terms of his employment. This was even though the Claimant claimed that he did not understand the meaning of sub-clause 12.1 of the Contract. Under cross-examination too, the Claimant admitted that his contract was stipulated to expire on 14.05.2019. He however disagreed that he was on a fixed-term employment or that he was not dismissed from his employment.

[18] Regarding the major restructuring of the Project by the Ministry of Finance in 2018, the Claimant had testified that although the Project was revised, there was no major descoping as asserted by the Company.

THE COMPANY'S PLEADING AND EVIDENCE

[19] It is the Company's pleaded case that the Claimant was not dismissed but that his employment ceased due to the expiry of the Fixed Term in the Contract. It is

also the Company's pleaded case that the Claimant had entered into the Contract with full knowledge that it is for a fixed duration of 24 months, which he accepted unconditionally when he had signed the Contract.

[20] According to the Company, the Claimant's functions were specifically required for the construction of the **MRT SSP Line Underground Works Project** and the Fixed Term was consistent with the Company's needs in relation to the Project.

[21] The Company had through its letter dated 22.03.2019 notified the Claimant that the Project was restructured by the Ministry of Finance, which in turn had resulted in a major reduction in the value of the contract that was awarded to the Company by the Government of Malaysia. The restructuring had impacted the delivery of the balance of the works since the Project required major de-scoping that changed its manpower requirements. As such, the Claimant's employment could not be extended beyond 14.05.2019.

[22] The Company contends that the Claimant was employed under a genuine fixed term agreement based on both parties' mutual consent and understanding. The Company thus had a right not to renew the agreement upon its expiry and the Company's action in this respect did not tantamount to dismissal since the Claimant's employment came to an end due to effluxion of time. As such, the Company had denied that the Claimant was dismissed or that the alleged dismissal was without just cause or excuse.

[23] The Company has further pleaded that it had rendered assistance to the Claimant in an application for Invalidation Pension to Social Security Organisation

(SOCCO) in the last months of his service. This was after the Claimant was diagnosed with prolapsed spinal disc.

[24] It is also the Company's case that payment of salary increment or annual bonus was at the Company's sole discretion. According to the Company too, whether the Claimant was given the opportunity to carry out performance appraisal of his staff is wholly irrelevant to the dispute before this Court. The Company has also averred that it was not aware of the discussion between the Claimant and the Company's senior management on 06.06.2017 and that the notes of this alleged discussion was given by the Claimant to the Company on his last working day, which was on 14.05.2019.

[25] It is the Company's case that it gave the Claimant advance notification of almost 2 months that the Contract will not be extended upon its expiry. Further, the post which the Claimant occupied was abolished in the Safety and Health Department. Given this fact and considering that Claimant was suffering from prolapsed spinal disc, the claim of reinstatement was untenable in this case. For these reasons the Company has prayed that the Claimant's claim before this Court be dismissed.

[26] The Company had tendered both oral and documentary evidence through two witnesses namely, the General Manager, Human Resource and Administration Department, **Ms. Ho Yim Cheng ("COW-1")** and the General Manager, Safety, Health and Environment Department, **Mr. Christopher John Fenton ("COW-2")**.

[27] According to COW-1, the Claimant was employed as the Head of Environmental under a fixed term contract to specifically perform the duties and functions for the KVMRT SSP Line Underground Works Project. This Project was however affected by the decision of the Ministry of Finance to initially terminate the Company as the contractor for the MRT2 underground project, as was reported in the newspaper clippings (*COB-2 p.1-5*). Subsequently, the Ministry of Finance had agreed to allow the Company to continue as the Project's contractor after a major cost-rationalisation and project restructuring (*COB-2 p.6-9*). The Company had agreed to accept this cost reduction for the underground works following negotiations with the Government. The Company had to carry out an internal exercise of reducing the scope of the Project or descoping. This required the Company to realign the Project to reduce its scope and review the resources in terms of headcount of the manpower required for the Project.

