EMPLOYMENT & INDUSTRIAL RELATIONS

FIXED-TERM CONTRACTS AND THE LIABILITY OF COMPANIES AS A GROUP

Businesses operating as groups may no longer rely on the principle of 'separate legal entity" as the Industrial Courts may lift the corporate veil to decide who is the true 'employer' in a claim.

In this article, we examine the facts, issues and ruling in the case of ***Ahmad Zahri bin Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd [2020] MLJU 595*** which led to the Federal Court's judgement in lifting the corporate veil and determining the genuineness of a fixed-term contract.

FACTS The Claimant was offered a total of 6 contracts of employment whereby the first 3 contracts were with AIMS Data Centre 2 Sdn Bhd ("ADC") and the subsequent 3 contracts were with AIMS Cyberjaya Sdn Bhd ("AIMS") as ADC was slowly being phased out by AIMS. In 2013, ADC was consolidated into AIMS. Sometime in September 2013 during the duration of the 4th contract, AIMS had offered the Claimant an appointment under the 5th contract which had excluded the performance bonus scheme. The Claimant was unhappy with the new terms of the contract and AIMS subsequently offered the 6th contract for a term of 3 months. On 1st October 2013, the Claimant informed AIMS that he was not accepting the 5th contract. AIMS issued a letter dated 18.10.2013 to the Claimant which provided for an early release of the contract where he was paid his full salary in October and given salary in lieu of notice for the months of November and December. The Claimant accepted the payment and thereafter made representation under Section 20 of the Industrial Relations Act 1967 for the matter to be referred to the Industrial Court.

The Industrial Court held that the Claimant was a permanent employee of AIMS and the purported "fixed-term contract" were not genuine fixed-term contracts and the Claimant's dismissal was without just cause or excuse. AIMS then filed a judicial review application to quash the Industrial Court's award where the High Court dismissed AIMS's application for judicial review. AIMS then appealed to the Court of Appeal where the Court of Appeal allowed AIMS's appeal and set aside the decision of the High Court and the Award of the Industrial Court. The Claimant then filed a notice of motion for leave to appeal to the Federal Court where the Federal Court granted the appeal on 2 questions of law.

THE ISSUES The issues in this case are (i) whether a need for work permit is a material consideration in determining whether an employment contract is a genuine fixed-term contract; and (ii) does a contract of employment which is renewed successively without application by the employee and without intermittent breaks in between, is in reality a permanent employment.

THE DECISION The Federal Court allowed the appeal and set aside the decision of the Court of Appeal, where it held that the Claimant was a permanent employee and that the work permit was not a material consideration in determining whether he was a permanent employee.

COMMENTS

Issue (i): Whether a need for work permit is a material consideration in determining whether an employment contract is a genuine fixed-term contract

The Court of Appeal had decided that an expatriate who requires a work permit to work in Malaysia can never be a permanent employee in Malaysia. The Federal Court however referred to the case of ***Assunta Hospital v Dr. A. Dutt. [1981] 1 MLJ 115*** and ***Toko Inomoto & Ors v Malaysian Philharmonic Orchestra [2017] 1 LNS 201*** and held that:

> *"…The citizenship of the appellant/claimant has no bearing in deciding whether the appellant/claimant was in permanent employment or in employment under a fixed-term contract. We also note that the Industrial Relations Act 1967 does not make any distinction between the citizens of Malaysia and non-citizens…"*

The Federal Court also pointed out that Malaysia is a member of the International Labour Organisation ("ILO") where the convention expressly provides that member states should undertake to promote and guarantee equal opportunities and treatment for migrant workers as well as local employees. The Federal Court referred to the case of ***Nacap Asia Pacific Sdn Bhd v Jeffrey Ronald Pearce & Anor [2011] 5 CLJ 791*** which had referred to **Article 9 of the ILO Migrant Workers (Supplementary Provisions) Convention 143 of 1975** and held that:

"…we take the view that all workers should be treated with fairness, dignity, and equality without distinction whether they are local or foreigners. This is also consonant with Article 8(1) of the Federal Constitution which essentially provides that all persons are equal before the law and entitled to the equal protection of the law…"

Issue (ii): Does a contract of employment which is renewed successively without application by the employee and without intermittent breaks in between, is in reality a permanent employment.

The Court of Appeal had decided that ADC and AIMS were 2 separate legal entities and as such the 6 contracts could not be treated as continuous employment. And as there were no evidence of any fraud or unconscionable conduct, there were no grounds to lift the corporate veils of ADC and AIMS.

