INDUSTRIAL COURT OF MALAYSIA

CASE NO: 26(10)/4-1579/07

BETWEEN

ENCIK MONG PAK NYONG

AND

IJM PLANTATIONS BERHAD

AWARD NO: 657 OF 2010

Before	:	**Y.A. PUAN CHOONG SIEW KHIM** **- CHAIRMAN (Sitting Alone)**
Venue	:	Industrial Court Malaysia, Kuala Lumpur
Date Reference	:	20.06.2007
Dates of Mention	:	27.08.2007, 01.10.2007, 05.11.2007, 22.11.2007, 24.01.2008, 21.02.2008, 15.09.2009 & 8.04.2010
Date of Hearing	:	11.09.2008 & 06.05.2010
Representation	:	Mr. S. Ravichandaran of Messrs. S. Ravichandaran & Anuar for the Claimant Mr. Lee Swee Seng of Messrs. Lee Swee Seng & Co for the Respondent/Company

Reference:

The reference of the Honourable Minister of Human Resources, Malaysia is regarding the dismissal of Mr Mong Pak Nyong ("the claimant") by IJM Plantations Berhad ("the company") on 31 December 2006.

AWARD

(NO. 657 OF 2010)

This is a reference under section 20(3) of the Industrial Relations Act 1967 ("the Act"), arising out of the dispute between Mr Mong Pak Yong ("the claimant") and IJM Plantation Berhad ("the company").

Background

This case was heard before Chairman Court 10 and it was completed on 11 September 2008. However, the said Chairman was elevated to the post of Judicial Commissioner of the High Court of Malaya. The counsel for the claimant filed his written submission on 2 December 2008 while company's counsel did filed his written submission on 17 December 2008. It is to be noted that on 15 September 2009 both parties had given their consent and did not object for the this award to be handed down by another Chairman of the Industrial Court. As such, this case was transferred to this court on 16 March 2010.The court then fixed 8 April

2010 for mention. During the mention date, the counsel for the claimant requested the court to hear oral submissions from the parties so that all pertinent questions which might arise from the evidence in court during the hearing and supported by the respective submissions may be clarified by both parties. As such, the court adjourned to 5 May 2010 to hear the additional oral submissions. After perusing through the notes of evidence and the submissions by the parties, the court does not find any problem in handing down the award, as the issue is straightforward, plain and clear. Although the court is unable to observe the demeanor of witnesses in the case, the court is however confident of understanding the evidence of the witnesses on the issue here. There is also no technical, scientific or accounting involved in this case. As such, it is not difficult at all for me to understand and follow the case. The court shall now make the award.

Brief Facts Of The Case

The claimant started his employment with the company as a Plantation Manager with a salary of RM5,000.00. His appointment was from 16 February 1998. At the beginning of the contract the claimant was employed under a fixed term contract for a term of 4 years from 16 February 1998 to 15 February 2002. The contract then was extended to 15 February 2003 and later renewed on yearly basis until 15 February 2006. However, the company *vide* a letter dated 31 October 2006 informed the claimant that his services will not be needed beyond 31 December 2006. Therefore, the claimant contends that the dismissal was

without just cause and excuse and that the company's decision was in violation of principles of natural justice and against equity and good conscience. At the time of the claimant's dismissal the claimant was earning a basic salary RM7,050 per month.

Issue For Determination

Issues for the court to determine are whether the claimant was employed by the company on a fixed term contract or whether he was a permanent employee at that material time. If the claimant was a permanent employee, whether there was a dismissal of the claimant by the company without just cause and excuse.

The Law

The first principle is that in determining whether a contract is a fixed-term contract or not, the court would have to decide purely on the facts of each case. In this regard the Court of Appeal in the case of *M Vasagam Muthusamy v. Kesatuan Pekerja-pekerja Resorts World, Pahang & Anor [2005] 4 CLJ 93* (*"M Vasagam* case") held as follows at p. 100:

> "No two sets of facts are alike. Each case is to be decided purely on its own facts before the tribunal called upon to adjudicate on the matter.".

The second principle is that on the facts of the case the court would have to determine the nature of the contract entered into between the parties. If the court finds the contract to be a genuine fixed term contract then the court would have rightly disposed of the dispute without going into the irrelevant question whether there was a dismissal and whether it was with just cause or excuse. In this regard the High Court in *M Vasagam Muthusamy v. Kesatuan Pekerja-pekerja Resorts World, Pahang & Anor* [2003] 5 CLJ 448 *("M Vasagam case")* held as follows:

> "... 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 as genuine fixed term contract .... 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 is 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."*. [Emphasis added]

In *Dixon v. British Broadcasting Corporation* [1979] I.C.R. 281, Lord Denning M.R. emphasized that a fixed-term contract must be for a specified period.

