

Aims Cyberjaya Sdn Bhd v Ahmad Zahri bin Mirza Abdul Hamid [2018] MLJU 1975

Malayan Law Journal Unreported

COURT OF APPEAL (PUTRAJAYA)

HAMID SULTAN , BADARIAH SAHAMID AND MARY LIM JJCA

CIVIL APPEAL NO W-02(A)-287-02 OF 2017

29 November 2018

(Shearn Delamore & Co) for the appellant.

(Bodipalar Ponnudurai De Silva) for the respondent.

Badariah Sahamid JCA:

FOUNDATIONS OF JUDGMENT Introduction

[1] This is an appeal against the decision of the learned High Court Judge, delivered on 24.08.2017, which dismissed the Appellant's application for an order of certiorari to quash the entire decision of the Industrial Court in Award No. 283 of 2016 which found the Respondent's dismissal from the Applicant's employment to be without just cause or excuse. The Industrial Court had awarded back wages of twenty-four (24) months and compensation of one and a half month's salary for each year of the Respondent's completed service in lieu of reinstatement.

Issue

[2] The primary issue before the Industrial Court, the High Court as well as before us was whether on the facts and circumstances of this case, the Respondent was employed on a fixed term contract or was a permanent employee of the Appellant at the material time? In this respect both the Industrial Court and the High Court made concurrent findings that the Respondent was a permanent employee of the Appellant and in consequence thereof, his termination was invalid.

Background Facts

[3] The following salient facts are undisputed. For ease of reference, parties will be referred to as they were in proceedings before the High Court.

[4] The Respondent had entered into a total of six contracts of employment that was considered by both the Industrial Court and the High Court. It is to be noted that chronologically the first three contracts were with Aims Data Centre 2 Sdn Bhd, while the fourth to the 6th contracts were with the Applicant, AIMS Cyberjaya Sdn Bhd.

[5] The six employment contracts are as follows:

- (i) 1st contract: From 1.10.2009 (on 6 months' probation) as a Consultant with Aims Data Centre 2 Sdn Bhd. (p.129-136 RR);
- (ii) 2nd contract: From 1.10.2009 to 30.9.2010, as a Consultant with Aims Data Centre 2 Sdn Bhd. (p. 137-144 RR);
- (iii) 3rd contract: From 1.10.2009 (on 6 months' probation) as Vice President, Product Development with Aims Data Centre 2 Sdn Bhd (p.145-151 RR);

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- (iv) 4th contract: From 1.10.2012 to 30.9.2013, (12 months) as a Consultant with AIMS Cyberjaya Sdn Bhd. (p.123 RR);
- (v) 5th contract: From 1.10.2013 to 30.9.2014, (12 months) as Vice President, Products & Solutions with AIMS Cyberjaya Sdn Bhd. (p. 110-116 RR); and
- (vi) 6th contract: From 1.10.2013 to 31.12.2013, (3 months) as Vice President, Products & Solutions with AIMS Cyberjaya Sdn Bhd. (p.103-109 of RR).

[6] Sometime in September 2013 during the duration of the 4th contract, the Respondent received a letter from the Applicant dated 10.9.2013 which offered him appointment under the 5th contract. The Respondent had informed the Applicant that he was unhappy with the terms of the 5th contract as the said contract had excluded the performance bonus scheme.

[7] After a discussion on 13 September between the Respondent and the Applicant, the Applicant offered the Respondent the 6th contract for a term of three months. According to the Applicant, the three-month contract period from 1.10.2013 to 31.12.2013 was to provide the Respondent time to reconsider the terms of the 5th contract.

[8] On 1.10.2013, the Respondent informed the Applicant that he was not accepting the 5th contract. Pursuant thereto, the Applicant issued a letter dated 18.10.2013 which provided the Respondent with an early release of his employment with the Applicant with effect from 19.10.2013. The Respondent was paid his full salary for the month of October 2013 as well as two months salary for the balance of the remaining two months viz. November and December in lieu of notice under the 6th contract. The Respondent accepted the aforementioned payments.