[28] COW-1 had further testified that apart from the Claimant, 33 other fixed term contract holders were not also given renewals of their employment agreement in the period from January 2019 up until May 2019. The Claimant's contract came to an end on 14.05.2019 of which, he had been given prior notice, approximately 2 months before the expiry of his contract.

[29] COW-2 in his testimony had clarified the changes that the Company underwent due to the Project restructuring by the Ministry of Finance and the impact of these changes on the Environmental team. According to COW-2, the Project no longer required the services of the Claimant as the focus was on the operational roles related to the Project as opposed to relationship building, which was the

primary function of the Claimant. The Company did not replace the Claimant's post as the Head of Environmental.

[30] During cross-examination when it was put to COW-2 that the major descoping only involved changes in the design and engineering plan and there was no impact on the Environmental Unit and the compliance requirements, he disagreed and stated that there was 40% reduction of manpower in the Safety and Health Department and 50% of the employees in the Environmental Unit were reduced by allowing their contracts to expire.

[31] COW-2 had further explained the major descoping that the Company underwent, which included the shelving of the plan to build the 2 MRT Stations at Bandar Malaysia. When probed by the Court on how these changes impacted the Company's Environmental team of which the Claimant was the head, COW-2 had testified as follows:-

Court : How does that impact the Environmental team?

*A : The Environmental unit had to essentially reduce, as we were originally under contract with specific headcount according to the specification of the government i.e the MRTC (Mass Rapid Transit Corporation). The new contract does not include the Claimant as the Claimant's role was not specified by the MRTC. It was added in later. **The Claimant was hired specifically to liaise with authorities, specifically departments of the government.** That was the primary role, besides that he also need to advise me where improvements for that respect are needed or to suggest to me the position to take when there are any foreseeable changes to the law.*

Court : In essence, the Claimant was not heading the operations at all?

A : No

- Court : But the Claimant held the title of Head of Environmental?*
- A : No. We gave him the title because of his seniority and the fact that he needed to liaise with the authorities. The impact of the Claimant's role was on high policy planning etc. The operations role is to implement the policy.*
- Court : How did the changes made by the Government in 2018 affect the Claimant's role?*
- A : The change was unprecedented, we moved from the traditional construction contract to a Turnkey form of contract which involves complete risk. Under the Turnkey contract, it was 100% our risk. We need to review and manage as to how to deliver within the revised budget. We looked at reducing the scope, moving it down to skeleton and this impacted 10,000 jobs. Relationship building has to come second. Roles can be shared now and we did more with less staff. There has been a specified headcount.*
- Court : Was the Claimant's job within the specified headcount?*
- A : No, its not.*

ISSUES

[32] As typically it is when the Court faces fixed term employment contracts, the Court will have to apply the following questions: -

- I. Whether the employment contract between the parties was a genuine fixed term employment contract;
- II. If the answer to the above question is in the affirmative, then the expiry of the fixed duration stipulated in the contract will bring the contract to its natural end; and

- III. If on the other hand, if the Court finds that the contract was not for a fixed term, then the Court will determine if there was a dismissal and if so whether the dismissal was with just cause or excuse.

THE LAW

[33] In determining whether the Claimant's employment contract in this case was a genuine fixed term employment, the Court refers to Industrial Court Award in the case of **Syarikat Joginder Singh v. Lai Swee Lin [1987] 2 ILR 155 (Award 262 of 1987)**, wherein the Learned Chairman held as follows :-

"Is the contract of employment between the claimant and the company a 'fixed term' contract? There is no doubt in the court's mind that it is, for the following reasons:

(a) the letter of appointment stipulated that the claimant was engaged for a specified period of two years - a term certain;

(b) the same letter laid down a salary scale for two years only;

(c) no probationary period was imposed;

(d) there was no provision made for either party to bring, the contract to an end by giving notice to the other party before the expiry of the two-year term certain; and

(e) there was nothing said about nor was provision made for renewal of the contract for a further term after the term certain.