In the case of *Han Chiang High School/Penang Han Chiang Associated Chinese Schools Association and National Union of Teachers in Independent Schools, W. M'sia* [1988] 2 ILR 611 of Phillips J's advice quoted as follows:

> "The great thing is to make sure that the case is a genuine one. ... On the one hand, employers who have a genuine need for a fixed-term employment which can be seen from the outset not to be on going, need to be protected. On the other hand, employees have to be protected against being deprived of their rights through ordinary employments being dressed up in the form of temporary fixed-term contracts. What we are saying in this judgment is that there is no magic about fixed-term contracts; that they are not .....excluded from Act.".

With regards to the issue of dismissal, in *Goon Kwee Phoy v.J. & P Coats (M) Bhd* [1981] 2 MLJ 129, Raja Azlan Shah CJ (Malaya) (as he then was), at page 136, laid down the following principle:

> "Where representations are made and are referred to the Industrial Court for inquiry, it is the duty of the 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 the 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 cause or excuse. The proper enquiry of the court is to 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.".

The above principle was followed in the case of *Milan Auto Sdn Bhd v. Wong She Yen* [1995] 4 CLJ 449.

The burden of proof to justify dismissal lies on the employer. (see: *Union Construction Allied Trades Technicians v. Brain* [1981] 1 ILR 224). The standard of proof is on a balance of probabilities (see: *Blue Apparels (M) Sdn. Bhd. v. Vickneswaran Ramanathan* [1997] 3 ILR 803 (Award No. 552 of 1997 and *Sime Bank Bhd. v. Tee Booi Eng* [2001] 3 ILR 773).

Company's Case

The only witness for the company is Khoo Choom Kwong. *Vide* his witness statement (COWS1), he stated that he has been working with the company since 1992 and currently the Human Resources Manager of the company. It is the COW1's contention that the claimant was appointed for a fixed term of 4 years because the company found out that the claimant was already passed 55 and was 56 years at the time of employment. According to COW1 before the expiry of the first contract the claimant through a letter dated 1 August 2001 (page 5 of ABD1)

appealed to the company to extend his contract for one or two years of service because of family and financial commitments. Therefore, the company agreed to extend the claimant contract for another year which will be expiring on 15 February 2003. Before the expiry of the second contract, COW1 said the claimant again wrote a letter requesting for his contract to be extended since he said he was still financially committed to supporting his children's education for the next few years. Again, according to COW1 the company extended the contract for another year on compassionate ground. COW1 said based on same reasons used by the claimant, the company again extended the claimant's contract on yearly basis for another 2 years (4th contract and 5th contract). However, after the expiry of the 5th contract that is on 15 February 2006, company continued to employ the claimant on a month to month basis. *Vide* a letter dated 31 October 2006, the company wrote a letter to the claimant stating that his employment with the company will be ending on 31 December 2006. COW1 denied the allegation by the claimant that the company had acted *mala fide* when terminating the claimant's services. In his additional testimony, COW1 denied the contention that the claimant was not extended because of his application for ESOS. This is because the claimant was then past 60 years and it was the company's option not to renew the contract.

Claimant's Case

To prove his contention, the claimant through his witness statement (CLWS1), did not deny that he wrote asking for extension of his services

with the company but he said he did it at the request of the company. This is because he claimed that the company needed his services. The claimant further admitted that he did write family and financial reasons when applying for the extension of his services but he said he did it because he was asked by one K.Thomas who was the Financial Controller at that material time. In fact, the claimant before the expiry of the first contract claimed that he was informed orally by the Executive Director one Velayuthan Tan that the company needed his services and his contract would be renewed for another 2 years. The claimant also claimed that at the material time even if his contract was not renewed he had an offer from another company but he wanted to work here because he is used to it's environment. In relation to the events after the expiry of the 5th contract, the claimant explained that he was asked to continue to work by the Senior Plantation Controller but was not asked to apply for extension as he was informed that his contract has been extended. The claimant claimed that his contract was not renewed because the company was upset with him when he complained to the Industrial Relations Department about his entitlement for ESOS. Further, he said the position as a Plantation Manager is not a temporary or seasonal position because the position existed in the company before he joined. The claimant also claimed that he regarded his employment with the company as permanent because when the company informed him that they needed his services everytime before the expiry of his contract. The claimant is also under the impression that he would be working there as long as his able to do the job since his contract was renewed automatically everytime by the company. The claimant denied that the

company did inform him that his employment was on a monthly basis. This is because he alleged that he was informed by the Senior Plantation Controller one Ng Chun Yin that his contract for the year 2006 had been renewed and was asked to continue to work. The claimant said that the company at no time did mention that his contract was extended on monthly basis.