[9] The Respondent thereafter made representations under section 20 of the Industrial Relations Act, 1967 for the matter to be referred to the Industrial Court. The Industrial Court delivered its decision in favour of the Respondent in Award No. 382 of 2016 dated 1.4.2016. The Applicant applied for an order of certiorari to quash the entire decision of the Industrial Court. The High Court dismissed the Applicant's application. Thus, the appeal before us.

Findings and Decision of the High Court

[10] The findings and decision of the High Court may be summarised as follows. The High Court agreed with the finding of the Industrial Court that the Respondent's contracts of employment with the Applicant, AIMS Cyberjaya Sdn Bhd was a continuation of the Respondent's contract of employment with AIMS Data Centre 2 Sdn Bhd, with no change in the terms and conditions of the previous contract of employment with AIMS Data Centre 2 Sdn Bhd and the subsequent contracts of employment with the Applicant, AIMS Cyberjaya Sdn Bhd. The learned High Court Judge had stated thus at paras 11 to 13 in her ladyship's 'Grounds of Judgment':

"11. Accordingly, the Industrial Court was not found to have erred in its conclusion that the Respondent was a permanent employee of the Applicant and not its consultant and, that the Respondent's contract of employment with the Applicant from 1 October 2012 was, in effect a continuation of the Respondent's employment with ADC2? (Aims Data Centre 2 Sdn Bhd).

12. The Respondent's original contract of employment dated 27 May 2009 with ADC2 did not provide for a fixed term contract but, was found to have been continuously renewed without any intermittent breaks since 2010.

13. Based on the Respondent's first contract of employment with the Applicant dated 18 October 2012, no changes was

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found in the terms and conditions of the Respondent's "renewed? employment from that of the Respondent's contract of employment dated 26 August 2009. Thus, the Respondent's contract of employment was rightly found by the Industrial Court to have been automatically executed by the Applicant and, not renewed pursuant to the Respondent's application. The Respondent's contract with the Applicant was clearly, a continuous and, successive contract with no intermittent breaks in between the preceding and the "successor contract?.

Our Judgment

[11]After careful consideration of the written and oral submissions of learned counsels as well as the Appeal Records and relevant authorities, we are of the considered opinion that there are merits in this appeal. We therefore allow the Applicant's appeal against the decision of the learned High Court Judge to dismiss the Applicant's application for a certiorari to quash the decision of the Industrial Court. Our reasons are stated below.

[12]Our reasons will focus on three main issues that were raised by the Appellant/Applicant in their Memorandum of Appeal:

- (1) the issue of separate legal entity;
- (2) the issue of whether the contracts of employment are fixed term contracts; and
- (3) the issue of whether the Respondent who is a foreign national, can be a permanent employee.

Separate legal entity

[13]We agree with the submission of the Applicant that the Industrial Court and the High Court had erred in law and fact in making the finding that the Respondent's contract of employment with the Applicant from 1 October 2012 was a continuation of the Respondent's employment with AIMS Data Centre 2 Sdn Bhd in 2009. It is trite law that the Applicant and AIMS Data Centre Sdn Bhd were two separate legal entities. Thus, the Respondent's six contracts of employment from 1.10.2009 to 31.12.2013 with two separate legal entities cannot be treated as one continuous contract with the Applicant.

[14]In disregarding the separate legal entity of AIMS Data Centre 2 Sdn Bhd and the Applicant, AIMS Cyberjaya Sdn Bhd, the learned High Court Judge had taken into account the irrelevant factor that the Respondent's contracts of employment had been 'renewed' successively every year since 2010 without a break although the renewals were made by two separate legal entities.

[15]The learned High Court Judge also took into account the irrelevant factor that the first contract with the Applicant dated 18.10.2012 was headed "*Renewal of Contract?* and stated that the Respondent's contract would be "*renewed for 12 months?* (1.10.2012 to 30.9.2013) and that, "*with this renewal, there shall be no change in your designation, grade and other terms and conditions of your contract dated 26 August 2009?*. The foregoing utilisation of the term "*renewal?* and the non-change of terms and conditions of a subsequent contract to the previous contract does not result in a continuous employment as the material fact remains that both contracts were entered with two separate legal entities.

