IN THE INDUSTRIAL COURT OF MALAYSIA

CASE NO.: 30(32)(19)/4-800/17

BETWEEN

PETER JAMES WILLIAM DYER

AND

YAYASAN UEM

AWARD NO. 1014 OF 2019

BEFORE	:	**Y.A. TUAN PARAMALINGAM A/L J. DORAISAMY** - Chairman
VENUE	:	Industrial Court of Malaysia, Kuala Lumpur
DATE OF REFERENCE	:	19.07.2017
DATES OF MENTION	:	25.08.2017; 08.11.2017; 10.01.2018; 07.02.2018; 02.05.2018; 30.05.2018; 12.06.2018; 02.07.2018
DATES OF HEARING	:	28.06.2018; 13.08.2018; 23.08.2018; 18.10.2018; 04.12.2018; 07.12.2018
REPRESENTATION	:	Mr. V. K. Raj together with Mr. Shanta Mohan Balasubramaniam Messrs. Chambers of Shanta Mohan Counsel for the Claimant Mr. P Jayasingam together with Ms. Thavaselvi Pararajasingam & Mr. Tan Hao Wei Messrs. Zul Rafique & Partners Counsel for the Company

REFERENCE :

This is a reference made under Section 20 (3) of the Industrial Relations Act 1967 (Act 177), arising out of the dismissal of **Peter James William Dyer** (hereinafter referred to as "the Claimant") by **Yayasan UEM** (hereinafter referred to as "the Company") on 30th June 2016.

AWARD

[1] The Ministerial reference in this case required the Court to hear and determine the Claimant's complaint of dismissal by the Company on 30th June 2016.

I. Procedural History

[2] The Industrial Court received the letter pertaining to the Ministerial reference under Section 20(3) of the Industrial Relations Act 1967 on 25th July 2017.

[3] The matter was fixed for mention on 25th August 2017, 8th November 2017, 10th January 2018, 7th February 2018, 2nd May 2018, 30th May 2018, 12th June 2018 and 2nd July 2018.

[4] The trial proceeded on 28th June 2018, 13th August 2018, 23rd August 2018, 18th October 2018, 4th December 2018 and 7th December 2018.

II. Factual Background

[5] The Company owns and runs a residential college named and styled as Kolej Yayasan UEM ("*KYUEM*"), specialising in providing top quality pre-university education to Malaysian students. The majority of KYUEM students are top scorers in the country, sponsored by amongst others the Malaysian government, Public Service Department (JPA), Majlis Amanah Rakyat (MARA), Ministry of Education, Bank Negara Malaysia, Government-Linked Companies and State foundation such as Yayasan Terengganu and Yayasan Sabah.

[6] The Claimant, a British citizen, commenced employment with the Company effective from 1st February 2012 as a teacher for KYUEM and terminating on 30th June 2014 vide a Contract of Employment dated 15th January 2012 ("*the First Contract*"). The Claimant however only reported for duty at KYUEM on 16th February 2012 due to his pre-employment medical examination. The Company contends that they noted the Claimant's voice to be odd when he reported for work, but they put it down to throat infection and nothing more.

[7] The Claimant contends that his initial contract was to run from 1st January 2012 until 30th June 2014 on the strict understanding between him and the then Headmaster of the college, i.e. one Donald Wilkinson, that his contract of employment was to be a permanent contract and that the fixed period mentioned in the letter of offer dated 16th October 2011 was merely a formality.

[8] The Claimant admits in his pleadings that the fixed period mentioned in the letter of offer and the First Contract was provided as such in keeping with the work permit requirements for an expatriate employee like the Claimant, who were usually issued work permits for a maximum period of 2 years at any one time.

[9] The Company contends that in February 2013 the Claimant was paid an *ex gratia* sum of RM26,208.00 being yearly completion bonus, in accordance with the terms of the First Contract. The Claimant also submitted his medical claim on 26th August 2013 to obtain reimbursement for medical treatment and examination on 4th July 2013. The Company noted that on 4th July 2013, the Attending Physician had confirmed, *inter alia*, that the Claimant suffered from vocal cords dysfunction for 11 to 12 months and that there was a possibility of a relapse.

[10] The Company further contends that since there was still no improvement in the Claimant's voice condition, during a meeting held at the Boardroom between the Claimant and the Headmaster of KYUEM at the material point in time, i.e. Paul Rogers, in the presence of the Human Resource Manager, Nurul'aain Binti Idrus in October 2013, the Claimant was informed that since his voice was weak and distracting for the students and in view of the Attending Physician's confirmation dated 4th July 2013, the Company has decided not to offer him a new contract upon the expiry of the First Contract. The Claimant appealed to Paul Rogers and insisted that he would be undergoing 2 separate throat operations in London in December 2013 which he claimed would improve and return his voice condition to normal. Paul Rogers relented and decided to defer issuing him the letter of non-renewal until the Claimant had undergone the necessary surgeries to rectify his voice condition.

