

Nasha'at Muhy Mahmoud v Malaysian Airlines System Bhd

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INDUSTRIAL COURT (KUALA LUMPUR) — AWARD NO 1745 OF
2013 (CASE NO 23/4-785/12)
RAJENDRAN NAYAGAM CH
24 OCTOBER 2013

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Labour Law — Employment — Contract of employment — Whether foreign worker engaged on genuine fixed-term contract — Whether renewal of fixed-term contract on several occasions made employment permanent — Whether foreign worker had cause to legitimately expect permanent employment — Whether worker was dismissed or employment contract ended through effluxion of time

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The claimant, Nasha'at Muhy Mahmoud, was one of eight Iraqi expatriate pilots seconded by Iraqi Airways to Malaysian Airlines System Bhd (the company) in 1996 when the company expanded its operations and found there were insufficient local pilots for hire. After the secondment period ended, the company continued to employ the claimant on a fixed-term contract which was renewed on five occasions. On the expiry of the last renewal term, the company did not renew the contract as there were sufficient local pilots to handle its services. The company contended that the claimant's employment ended by effluxion of time and that he was not dismissed. The claimant, however, contended that the fact his contract was renewed on so many occasions legitimately gave him the expectation he was entitled to permanent employment as his services were required by the company on a continuous basis rather than for a definite period and that, in the circumstances, he had been dismissed. The dispute over the claimant's 'dismissal' was referred by the Minister to the Industrial Court for adjudication under s 20(3) of the Industrial Relations Act 1967.

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Held, dismissing the claim:

- (1) The contract of employment given to the claimant was a genuine fixed-term contract and it came to an end through effluxion of time. As such, there was no dismissal (see para 12).
- (2) The nature of employment offered to the claimant from the outset was temporary in nature. The fact that the fixed-term contract was renewed many times could not ipso facto convert it into permanent employment (see para 9).
- (3) The issue of legitimate expectation was a non-starter. Apart from renewing the claimant's contract there was no evidence the company gave him any assurance that he would be employed on a permanent

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A basis. It was not reasonable for the claimant as a foreign workman to say he expected to work in Malaysia on a permanent basis just because his fixed-term contract was renewed (see para 10).

[Bahasa Malaysia summary

B Penuntut, Nasha'at Muhy Mahmoud, adalah salah seorang daripada lapan juruterbang ekspatriat Iraq yang telah dipinjamkan oleh Iraqi Airways kepada Malaysian Airlines System Bhd ('syarikat') pada tahun 1996 apabila syarikat memperbesarkan operasinya dan mendapati tidak terdapat juruterbang tempatan yang mencukupi untuk diambil bekerja. Selepas tempoh peminjaman tersebut tamat, syarikat terus mengambil penuntut bekerja atas kontrak jangka tetap yang telah diperbaharui dalam lima kali. Pada tamat jangka diperbaharui terakhir, syarikat tidak memperbaharui kontrak tersebut memandangkan terdapat juruterbang tempatan yang mencukupi untuk menjalankan perkhidmatannya. Syarikat berhujah bahawa pekerjaan penuntut berakhir oleh luput masa dan bahawa dia bukan dibuang kerja. Penuntut walaubagaimanapun berhujah bahawa fakta kontraknya diperbaharui beberapa kali dengan sah memberi dia harapan yang dia berhak kepada pekerjaan tetap memandangkan perkhidmatannya diperlukan oleh syarikat secara berterusan bukan untuk tempoh yang ditetapkan dan bahawa, dalam keadaan ini dia telah dibuang kerja. Pertikaian ke atas 'dismissal' penuntut dirujuk oleh Menteri kepada Mahkamah Perusahaan untuk penghakiman di bawah Akta Perhubungan Perusahaan 1967.

F **Diputuskan**, menolak tuntutan:

- (1) Kontrak pekerjaan yang diberi kepada penuntut adalah kontrak jangka tetap yang tulen dan ia berakhir melalui luput masa. Oleh itu, tidak terdapat pembuangan kerja (lihat perenggan 12).
- G (2) Sifat pekerjaan yang ditawarkan kepada penuntut dari permulaannya adalah bersifat sementara. Fakta bahawa kontrak jangka tetap diperbaharui beberapa kali tidak dapat *ipso facto* menukarkannya kepada pekerjaan tetap (lihat perenggan 9).
- H (3) Isu harapan yang sah bukan permulaan. Selain daripada kontrak penuntut tidak terdapat keterangan syarikat memberi dia apa-apa jaminan yang dia akan diambil bekerja secara tetap. Tidak munasabah untuk penuntut perkerja asing untuk menyatakan dia berharap untuk bekerja di Malaysia secara tetap hanya kerana kontrak jangka tetapnya diperbaharui (lihat perenggan 10).]
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Notes

For cases on contract of employment, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1006–1037.