[16]Established authorities have held that there must be special circumstances, where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity that warrants the lifting of the corporate veil by either the Industrial Court or the High Court. (Refer to *Law Kam Loy & Anor. v Boltex Sdn Bhd*

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& Ors [2005] CLJ 355).

[17] There is no evidence that the facts of the instant case demonstrate fraud or unconscionable conduct of the Applicant and neither did the learned High Court Judge address this matter in her 'Grounds of Judgment'. Thus, there are no grounds for the Industrial Court or the learned High Court Judge to lift the corporate veils of AIMS Data Centre 2 Sdn Bhd and the Applicant, AIMS Cyberjaya Sdn Bhd to treat the two separate entities as one i.e. the Applicant, AIMS Cyberjaya Sdn Bhd.

Fixed Term Contracts

[18] In the light of the above, the pertinent contracts of employment can only be between the Applicant and the Respondent i.e. the 4th to the 6th contracts as aforesaid.

- (i) The 4th contract: From 1.10.2012 to 30.9.2013, (12 months) as a Consultant with AIMS Cyberjaya Sdn Bhd. (p.123 RR);
- (ii) The 5th contract: From 1.10.2013 to 30.9.2014, (12 months) as Vice President, Products & Solutions with AIMS Cyberjaya Sdn Bhd. (p. 110-116 RR);
- (iii) The 6th contract: From 1.10.2013 to 31.12.2013, (3 months) as Vice President, Products & Solutions with AIMS Cyberjaya Sdn Bhd. (p.103-109 of RR).

For the purposes of this appeal, the earlier contracts of employment between the Respondent and AIMS Data Centre 2 Sdn Bhd (1st to 3rd contracts) must be disregarded.

[19] The next question to ask is this: Are the three contracts abovementioned fixed term contracts or are the terms in the nature of a permanent employment with the Applicant?

[20] A perusal of each of the three contracts abovementioned stipulates the offer of appointment was for a specified period of time. The 4th contract stipulates the period of 12 months from 1.10.2012 to 30.9.2013. The 5th contract also stipulates a period of 12 months also from 1.10.2013 to 30.9.2014. The 6th contract stipulates a period of three months from 1.10.2013 to 31.12.2013. Thus the inescapable conclusion is that the employment contracts of the Respondent with the Applicant were fixed term contracts. A fixed term contract expires by effluxion of time. (Refer to *M. Vasagam a/l Muthusamy v Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor* [2003] 5 CLJ 448; *Mong Pak Nyong v IJM Plantations Bhd* [2010] 2 LNS 0657).

[21] Prior to the expiry of the 1st contract with the Applicant (also referred to as the 4th contract), by letter dated 10.9.2013, the Applicant had offered the Respondent another contract also for a period of 12 months from 1.10.2013 to 30.9.2014 (also referred to as the 5th contract). The Respondent was not agreeable to the 5th contract as it did not provide for a sales performance bonus. At this point therefore, the only subsisting contract between the Respondent and the Applicant was the 4th contract which had stipulated a fixed term from 1.10.2012 to 30.9.2013.

[22] Subsequently, prior to the expiry of the 4th contract, on the 18.9.2013, the Applicant had offered the Respondent a three-month contract for the period 1.10.2013 to 31.12.2013 (also referred to as the 6th contract). The Respondent accepted the 3-month contract on 20.9.2013. However, on 1.10.2013, the Respondent informed the Applicant he was not accepting the 5th contract. At this point the subsisting contract (the 4th contract) had already expired by

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effluxion of time. What remained between the Applicant and the Respondent was only the three-month contract from 1.10.2013 to 31.12.2013. It was during the duration of this three-month contract, on 18.10.2013 that the Respondent had issued a letter of "early release", giving the Applicant two months' notice of expiry of the three months' contract with effect from 1.11.2013 to 31.12.2013.

