

FIXED-TERM CONTRACTS – PRACTICAL CONSIDERATIONS FOR EMPLOYERS

by Kavin Raaj

Employment contracts are categorised into two categories:

- Short-term, known as fixed-term contracts; or
- Long-term, often referred to as permanent or regular contracts.

The distinction between a fixed-term contract and a regular contract is crucial. A fixed-term contract is an employment agreement for a specified period. The employment's start date and the contract's expiration date are clearly laid down. Thus, the contract has a definite beginning and end³⁰. An employee under a fixed-term contract enjoys job security for the duration specified in their agreement. This type of contract terminates upon the expiry of the agreed period, unless either party terminates it at an earlier date or parties agree to renew the period of agreement.

In the absence of explicit renewal, the contract automatically concludes. Consequently, the general principle is that the principle of unfair dismissal does not apply when a fixed-term contract ends concludes and is not renewed by the employer. A fixed-term contract may specify a duration of 6 months or indicate that it will commence on a particular date. This information should be included in the title of the appointment letter to clearly communicate to employees that the employment is temporary. The duration of fixed-term contracts can vary, ranging from as short as 3 months to as long as 3 years.

In contrast, a permanent contract of employment is for an indefinite period, until the stipulated or statutory minimum retirement age. If the maximum duration is uncertain, the agreement cannot be considered a fixed-term contract.

Rights of Employees on Fixed-term Contracts

Employees under fixed-term contracts enjoy the same legal rights as those on regular contracts. These rights encompass, but are not limited to:

- All benefits and protections provided by the Employment Act 1955 and the Sabah and Sarawak Labour Ordinances, provided, the employees fall within the scope of these Acts. This includes entitlements such as leave, rest days, and other statutory benefits.
- Coverage under the Employees Provident Fund Act 1991 and the Employees Social Security Act 1969, provided, the employees meet the criteria set forth by these Acts. This ensures that employees have retirement savings and are protected in cases of injury, disability, or death.
- Coverage under the Industrial Relations Act 1967, which grants employees the right to claim compensation on the ground of dismissal without just cause or excuse. This Act provides a mechanism for resolving industrial disputes and ensures fair treatment in the termination process.

³⁰ *Dixon v British Broadcasting Corporation* [1979] ICR 281

Outside these statutory rights, the entitlements of employees on fixed-term contracts regarding benefits not mandated by law—such as bonuses and annual increments—depend on the specific terms outlined in their respective employment contracts. Employers often stipulate these terms clearly to avoid misunderstandings at a later date.

It is common practice for employers to exclude fixed-term contract employees from certain benefits that are typically provided to permanent staff. However, to compensate for this exclusion, these employees usually receive higher monthly wages. In some cases, a gratuity or lump-sum payment is awarded upon the contract's conclusion as a form of compensation for the lack of long-term benefits.

This compensation strategy helps in balancing the temporary nature of fixed-term employment with the need to attract and retain skilled workers. Employers may also offer other incentives, such as professional development opportunities or performance bonuses, to make fixed-term positions more appealing.

By ensuring that employees on fixed-term contracts are aware of their rights and entitlements, and by providing fair compensation and benefits, employers can foster a positive and productive working environment. This approach not only supports employee satisfaction and retention but also aligns with legal requirements and ethical employment practices.

How does the Court decide whether an employee under a fixed-term contract has been unfairly dismissed?

• Role And Functions of The Industrial Court

The principle pertaining to fixed-term employment contracts was laid down in the case of **M Vasagam Muthusamy v. Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor [2003] 5 CLJ 448** wherein the High Court held that:

“The applicant contended that the Industrial Court had not applied the correct test in making its decision by first asking itself whether there was a dismissal and secondly that if there was a dismissal, whether the dismissal was with just cause or excuse. 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 a genuine fixed term contract (see pp. 3 and 4 of the said award). 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 was 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.”

In cases involving the issue of fixed-term contracts of employment, the burden of proof lies on the Company. Non-renewal of contract falls within the category of dismissal,

as envisaged under Section 20 of the Act, along with contractual terminations, constructive dismissals, forced resignations, retrenchments, and retirements.