Evaluation And Findings

In the instant case, it is not disputed that after the expiry of the claimant's first contract, the company did renew it on a yearly basis until 15 February 2006. It is also not disputed that in all the contracts it is clearly stated the time period for each of the contract. Therefore, the court is of the view that when the company employed the claimant, the intention of the company at the material time was to be on a fixed time basis. Although, the claimant in this case contended that the company had renewed the contract automatically over the years but the court is of the view that this does not diminished the status of the said fixed term contract since the contracts the company did not at all indicate that the said claimant's employment will be permanent. Further, the court finds that it is not true that the claimant's contract was extended automatically since it has been proven by the company that the claimant's contract was extended only upon the claimant's application by way of letters. The court also cannot accept the claimant's contention that he was informed by K.Veluyathan and K.Thomas that his contract will be extended automatically. This is because the claimant did not

submit or adduce any documentary evidence to support his contention. Secondly, if this is true the remaining question is why the claimant's did not mention or state in all his request for extension letters the fact that he was informed by the company in particular Veluyathan Tan and K.Thomas that his contract will extended automatically and the need to write in for extension was just for record purposes?. The court is also of the view that the claimant should have at least mentioned the conversation on this matter that he had if any with Veluyathan Tan and K.Thomas. In the same vein also, the court finds that there is no need to call Veluyathan Tan and K.Thomas since the presence of them could only testify to the same facts which had been sufficiently established by COW1 that it was the claimant who requested his contract to be extended. In addition, the court also agrees that the burden lies upon the claimant to prove this allegation since he made the said assertion.

As for the claimant's attention that his contract was not renewed because the company was not happy when the claimant lodged a complaint to the Industrial Relations Department regarding ESOS, the court finds that the company has successfully proved in court that ESOS is only eligible for confirmed employees and not the claimant who was employed on contract basis. This is because it is clearly provided in clause 4.0 of the By Law for ESOS (CO2).

In relation to the salary increments given to the claimant, the court does not consider this as indication that the claimant's position is permanent. This is because although the salary is fixed under the fixed term contract

the company has the discretion whether to increase your salary. Secondly, after working for certain number of years surely the company would want reward its employees for their contribution to the company. Regarding bonus payments, sufficient for this court to quote the case of *UMW Toyota (M) Sdn. Bhd. v. Chow Weng Thiem* [1996] 1 LNS 92 where his Lordship said "In my judgement bonus was a form of gratuitions payment of a discretionary nature, the respondent was not entitled to it as of `right'.".

The court notes that although the claimant alleged that his position is not temporary but rather permanent but the court cannot accept this contention since the claimant knew that his position in the company was based on fixed term contract.

In this case also, although after the expiry of the 5th contract (15 February 2002) the company did not immediately terminate the claimant and allowed the claimant to continue working on a monthly basis, the court finds that does not tantamount an agreement by the company that claimant's position is permanent. This is because firstly, the claimant did not even protest about the existence of the month to month contract after 15 February 2002. Secondly, the claimant knew that his contract had already expired but why he continued to work on a monthly basis since he has the option to stop his service with company. The court is of the opinion that the claimant should have informed or asked the company about his status immediately after the expiry of the 5th contract.

The court also believes that the company did not commit *mala fide* when terminating the claimant's contract. This is because in court's view the company was just exercising its discretion under the contract when they refused to extend the services of the claimant. Further, the court notes that the claimant was already 64 years at the material time and surely the court does not think that the claimant is entitled to employment for life (see *Sharp Roxy Sales & Services Co. (M) Sdn. Bhd. v. Soo Hing Lin*, [2003] 3 ILR 1424 (Award No. 896 of 2003), and *Kwong Hock Leong Trading Sdn. Bhd. v. Tan Teik Hooi,* [2006] 4 ILR 2605 (Award No. 1770 of 2006). However, in the same breath it is pertinent to note this does not mean that the company can retire its employees at any age but in the instant case as stated earlier, the court finds that there are evidence to show that the claimant's contract was a fixed term.

Based on the above reasons, it is abundantly clear from the documentary and oral evidence that the claimant's contract was for a fixed term. There is no evidence that this is a permanent contract dressed up in the form of fixed term contract.

Based on the evidence, and applying section 30(5) of the Industrial Relations Act 1967 the court holds that the claimant's contract was a genuine fixed term contract. As such, the question of there being a

dismissal or not does not arise. Accordingly the claimant's claim is hereby dismissed.

HANDED DOWN AND DATED THIS 13 DAY OF MAY 2010

SIGNED
AHMAD TERRIRUDIN BIN MOHD SALLEH
CHAIRMAN
INDUSTRIAL COURT