[23]The question arises whether the Applicant was entitled to unilaterally terminate the three-month contract before its expiry date? The answer to this question must be found in the terms and conditions of the contract therein.

[24]Appendix A provides the tenure and terms of the contract. Among the relevant terms are as follows:

*1. a) Your contract with AIMS Cyberjaya Sdn Bhd shall commence from **1 October 2013** for a period of 3 months ending **31 December 2013** subject to compliance of any legal requirements necessary for you to be able to provide services in Malaysia. This contract shall automatically terminate upon the expiry of the Contract term unless extended or renewed accordance with the provisions of clause 8.*

In respect of termination, clause 1. (d) provides that either the Respondent or the Applicant may terminate the contract in accordance with clause 8 which provides as follows:

8. Termination

Your appointment may be terminated by giving two (2) months' notice. Such notice shall be given by the party that intends to effect termination. Where no notice is given, two (2) months salary in lieu of notice shall be payable by the party effecting such termination.

[25]It is clear from the above that the Respondent was appointed under a fixed term contract of three months and that the early termination of the Respondent was effected in accordance with clause 8 thereof. In addition, thereto, clause 1 (e) had expressly confined the terms of the contract to Appendix A as follows:

1. (e) This contract shall supersede all other contracts previously issued under AIMS Data Centre 2 Sdn Bhd and AIMS Data Centre Pte. Ltd.

[26]It is unfortunate that the learned High Court Judge had concluded that the Respondent's contract of employment with the Applicant was a permanent contract without examining the terms and conditions of the relevant contract which had expressly stipulated a fixed term contract with a termination clause that can be effected by either the Applicant or the Respondent. The learned High Court Judge had thus committed errors that warrant appellate intervention.

Can A Foreign National be a permanent employee?

[27]In our view, the status of the Respondent as an employee on a fixed term contract or a permanent employee of

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the Applicant can and has been determined by the facts and circumstances of the case as well as the specific terms and conditions of the material contracts. However, for the sake of completeness, we will deal with the issue of whether a foreign national can be a permanent employee of a Malaysian company?

[28]It is not disputed that the Respondent was and is a citizen of Singapore. The question that arises is whether the Respondent who was a foreign national can be a permanent employee of the Applicant? We note that neither the Industrial Court nor the learned High Court Judge had addressed this issue although it was a relevant factor in determining whether the Respondent was a permanent employee.

[29]In respect of an expatriate employee, authorities have held that there cannot be a permanent employment. In the case of *Nasha'at Muhy Mahmoud v Malaysian Airlines System Bhd* [2013] 2 LNS 1745 which was also referred to in the case of *Toko Inomoto & Ors v Malaysian Philharmonic Orchestra* [2015] 2 LNS 1034 (recently affirmed by the High Court in Suit No.25-300-11/2015), the case involved a pilot who was a foreign national who was engaged under a series of successive contracts which had been renewed several times. He claimed that he was a permanent employee. The learned Chairman Nayagam held that:

"This is the normal practice where companies employ foreigners to work for them as a stop gap measure as it requires a valid work pass, which is only for a limited period and can be cancelled if there has been a breach of any condition attached to it. This is reason the claimant's contracts were subject to him obtaining a work pass. In the circumstances, it is not reasonable for the claimant as a foreign workman to say that he expected to work in Malaysia on a permanent basis, just because his fixed term contract was renewed.?"

[30]In the instant case, we note that in Appendix A of the Tenure and Terms of the three month contract between the Applicant and the Respondent, clause 1. (a) stipulates that the contract was "*subject to compliance of any legal requirements necessary for you to be able to provide services in Malaysia*". This would include the legal requirement to obtain a work permit from the relevant departments. Thus, it cannot be said that an expatriate who requires a work permit to work in Malaysia can be a permanent employee.

[31]In conclusion, for the foregoing reasons we are of the considered view that there are appealable errors in the concurrent findings of the Industrial Court and the High Court which warrant appellate intervention. The decision of the High Court dismissing the Applicant's application for an order of *certiorari* is set aside. Accordingly, we allow this appeal with costs.