In **Colgate Palmolive Sdn Bhd v. Yap Kok Foong [1998] 3 ILR 843** it was held that:

"In a s. 20 reference, a workman's complaint consists of two elements: firstly, that he has been dismissed, and secondly that such dismissal was without just cause or excuse. It is upon these two elements being established that the workman can claim his relief, to wit, an order for reinstatement, which may be granted or not at the discretion of the Industrial Court. As to the first element, industrial jurisprudence as developed in the course of industrial adjudication readily recognises that any act which has the effect of bringing the employment contract to an end is a "dismissal" within the meaning of s. 20. The terminology used and the means resorted to by an employer are of little significance; thus, contractual terminations, constructive dismissals, non-renewals of contract, forced resignations, retrenchments and retirements are all species of the same genus, which is "dismissal".

In **Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 2 MLJ 129**, the Federal Court ruled that:

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

Dr Dunston Ayadurai in his text *"Industrial Relations in Malaysia: Law & Practice"* 3rd edn at p. 297 states:

A workman can seek a remedy under s. 20 only if he had been dismissed. More often than not, there is no dispute that there was an actual dismissal of the workman by his employer. The only issue for the Industrial Court to determine is whether the dismissal had been for just cause or excuse, the onus of proving the existence of the same being cast upon the employer.

• **Standard Of Proof**

In the case of **Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314**, the Court of Appeal established the principle that the standard of proof required in the Industrial Court is that of balance of probabilities, indicating that even in cases of alleged misconduct such as theft, the Industrial Court is not obligated to ascertain beyond reasonable doubt that the employee has committed the offence, aligning with views expressed by courts and scholars, as outlined in 'Administrative Law' by H.W.R. Wade & C.F. Forsyth, emphasising the flexible nature of the civil standard, proportionate to the gravity of the issue, while cautioning that these terms are not rigid prerequisites for a legal decision to be valid.

What happens where a permanent contract is disguised as a fixed contract in order to benefit the employer?

In ***Han Chiang High School Penang Han Chiang Associated Chinese School Association v. National Union of Teachers in Independent Schools, W. Malaysia [1988] 2 ILR 611 (Award No. 306 of 1988)***, the presiding Industrial Court Chairman, while deliberating on the authenticity of a contract as genuinely fixed-term or otherwise, underscored the importance of ensuring the genuineness of the contract in each case. The Judge emphasised the necessity of safeguarding both, employers with genuine requirements for fixed-term employment and employees against potential exploitation through disguised temporary contracts. The ruling conveyed that fixed-term contracts should not be exempted from legal scrutiny and protection under the Act. Thus, the Court emphasized on the judicial discernment of the true nature of the employment arrangement.

The Court is obligated to determine whether the fixed-term contract is authentic or merely a permanent contract disguised as a fixed-term agreement. This principle was most clearly articulated in the case of ***Malaysia Airlines Bhd. v. Michael Ng Liang Kok [2000] 3 ILR 179 (Award No. 588 of 2000)***, where the Industrial Court ruled that:

"Sometimes, however, the workman's service comes to an end without the necessity for an employer to take the active step of terminating his service. Here the employer need only notify the workman of the fact of the ending of the employment relationship as where the workman attains his age of retirement or where a genuine fixed-term contract expires, the latter situation being the subject 'latter of the dispute between the parties in this case. In the context of the claimant's representation it will be necessary to examine the nature of the claimant's employment. The task before the court is to determine whether the contract between the parties was intended to be only for a fixed duration which comes to an end when the purpose of the employment for the definite duration has ceased to exist or one, through specified to be a fixed number of years, is an ordinary contract which was intended to continue unless some just cause or excuse arises for a termination or non-renewal."

In ***Ahmad Zahri Mirza Abdul Hamid v. AIMS Cyberjaya Sdn Bhd [2020] 1 LNS 494***, the Federal Court had laid down three conditions that need to be fulfilled when deciding whether a fixed-term contract is genuine. These conditions are:

- The intention of parties;
- Employers' subsequent conduct during the course of employment; and
- Nature of the employer's business and the nature of the work which an employee is engaged to perform.

The case of ***Han Chiang High School v. National Union of Teachers in Independent Schools, West Malaysia [1988] 2 ILR 611***, had distinguished between genuine fixed-term contracts and those disguised as such.

The Court had taken cognisance of the relevance and the need required to be

classified as a definite duration and explained the main distinguishing features of such contracts as follows:

“The court however, is aware that on the other hand there are genuine fixed term contracts, where both parties recognise there is no understanding that the contract will be renewed on expiry. The court realises that such genuine fixed term contracts for temporary, one-off-jobs are an important part of the range of employment relationships. Some such jobs are found in seasonal work, work to fill gaps caused by temporary absence of permanent staff, training, and the performance of specific tasks, such as research projects funded from outside the employer's undertaking.”