[11] Between 30th November 2013 and 5th January 2014, the Claimant was away for the semester break and underwent operations in London. He reported back to work for the January 2014 semester on 6th January 2014 and the Company noted that there was a slight improvement in his voice. The Company thereafter re-appointed the Claimant as a teacher for KYUEM vide a fresh Contract of Employment dated 20th February 2014 ("*the Second Contract*") which was to run from 1st July 2014 until 30th June 2016.

[12] The Company contends that in January 2014 the Claimant was paid an *ex gratia* sum of RM26,208.00 being yearly completion bonus, in accordance with the terms of the First Contract. The Claimant also submitted his medical claim on 11th March 2014 to obtain reimbursement for his medical expenses incurred for medical treatment and examination on 12th December 2013 and between 19th December 2013 and 20th December 2013. The Company noted that on 11th December 2013 and 29th January 2014, the Attending Physician had confirmed, *inter alia*, that:-

(i) The Claimant suffered damage to his vocal cords;
(ii) The condition existed since 1st June 2012; and
(iii) There was a possibility of a relapse.

[13] It is not in dispute that upon the termination of the First Contract, the Claimant was paid a lump sum of RM23,695.41 comprising of the following payments:-

(i) June 2014 basic salary of RM8,736.00;
(ii) Overseas allowance of RM3,639.00 per month;
(iii) Head of Psychology Department Allowance of RM550.00; and
(iv) *Ex-gratia* sum of RM10,770.41 being the pro-rated yearly completion bonus.

[14] The Company further contends that in June 2015, the Claimant was paid an *ex-gratia* sum of RM27,780.00 being yearly completion bonus in accordance with the Second Contract. The Company however noted that the Claimant's voice condition was still an issue since numerous verbal complaints were received by the Headmaster of KYUEM, i.e. Paul Rogers, from the Claimant's students that they were unable to hear him clearly during classes.

[15] Thereafter on 21st January 2016, during a meeting held at the Boardroom between the Claimant and Paul Rogers and in the presence of the Human Resource Manager, Nurul'aain binti Idrus, the Claimant was informed of the Company's decision not to renew his Second Contract upon its expiry on 30th June 2016 mainly due to his voice condition which appeared to be deteriorating based on the Attending Physician's confirmations. A letter entitled "Non-Renewal of Contract" dated 4th February 2016 was issued by the Company to the Claimant informing him that they would not be renewing his contract from June 2016.

[16] It is the Claimant's contention that his contract of employment was in fact a permanent one and that the parties' intention of not envisioning the Claimant's contract of employment as a fixed term contract of employment can be seen from the existence of a specific clause indicating that the contract of employment can be extended by mutual agreement and also the fact that his renewed contract of employment was subject to KYUEM's Employee Handbook. The Claimant also pleaded that the said intention was manifest when the Claimant was continued in his employment with the Company beyond 30th June 2014 vide a new Contract of Employment dated 20th February 2014 for the period from 1st July 2014 to 30th June 2016, i.e. the Second

Contract. In this way, the Claimant continued his employment with the Company uninterrupted without having the need to discontinue his classes or duties after 30th June 2014 nor KYUEM having to announce his departure before 30th June 2014.

[17] It is the Company's contention that, for all intents and purposes, the Second Contract was, in pith and substance, a genuine fixed term contract. Being a British citizen serving in Malaysia, his contracts of employment with the Company were for fixed terms contingent upon the issuance of a valid residential visa and Work Permit/Employment Pass. The Company was not in a position to employ the Claimant on a permanent basis because his employment is subject to him obtaining a Work Permit or an Employment Pass. An Employment Pass (Category I) with a minimum period of 2 years will be issued to expatriates with an employment contract that is valid for a minimum of 2 years.

[18] The Claimant contends that his last held position in KYUEM was as a Head of Psychology and the last monthly remuneration package were as follows:-

(i) Basic monthly salary of RM9260.00;

(ii) Fixed monthly overseas allowance of RM3858.00;

(iii) Employer's contribution of 12% into the Claimant's EPF account;

(v) Contractual bonus of one month's salary;

(vi) Yearly completion bonus of 3 months' salary.