The Federal Court firstly examined the case of ***Hotel Jaya Puri Bhd v National Union of Hotel Bar and Restaurant Workers [1980] 1 MLJ 109***, where an application for certiorari against the decision of the Industrial Court ordering Hotel Jaya Puri Berhad ("the Hotel") to pay compensation to workmen employed in Jaya Puri Chinese Garden Restaurant Sdn Bhd ("the Restaurant") which was a fully-owned subsidiary of the Hotel. On appeal, the Federal Court upheld the Industrial Court award which essentially held that the Restaurant and the Hotel were one single unit and therefore the Hotel was the employer of the workmen employed in the restaurant.

The Court of Appeal had relied on the case of ***Law Kam Loy And Anor v Boltex Sdn Bhd And Others [2005] MLJU 225*** in determining that the corporate veil should not be lifted in the present case. Law Kam Loy was however distinguished, whereby it was a case involving the transfer of shares. The Federal Court quoted the decision of that case which held that:

"…But that is not to say that the court in the Hotel Jayapuri case was wrong in lifting the veil of incorporation of the facts of that case. The Hotel Jayapuri case was concerned with the Industrial Relations Act 1967 which requires the Industrial Court to disregard the technicalities and to have regard to equity, good conscience and the substantial merits of a case. Accordingly, in industrial law, where the interests of justice so demand, it may, in particular cases be appropriate for the Industrial Court to pierce or to disregard the doctrine of corporate personality. That is what happened in the Hotel Jayapuri case and no criticism of that case on its facts may be justified…"

It was established that in Law Kam Loy, the Court of Appeal had expressly stated that the lifting of the corporate veil in Hotel Jaya Puri is accepted as it is within the ambit of the Industrial Relations Act which disregards technicalities and where the interest of justice demands it, the Industrial Court may lift the corporate veil.

The Federal Court also examined authorities from Commonwealth jurisdictions where the courts have pierced the corporate veil. From the examination, the Federal Court held that:

"…it would appear that although the principle of separate legal entity is at the core of the company law, there are a number of situations in which a corporate group and its members can be treated the same. In other words, while the dicta in Hotel Jaya Puri case is correct in substance particularly in the context of industrial jurisprudence, the approach of 'common employer' taken by the Canadian, South African and English courts better explains the rationale in industrial law terms in order to achieve equality and social justice…"

The Federal Court also laid down a non-exhaustive test to pierce the corporate veil and determine a group of companies to be common employers, whereby it was held:

> *"…*
> *(i) Where there is "functional integrality" between entities;*
> *(ii) Unity of establishment between the entities.*
> *(iii) The existence of a fiduciary relationship between the members of the entities and/or the extent of control;*
> *(iv) There was essential unity of group enterprise; and*
> *(v) Whenever it is just and equitable to do so and/or when the justice of the case so demands.*
> *…"*

Using the test above, the Federal Court held that ADC and AIMS were part and parcel of the group and there was "an essential unity of group enterprise".

The Federal Court then examined whether the Claimant was on a fixed-term contract or a permanent employee. The court recognised the need to balance the employer's prerogative in making commercial decisions against the principle of security of tenure in employment and laid down 3 consideration points to determine whether an employer had a genuine need for the service of an employee for a fixed-term which are:

(i) The intention of parties;
(ii) Employer's subsequent conduct during the course of employment; and
(iii) Nature of employer's business and the nature of work which an employee is engaged to perform.

Based on the considerations above, the Federal Court held that:

> *"…we are satisfied that the appellant's/claimant's contract of employment beginning with ADC before being terminated under the respondent, was not one-off, seasonal or temporary employment. It was on going, continuous employment without a break from 2009 to 2013. In our considered opinion, the Court of Appeal erred in not recognising the industrial law principle of lifting/piercing the corporate veil in the circumstances and the ongoing nature of the appellant's/claimant's contract of employment with both the companies…"*

CONCLUSION Companies that have previously relied on the principle of separate legal entity when operating as a group can no longer rely on the principle to deflect liability as they may be deemed as a 'common employer' and as such will be liable to claims brought by disgruntled employees.

Furthermore, this case manages to clear up several questions regarding fixed-term contracts, as the nature of fixed-term contracts in the context of industrial jurisprudence have been highly debated for a long time and is likely to continue even after this judgement.

Given the need for businesses to engage employees on fixed-term contracts, perhaps it is better for an amendment to the current legislation to regulate fixed-term contracts to ensure that employers are aware of their rights and obligations (notwithstanding what is written in the contract) rather than having to go through the litigation process only to discover the fixed-term contract is not genuine.

For more information, kindly contact the undersigned.

Authors

Wong Keat Ching
keat_ching@zulrafique.com.my

Syazwani Suhaimy
syazwani.suhaimy@zulrafique.com.my

Azfar Asadullah Abdul Sathar
azfar.asadullah@zulrafique.com.my

Zul Rafique & Partners
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