Added to the above considerations, it is the considered opinion of the court that both parties genuinely intended the employment to be for a fixed term of two years. Also, this was obviously not an ordinary ongoing employment dressed up in the form of a 'fixed term' contract to circumvent the law - and it must therefore be recognised for what it is, and treated as what it was meant to be.

As a general observation in this connection, when determining whether a contract of employment is for a fixed term or not, the full facts of each case must be looked in to with a common sense approach. No two cases are completely alike. Any or all the considerations employed above in the determination of this case should not, therefore, be cited as absolute arbitral precedents for the determination of any future case”.

[emphasis ours]

[34] In *Han Chiang High School v National Union of Teachers in Independent Schools* [1988] 2 ILR 611 (Award No.306 of 1988), the Industrial Court had this to say about the usage of the fixed-term employment contract in the light of the provision of Section 20 of Industrial Relations Act 1967 and the statute guaranteed security of employment: -

“...it would be an obvious loophole if any employer could evade the statutory protection by making a series of contracts of finite duration with his workmen... and simply fail to re-engage particular workmen whom they wanted to get rid of, without having to face a claim for reinstatement. This would (to quote from Dr. Dutt's case) “make nonsense of the whole purpose and intent of and stultify the Act as well as offend well-known principles of interpretation of statutes.

The Court, however, is aware that on the other hand there are genuine “fixed term” contracts, where both parties recognise there is no understanding that the contract will be renewed on expiry. The Court realises that such genuine fixed-term contracts for temporary, one-off jobs are an important part of the range of employment relationships. Some such jobs are found in seasonal work, work to fill gaps caused by temporary absence of permanent staff, training, and the performance of specific tasks...”

[emphasis ours]

[35] Given the wisdom in the above pronouncements, it is of utmost importance that the Court examines the contract between the parties carefully and scrutinize all the relevant facts of the case before determining whether a contract of employment is a genuine fixed term contract.

[36] The Federal Court too recently had dwelled on the issue of fixed term employment in the case of **Ahmad Zahri Bin Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd [2020] 1 LNS 494** wherein it held: -

*“[54] The use of fixed term contract employee had become a trend in Malaysia, particularly in the employment of expatriates and also in the construction industry where employees are commonly engaged on a project basis. A fixed term contract is a contract of employment for a specific period of time i.e. with a defined end (See: *Wiltshire Country Council v. National Association of Teachers in Further and Higher Education and Guy [1980] 1 C.R 455*). As a general rule, such contract cannot be terminated before its expiry date except for gross misconduct or by mutual agreement. However, a contract can still be for a fixed-term if it contains within it a provision enabling either side to terminate it on giving notice before the term expires (See: *Dixon and another v. British Broadcasting Corporation [1979] 1 Q.B. 546*)...”*

[Emphasis ours]

EVALUATION AND FINDINGS

[37] In this case, the Claimant was employed for a specific duration for a particular type work in a construction Project, which is the underground portion of the Mass Rail Transit System Sungei Buloh-Serdang-Putrajaya Line (MRT 2). It is apparent to this Court that the Claimant’s employment was specifically for the KVMRT SSP Line

Underground Works Project and no other. It is also clear that the Company's intention was to hire the Claimant for a period of 2 years, ending on 14.05.2019, whilst at the same time reserving the discretion to renew the Contract, if need be, based on the requirements of the Company or the Project.

[38] The nature of the Company's business and the Claimant's work makes it clear that the parties were not intending to have a long-term relationship. The nature of the Project was clearly impermanent. The Claimant's employment was for a specific purpose or task that was explained by COW-2. As a former civil servant, the Claimant was hired to increase the liaison between the Company and the Government in matters pertaining to the environmental issues affecting the Project. The Claimant's primary role was to advise COW-2 on improvements to be done and on foreseeable changes in the related laws. The Claimant did not head the operations of the Environmental Unit in the Company even though he carried the title as the Head of Environmental. There was also no operational job scope for the Claimant as his role was more in relation to the government policies or decisions.