[19] The Claimant also contends that throughout his tenure of employment with the Company and until he received the letter of non-renewal of the Second Contract, he did not receive any adverse comments or feedback from KYUEM about his work

performance. He in fact had received very positive feedback from the Students' Evaluation for 2015 and 2016.

[20] The Claimant alleges that he had then spoken to KYUEM's Academic Manager, i.e. Azman bin Zainal Abidin and Dr. Paul Rogers about the letter of non-renewal. The response the Claimant received was that he was to "go quietly", otherwise his yearly completion bonus would be withheld. The Claimant contends that this amounted to economic duress, which he had no option but to succumb to.

[21] The Claimant also found out that his position was replaced by another British expatriate, one Narges Rahimi, who, according to the Claimant, was apparently much less qualified and did not have sufficient teaching experience at the CIE A-Level program that was being taught at KYUEM. He then had raised his concerns with the CEO of UEM, i.e. Dato' Izzadin Idris, but received no response.

[22] The Claimant contends that he had been unjustly and without due cause terminated from his permanent contract of employment with the Company. The utilisation of the fixed term contracts by the Company was in reality a sham and that the two fixed term contracts amounted to a permanent contract of employment.

[23] The Claimant seeks reinstatement to his former position without loss of seniority, wages or benefits, monetary or otherwise, together with arrears of salary, allowances, employer's EPF contribution to the Claimant's EPF account, and contractual bonus(es) from the date of dismissal to the date of reinstatement.

III. The Function Of The Industrial Court & The Burden of Proof

[24] In a case involving fixed term contracts, the Industrial Court has to determine:-

(i) Whether or not the employment contract is a genuine fixed term contract;

(ii) If the employment contract is not a genuine fixed term contract, the Court would have to determine whether there was a dismissal or not and, if so, whether it was with just cause or excuse;

(iii) If, however, the employment contract is a genuine fixed term contract, then there would be no issue of dismissal to begin with.

[25] 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** where Faiza Tamby Chik J held:-

> "*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".

[26] In cases involving the issue of fixed term contract of employment, the burden of proof lies with the Company as the fact of dismissal is not in dispute. Non-renewal of contracts belongs in the category of "dismissal" envisaged under Section 20 of the Industrial Relations Act 1967, along with contractual terminations, constructive dismissals, forced resignations, retrenchments and retirements. This was stated in the case of **AZRIZAL ALI v. SIME DARBY AUTO HYUNDAI SDN. BHD. [2018] 3 ILR 440** where the Industrial Court held:-

"*In* Colgate Palmolive Sdn Bhd v. Yap Kok Foong (Award 368 of 1998) [1998] 2 MELR 815; [1998] 3 ILR 843, *it was held as follows:*

> *'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 recognizes 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".'*

As there is no quarrel that there was an unequivocal termination of service of the Claimant by his employer; and bearing in mind the factual matrix of this case, I take cognizance of the decree of Mohd Azmi FCJ in the cases of Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Anor [1995] 1 MLRA 412; [1995] 2 MLJ 753; [1995] 3 CLJ 344; [1995] 2 AMR 2145 *and* Milan Auto Sdn Bhd v. Wong She Yen [1995] 2 MLRA 23; [1995] 3 MLJ 537; [1995] 4 CLJ

449; [1996] 1 AMR *049 wherein His Late Lordship expressed the two-fold task of the Industrial Court under a s 20 reference in terms of first, the determination of whether the alleged misconduct had been established, and second, whether the proven misconduct constitutes just cause or excuse for the dismissal.*

In Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 1 MLRA 415; [1981] 2 MLJ 129 *Raja Azlan Shah CJ (Malaya) (as Almarhum DYMM Paduka Seri Sultan Azlan Shah Sultan Perak Darul Ridzuan then was) speaking for the Federal Court ruled:-*

> *'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.'*

And this onus or burden of proof on the Company is based on a standard of a balance of probabilities (see Union Of Construction, Allied Trades And Technicians v. Brain [1981] ICR 542, [1981] IRLR 224, CA; Smith v. City Of Glasgow District Council [1987] ICR 796, [1987] IRLR 326, HL; Post Office (Counters) Ltd v. Heavey [1990] ICR 1, [1989] IRLR 513, EAT; Ireka Constructions Berhad v. Chantiravathan A/L Subramaniam James [1995] 1 MELR 373; [1995] 2 ILR 11 *and* Telekom Malaysia Kawasan Utara v. Krishnan

Kutty Sanguni Nair & Anor [2002] 1 MELR 4; [2002] 1 MLRA 188; [2002] 3 MLJ 129; [2002] 3 CLJ 314; [2002] 3 AMR 2898)".