Awards referred to

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Han Chiang High School v National Union of Teachers in Independent Schools, W Malaysia [1988] 2 ILR 611, IC (refd)

Cases referred to

Dr Chandra Muzaffar v University of Malaya [2002] 5 MLJ 369; [2002] 2 CLJ 448, HC (refd)

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Goon Kwee Phoy v J & P Coats [1981] 2 MLJ 129, FC (refd)

Wiltshire Country Council v National Association of Teachers in Further and Higher Education and Guy [1980] ICR 455, CA (refd)

Wong Chee Hong v Cathay Organisation Sdn Bhd [1988] 1 MLJ 92, SC (refd)

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Legislation referred to

Industrial Relations Act 1967 s 20, 20(3)

Nanthini Nair (Uma Rani with her) (Idris & Partners) for the claimant.

Vijayan Venugopal (Meithan Ramesh with him) (Shearn Delamore & Co) for the company.

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[1] This matter was referred to the Industrial Court by way of a Ministerial reference under s 20(3) of the Industrial Relations Act 1967 on 24 May 2012, for an award in respect of the dismissal of Nasha'at Muhy Mahmoud ('the claimant') by Malaysian Airlines System Bhd ('the company').

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THE FACTS

[2] The claimant commenced employment as a pilot with the company in 1996. The company in 1996 was expanding its business and needed more pilots, as such the claimant together with seven other Iraqi expatriate pilots were seconded from Iraqi Airways to the company. Subsequently after the completion of the secondment period, the claimant was offered continued employment by way of a fixed term contract for two years commencing on 1 February 1997. Thereafter, the company renewed the fixed term contract five times. The last contract expired on 1 February 2010 and the company did not renew the contract. The reasons given by the company for the non-renewal of the claimant's contract were that they had an excess of pilots and sufficient local pilots to fly the existing aircrafts and service the existing routes. Hence, the company contended that claimant's employment came to an end through an effluxion of time and as such there was no dismissal.

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[3] The claimant on the other hand contended that he is entitled to security of tenure and had a legitimate expectation to continue in his employment as

A the contract had been renewed many times by the company. It had been submitted that since the claimant's services as a pilot were required on an ongoing basis rather than for a definite period, the employment should be permanent rather than on a fixed term contract. In other words, it was not a genuine fixed term contract. Hence, the non-renewal of his contract in effect
B was a dismissal.

[4] When dealing with a reference under s 20 of the Industrial Relations Act 1967, the first thing the Industrial Court has to ask itself is whether there was a dismissal and only then, if there was one, the court will ask the second question of whether it was with or without just cause or excuse (see *Wong Chee Hong v Cathay Organisation Sdn Bhd* [1988] 1 MLJ 92). In the present case, the question of whether there was a dismissal depends on whether the fixed term contract given to the claimant was a genuine fixed term contract. If it was so, then there was no dismissal and vice versa. I will now proceed to determine whether the fixed term contract given to the claimant was a genuine fixed term contract.
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WAS IT A GENUINE FIXED TERM CONTRACT?

E [5] A fixed term contract as opposed to a permanent contract has a term which has a defined beginning and a defined end (see *Wiltshire Country Council v National Association of Teachers in Further and Higher Education and Guy* [1980] ICR 455). A fixed term contract is entered into by the parties whereby the workman is employed, inter alia, for a specific period and at the end of which the contract automatically comes to an end. At common law, there is no dismissal. However, fixed term contracts do not escape scrutiny of the Industrial Court under s 20 of the Industrial Relations Act 1967 on the grounds that any termination of employment is regarded as a dismissal (see *Goon Kwee Phoy v J & P Coats* [1981] 2 MLJ 129 (FC)). Hence, if upon inquiry the fixed term contract is found not genuine, the remedy of reinstatement may be granted. In the leading case of *Han Chiang High School v National Union of Teachers in Independent Schools, W Malaysia* [1988] 2 ILR 611, the Industrial Court recognised the need for fixed term contracts for temporary, one-off jobs and seasonal work and the categories are not closed. These were regarded as genuine fixed term contracts which needed to be protected as opposed to sham fixed term contracts given for work which can be seen from the outset to be ongoing. In the *Han Chiang's* case, the court found that the system of fixed term contracts in the school was employed not of genuine necessity but as a means of control and subjugation of its teachers. Hence, the non-renewal of the fixed contracts of the 35 teachers was ruled as dismissals without just cause or excuse and an order of reinstatement was made.
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[6] The question of whether a contract of employment is a genuine fixed

term contract is to be determined by the court. In making this determination, the court has to examine the nature of the employment of the workman from the outset. In particular the nature of business of the employer and whether the employment offered was in fact an ongoing, permanent employment. Further, whether the employer had any ulterior motive as in the *Han Chiang's* case in giving a fixed term contract instead of permanent employment.

