

# Apex court rules that foreign employee on successive fixed-term contract is permanent employee

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## Facts

### Federal Court decision

[Leave Question 1 – answered in affirmative](#)

[Leave Question 2 – answered in negative](#)

### Comment

Employers can offer fixed-term contracts to their employees (often for economic or management reasons). However, such prerogative is subject to scrutiny by the Malaysian courts so that it does not fetter employees' rights in terms of employment security. In *Ahmad Zahri bin Mizra Abdul Hamid v AIMS Cyberjaya Sdn Bhd* ([2020] 1 LNS 494), the Federal Court delivered a groundbreaking decision on this matter concerning a foreign employee.

## Facts

The claimant, a foreign national, was offered a fixed-term contract (the original contract) spanning from October 2009 to September 2010 for the role of vice president of product development at a company (the company) in Malaysia. The original contract, which provided that the claimant would be entitled to the performance bonus scheme, was subsequently renewed four times. Each renewal was for one year, with no changes to its terms and conditions. However, in the fourth renewal contract, the claimant's position was changed to a consultant at the respondent due to the phasing out of the company. During the fourth renewal term, the company was consolidated into the respondent. In view of the company structure, the claimant was redesignated to vice president of products and solutions for the respondent. Nonetheless, all of the terms and conditions of the original contract remained the same.

At the end of the fourth renewal term, the claimant was offered another year of employment from October 2013 until September 2014. However, the respondent sought to change the terms of the claimant's employment by excluding the performance bonus scheme. The claimant informed the respondent's CEO that he disagreed with the exclusion. As a result, the respondent renewed the claimant's original contract for three months from October 2013 to December 2013 excluding the performance bonus scheme (the offer).

The claimant disagreed and rejected the respondent's offer. The respondent gave the claimant two months' notice of expiry of his contract from November 2013 until December 2013.

Aggrieved, the claimant made a representation for dismissal without just cause and excuse. The claim was adjudicated in the Industrial Court, the high court and the Court of Appeal. Both the Industrial Court and the high court held in favour of the claimant on the grounds that:

- the claimant was a permanent employee of the respondent and the purported fixed-term contracts were not genuine fixed-terms contracts; and
- the claimant's dismissal was without just cause and excuse.

The Court of Appeal allowed the respondent's appeal and set aside the high court's decision and the Industrial Court's award. The crux of the Court of Appeal's decision was that:

- the Industrial Court and the high court should not have lifted the corporate veils of the company and the respondent to treat the two separate entities as one; and
- without lifting the corporate veil, there had been no repeated renewals of the claimant's employment by the respondent as the renewals had been done by the company.

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## **Federal Court decision**

There were two questions of law before the apex court:

- Does an employment contract which is renewed successively without application by the employee and without any intermittent breaks in between constitute permanent employment (Leave Question 1)?
- Is a need for a work permit a material consideration in determining whether an employment contract is a genuine fixed-term contract (Leave Question 2)?

### **Leave Question 1 – answered in affirmative**

The Federal Court found that the company and the respondent were part of the same group. Hence, the claimant's employment contract was a continuous one from the company to the respondent.

The Federal Court went on to consider whether the claimant's employment contract was a genuine fixed-term contract or a permanent contract disguised as a fixed-term contract. The Federal Court observed that the following factors were relevant for such consideration:

- the contractual provision for termination before the term expires;
- the parties' intention;
- the employer's subsequent conduct during the course of employment (eg, whether the contract has been automatically renewed without the need to reapply and whether the employee continues to stay in employment after the contract expires without any extension);
- the employee's total duration or length of service with the employer;
- the nature of the employer's business; and
- the nature of work which the employee is engaged to perform.

The Federal Court observed that the employee's citizenship is irrelevant.

Having considered the above against the facts, the Federal Court held that the claimant's employment contract was permanent and not fixed-term.

### **Leave Question 2 – answered in negative**

The Federal Court held that the work permit was a non-issue in the appeal as it had not been pleaded at the Industrial Court or raised by the respondent in the submission before the Industrial Court. In any event, it had no bearing on whether the claimant's contract was fixed-term or permanent.

### **Comment**

The Federal Court's decision assures employees that they will be treated with fairness, dignity and equality regardless of whether they are Malaysian. It also serves as a reminder to employers, particularly those in a group of companies, that the corporate veil may be lifted in order to establish or identify the true labour relationship between parties in terms of existing labour relationships. In view of this decision, employers with a global business presence should be vigilant when handling the renewal of foreign employees' employment contracts.

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