[39] The plain reading of the employment contract establishes that the Claimant's services were meant to be for 2 years (*sub-clause 3.1*). Even though, this term is not absolute, the Claimant's employment could only be extended at the sole discretion of the Company. Such renewal, if any would be for the purpose of facilitating hand-over of the Claimant's duties and functions to his replacement (*sub-clause 3.2*). These terms are indicative that the Claimant and the Company were entering into a fixed-term contract.

[40] There is clear evidence that during the Claimant's tenure, the Company was forced to reduce the cost and revamp the Project massively. The Company had to

also review and manage the delivery of the Project within the revised budget. As testified by COW-2, the Company's focus was its operational staff and the Claimant's function as Government liaison person became unnecessary to the Project's requirement.

[41] Despite the aforementioned supervening events, the Company had allowed the Claimant to complete the 24 months' term as agreed between the parties initially. The Claimant did not deny that he was notified of the expiry of the Contract on 22.03.2019, which was close to 2 months before his term ended. As such, it is the finding of this Court that the Claimant was fully aware and accepted that his employment was for a fixed duration. In these circumstances, the issue of alleged unfair dismissal by the Company does not arise.

[42] The Court will now turn to two separate matters which were raised by the Claimant in the course of the hearing of this case. The first was about his discussion with the Company's senior management which the Claimant claimed was held on 06.06.2017 (Appendix 8). According to COW-1, she was unaware of the said discussion and the Claimant had only shown Appendix 8 to her on his last date of employment. This evidence was not challenged by the Claimant. The Court noted that Appendix 8 is merely showing the talking points and it is neither the minutes of any meeting nor is it an official document in any way. Furthermore, the alleged discussion had taken place almost **2 years** before the expiry of the Claimant's Contract. The Court also noted that the Claimant did not follow up or raise problems, if any, he had in his Department until after his departure from the Company. The Company had been the recipient of Best Practices Award from the Department of

Environment as well as the British Safety Council. As such, the Court is unable to attach any importance to Appendix 8.

[43] The second issue that was raised by the Claimant was about his performance and the non-payment of salary adjustment as well as bonus for the year 2018. The Court finds that the Claimant was informed of his unsatisfactory performance through the Company's letter of 24.01.2019. It is in evidence that the Claimant was initially rated as Good-5 by COW-2. Subsequently, the Claimant's ratings had changed upon calibration during the Peer Manager Review stage. Thus, his final rating became "Weak-1". This was then communicated to the Claimant in the Company's letter of 24.01.2019. The Claimant appears to have accepted the decision of the Company and he did not question the Company up until when he filed his Statement of Case on 17.09.2019. The Court finds that there has been acceptance by the Claimant of the Company's decision to not pay him bonus and salary adjustment for the year 2018. The Court further accepts that the grant of salary increment and bonus in this matter is something that was within the Company's discretion. As such, the Court finds that this issue is not directly connected to the issues for determination by the Court in this case.

CONCLUSION

[44] Having considered all evidence adduced before it, this Court finds that the Claimant's contract of employment was in fact a genuine fixed term agreement. This contract had come to its natural end on 14.05.2019. In view of this finding, the Claimant's claim of being unlawfully dismissed upon the expiry of his contract of employment on 14.05.2019 is without basis.

[45] Based on totality of evidence adduced by both parties and also having regard to Section 30(5) of the IRA Act 1967, the Claimant's claim is found to be without merit and is hereby dismissed.

HANDED DOWN AND DATED THIS DAY OF 28th DAY OF AUGUST 2020

-signed-

(RAJESWARI KARUPIAH)
CHAIRMAN
INDUSTRIAL COURT MALAYSIA,
KUALA LUMPUR