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EVALUATION

[7] The company in the present case is in business of operating a national airline, which flies international routes. This nature of business is highly competitive and is dependent on the global world economy. It is common knowledge that many factors may affect its business at any point in time. For instance, after the 9/11 incident there was a drastic drop in aviation business. In 1996 the company was expanding its operations and as such it recruited eight Iraqi expatriate pilots including the claimant on secondment basis from Iraqi Airways, as it did not have enough local pilots. When the secondment period was over, the company found that it still needed the services of the pilots and offered them employment on a fixed term contracts for two years. The company offered continued employment to the claimant as it still needed his services as a pilot but it could not ascertain how long his services will be needed. This is because the demand for air travel depended very much on global economic situation and further local pilots were also being trained to take over. Hence, the nature of employment offered to the claimant from the outset was temporary in nature. The only question was when should it come to an end. Hence, the company without any ulterior motive gave the claimant a two year fixed term contract which stated clearly that the claimant terms and conditions of employment were to be in accordance with the 'Terms and Conditions of Employment of Temporary Pilots'.

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[8] However, when the first fixed term contract expired after two years, the company renewed the fixed term contract and kept renewing it until 1 February 2010. The claimant contended that the renewal of his contract by the company had shown that his employment was ongoing and not for a definite period and further had given him a legitimate expectation to continue in his employment.

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[9] As regard the issue of whether his employment was ongoing, it was contended that his job functions continued to exist till today and that he was employed as an integral part of company's ongoing business. In contrast, the company's witness COW1 stated that in 2009, in view of the economic situation, the company had to take cost-cutting measures such as cutting unprofitable routes and it found that it had 200 B737 rated pilots, with an oversupply of 30 pilots. Hence, in October 2009 the company had to make a

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A decision on whether to extend the services of the claimant and they found that his services were no longer needed. Further, they found that by that time they had sufficient local pilots to fly the existing aircrafts and service the existing routes. As stated above, the very nature of the airline business is fluid and depended very much on the global economic conditions. What this means is that the demand for pilots in the company may go up and down from time to time and the company does not have a magic bowl to show them what the future holds for them. In these circumstances, it certainly would not be in the best interests of the company to offer permanent employment contracts to foreign pilots. Hence, the company must be given the flexibility to arrange their contractual relationships in the best interests of their business. The Industrial Court in the *Han Chiang's* case had recognised this contingency and said that there is a need for fixed term contracts 'where both parties recognise there is no understanding that the contract will be renewed on expiry'. The fact that the fixed term contract was renewed many times cannot ipso facto convert it into permanent employment.

[10] As regard the issue of legitimate expectation, with respect this is a non-starter. Apart from the renewal of the contract, there is no evidence that the company made any assurances to the claimant that he will be employed on a permanent basis (see *Dr Chandra Muzaffar v University of Malaya* [2002] 5 MLJ 369; [2002] 2 CLJ 448). In present case, the claimant was seconded by Iraqi Airways to work for the company for a period of two years. Subsequently, he was given a fixed term contracts for two years. 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 conditions 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.

[11] Finally, in 2009 when the company had to make the decision as to whether to renew the contract of the claimant, they found that they had sufficient local pilots to fly the existing aircrafts and therefore priority was given to employing them. It has been submitted that the claimant should have been retrained to fly the new Boeing 747-800, which the company was taking delivery in 2011 and re-employed over the younger local pilots. With respect, the company was not under any obligation to provide employment opportunities to foreign pilots. It has done the right thing by recruiting local pilots. This is industry practice globally.

[12] In conclusion, for the reasons given, it is the finding of this court that the contract of employment given to claimant was a genuine fixed term

contract and it came to an end due to effluxion of time and as such there is no dismissal. A

ORDER

[13] Accordingly, the claim is hereby dismissed. B

Claim dismissed.

Reported by Ashok Kumar C

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