[27] The fact of termination of the Claimant's service by the Company is not in dispute, be it by way of effluxion of time of the fixed term contract or otherwise. Thus, the burden of proof lies on the Company to show, on a balance of probabilities, that it was a genuine fixed term contract and that it had come to its natural end via effluxion of time.

[28] The Claimant however bears the evidential burden of convincing the court of the existence of factors that would render the fixed term contracts not being genuine. In **TOKO INOMOTO & ORS v. MAHKAMAH PERUSAHAAN MALAYSIA & ANOR [2017] 1 LNS 201** it was held by Azizul Azmi Adnan JC (as His Lordship then was):-

> "*In relation to the issues in subparagraphs 39(b) and 39(c) ante, the incidence of the burden of proof of a fact in issue is a pertinent consideration. The appellants' case was that the burden of proving that the contracts were for a fixed term and not contracts for permanent employment lay with the employer.*
>
> *In general, once the fact of dismissal has been proven, the employer bears the general legal burden to provide lawful justification for such dismissal. Even though the legal burden is placed on an employer to prove that there had been just cause or excuse for a dismissal or termination of employee, the evidential burden of a particular fact in issue lies on the party that is seeking to persuade the court of its existence, in accordance with s 103 of the Evidence Act 1950*".

V. Issues To Be Decided

[29] The issues to be determined in this case are:-

(i) Whether there was a dismissal on 30th June 2016;

(ii) Whether the employment contract between the Claimant and the Company is a genuine fixed term employment contract;

(iii) If it was not a genuine fixed term contract, whether there was a dismissal and, if so, was it done with just cause and excuse;

VI. The Court's Findings And Reasons

(i) Whether there was a dismissal on 30th June 2016?

[30] During the course of submissions, Counsel for the Company had raised a preliminary issue as to whether this Court is seized with jurisdiction to hear this matter as the Claimant's representations to the Director-General of Industrial Relations ("*DGIR*") for reinstatement under Section 20 of the Industrial Relations Act 1967 predated the actual date of dismissal, rendering the Claimant's case premature and liable to be struck off.

[31] Counsel for the Company submitted that the Claimant was still an employee of the Company on 30th June 2016 and thus he was not dismissed on 30th June 2016 as per his representation to the DGIR. Upon being cross-examined by the counsel for the Company, the Claimant relented and agreed, albeit in a rather confused state, that

his last day of employment with the Company was on 30th June 2016 and that he only ceased employment effective from 1st July 2016.

[32] Counsel for the Company further submits that since the Claimant's dismissal did not take place on 30th June 2016 as it took effect only on 1st July 2016, thus his representation for reinstatement under Section 20 of the Industrial Relations Act 1967 was premature as it preceded the dismissal. Flowing from that, the Industrial Court would then not have the threshold jurisdiction to hear the matter and the claim ought to be struck off. The Company relied on the cases of **SUPERMIX CONCRETE (M) BHD v. TEOH BOON BENG [1987] ILR 274** and **SOUTHERN BANK v. NG KENG LIAN & ANOR [2002] 2 CLJ 514** to fortify their position.

[33] This Court does not however find the Company's preliminary issue to be with merits. First of all, this issue had not been pleaded by the Company in its Statement In Reply. Questions pertaining to this issue were put for the first time to the Claimant during his cross-examination and thereafter raised in further detail in the Company's Written Submission dated 18th January 2019. It is trite law that parties are bound by the four corners of their pleadings and this is equally applicable to S. 20(3) Industrial Relations Act 1967 proceedings (**RANJIT KAUR S GOPAL SINGH v. HOTEL EXCELSIOR (M) SDN BHD [2010] 8 CLJ 629**). Secondly, the Second Contract dated 20th February 2014 terminated on 30th June 2016. Even though the Claimant reported for work on 30th June 2016, he ceased to be an employee of the Company the minute he clocked out for the last time at the end of the working day on 30th June 2016. The Court finds guidance from the dictum of the learned Industrial Court Chairman, W.