In a recent industrial court case titled **Syed Hizam Alsagoff v Cahya Mata Sarawak Berhad (Industrial Court Award No. 2179 of 2023)**, the Court had decided on principles relating to fixed-term employment contracts. In this case, the non-renewal of the Claimant's employment contract is disputed. The Court had to first decide whether the contract is genuinely for a fixed term or a permanent one that was under the guise of a fixed-term contract.

Bearing in mind Section 30(5) of the Industrial Relations Act 1967, which mandates the Court to act according to equity and good conscience and the substantial merits of the case without regard to technicalities and legal form and upon analysing the factual matrix of the case and taking into account the totality of the evidence adduced by the parties, the Court concluded that the Company had failed to discharge its legal and evidential burden of proving, on a balance of probabilities, that it had dismissed the Claimant with just cause or excuse.

When the Courts find that there has been an unfair dismissal and are deciding on the appropriate remedy, they are often guided by the principles laid down in **Koperasi Serbaguna Sanya Bhd. (Sabah) v. Dr. James Alfred and Anor [2000] 3 CLJ 758**, wherein the Court of Appeal held that:

“In industrial law, the usual remedy for unjustified dismissal is an order of reinstatement. It is only in rare cases that reinstatement is refused. For example, as here, where the relationship between the parties had broken down so badly that it would not be conducive to industrial harmony to return the workman to his place of work. In such a case, Industrial Court may award monetary compensation. Such an award is usually in two parts. First, there is the usual award for the arrears of wages, or back wages, as it is sometimes called. It is to compensate the workman for the period that he has been unemployed because of the unjustified act of dismissal. Second, there is an award of compensation in lieu of reinstatement.”

Thus, it is evident that the determination of whether a contract is genuinely fixed-term or merely a disguised permanent one is pivotal to safeguarding the rights of both employers and employees. Courts, as exemplified in landmark cases like *Han Chiang High School Penang Han Chiang Associated Chinese School Association v. National Union of Teachers in Independent Schools and Malaysia Airlines Bhd. v. Michael Ng Liang Kok*, meticulously scrutinise the nature of the employment relationship to ensure fairness and adherence to the prescribed legal standards.

Furthermore, recent cases, as illustrated by *Ahmad Zahri Mirza Abdul Hamid v. AIMS Cyberjaya Sdn Bhd* and *Syed Hizam Alsagoff v Cahya Mata Sarawak Berhad*, highlight the importance of evaluating factors such as parties' intentions, subsequent conduct, and the nature of the employer's business in determining the authenticity of fixed-term contracts. Courts are entrusted with the responsibility to act in equity and good conscience, considering the totality of evidence presented, to ascertain whether dismissal under such contracts is justified.

Ultimately, the overarching aim of industrial law is to promote fairness and uphold the rights of employees. While reinstatement remains the primary remedy for unjustified dismissal, monetary compensation may be awarded in exceptional cases where reinstatement is impracticable. This holistic approach to resolving disputes ensures that justice is served and industrial harmony is preserved in the employment landscape.

Conclusion

Understanding the distinction between fixed-term and regular contracts is essential for both employers and employees. Fixed-term contracts, characterised by their specified duration, provide job security for the agreed period but conclude automatically unless explicitly renewed. By contrast, permanent contracts last indefinitely, often until the employee reaches retirement age.

Employees on fixed-term contracts have the same legal rights as those on permanent contracts, including coverage under various employment, provident fund, and social security laws.

The Industrial Court plays a crucial role in determining whether a fixed-term contract is genuine or a disguised permanent contract. This distinction is vital to prevent employers from circumventing legal obligations. In *Malaysia Airlines Bhd. v. Michael Ng Liang Kok and Syed Hizam Alsagoff v. Cahya Mata Sarawak Berhad*, the courts examined the intent of the parties, the nature of the employer's business and the employer's conduct during the contract period.

When unfair dismissal claims arise, the burden of proof lies with the employer to demonstrate just cause or excuse. The Court evaluates the substantial merits of each case, guided by principles of equity and good conscience, as highlighted in the cases of *M Vasagam Muthusamy* and *Colgate Palmolive Sdn Bhd v. Yap Kok Foong*.

Ultimately, fair and transparent employment practices not only comply with legal standards but also foster a positive and productive work environment. Ensuring that employees understand their rights and are fairly compensated enhances job satisfaction and retention, contributing to overall organisational success.

Kavin Raaj A/L Veerasamy | Associate
Dispute Resolution
kavin@rdslawpartners.com