Satchithanandhan, in **SHIN MIN DAILY NEWS (M) SDN. BHD. v. CHIN HONG KONG [1990] 1 ILR 389**:-

> *"This Court should always bear in mind that in making an Award which is defined in s. 2 as 'an award in respect of a matter referred to it or any decision or order made by it under the Act', this court under s. 30(5) 'shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form'. Obviously these words in s. 30(5) are not words of ornament and there is a social purpose behind the mandatory requirement to disregard technicalities to legal formalities in place of strict adherence to legal requirements. S. 30(5) ostensibly prevents and proscribes technical knockout of claimants who lodge their complaints during the notice period of dismissal.*
>
> ***Is a workman in his innocence or due to anxiety, or misapprehension or misconstruction of the letter of dismissal or a misunderstanding of the law or because he cannot read or write to be penalised because he made his representation under s. 20(1) earlier in time before the effective date of his dismissal? Will it not be a glaring injustice to dismiss his representations on a technical ground without going into its merits? It is well established that equity only refuses to give its aid to stale demands, where a party has slept upon his rights and has acquiesced for a great length of time*** *(Lord Camden in* Smith v. Clay [1767] 3 Bro. c.c. 639*)*
>
> *Here in the instant case* ***the claimant has arrived at the door of the Director-General earlier than within one month of his dismissal. Is he to be executed at the altar of the law or to be reprieved at the shrine of equity? Conscience favours a reprieve***". (Emphasis added)

[34] In light of the above, this Court disallows the preliminary issue raised by the Company. The Claimant was perfectly entitled to consider himself dismissed when he clocked out at the end of the working day on 30th June 2016.

(ii) Whether the employment contract between the Claimant and the Company is a genuine fixed term employment contract

Did Company assure the Claimant that it would be a permanent employment?

[35] It is not disputed that the Claimant, when he entered into the First Contract (*at pp. 3-13 of COB-1*) as well as the Second Contract (*at pp. 14-25 of COB-1*), was fully aware of the terms and conditions of the said contracts and that the tenure of employment under the said contracts were for a specific period.

[36] The Claimant however contends that the letter dated 16th October 2011 (*at pp. 16-17 of COB-2*), i.e. the letter of offer issued by Donald Wilkinson (CLW-3) on behalf of KYUEM, is pivotal to the determination of his status as a permanent staff of the Company. The relevant part of the letter relied upon by the Claimant reads as follows:-

> "*Your initial contract would run from 1 January 2012 until 30 June 2014. Subject to mutual agreement, this would be renewable*".

However, during cross-examination, both the Claimant (CLW-4) and CLW-3 admitted that the term "*subject to mutual agreement*" connotes the fact that either party had the right to refuse renewal of the contract. In such a situation, such a clause in the letter of offer by itself does not convert a fixed term contract of employment into a permanent employment (**ASIAN SUPPLY BASE SDN BHD v. TERRY MOGINDOL [2005] 1 ILR 708**). It is also pertinent to note that this letter was only applicable to the First Contract. No such letter was issued to the Claimant before the Second Contract was entered into.

[37] CLW-3 during cross-examination further admitted that the letter of offer does not indicate the employment contract to be a permanent one and that he was aware that expatriates could not be given permanent contracts due to the Malaysian immigration laws. He admitted that the First Contract was renewable and agreed to the suggestion by the Company's counsel that if the Company did not want to extend, then the contract would not be renewed. CLW-3 also admitted that during his own tenure of employment with the Company, he himself was placed under fixed term contracts of employment by the Company, lending credence to the fact that foreign employees working with the Company were placed under fixed term employment.

[38] The Claimant himself admitted that if the contract was a permanent contract of employment then there would be no necessity to state that the initial contract would be renewable subject to mutual agreement. The Claimant testified during cross-examination:-

> "*Q :* *I refer to A. 7 & 9 of CLWS-4 and pages 16-17 of COB-2. I put it to you, Dr. Dyer, that if your position was a permanent contract of employment as alleged by you, there was no necessity to state your initial contract would be renewable subject to mutual agreement, correct? You agree with me?*
>
> *A :* *Right.*
>
> *Q :* *I now refer you to A. 7 & 9 of CLWS-4 and pages 16-17 of COB-2. I put it to you that given the fact that your initial contract would be renewable subject to mutual agreement, one can party can decide not to renew the contract. Agree or disagree?*
>
> *A :* *I'll agree*".

[39] The Claimant had also accepted the letter of offer without any reservation or qualification whatsoever, as is evident from the exchanges of emails at page 7 of CLB-1. The Claimant did not raise any queries or protest as to why the letter of offer failed to state that his contract of employment was permanent in nature. He was perfectly happy with it and voluntarily executed the First Contract, which also did not provide for the Claimant's employment to be permanent.

[40] The Claimant had produced a letter written by CLW-3 dated 11th August 2016 which seemed to confirm that when CLW-3 appointed the Claimant, he had made it clear that "*the extension of his contract would be a formality, provided he performed as was expected*". However, this letter was written 5 years after CLW-3 issued the letter of offer on 16th October 2011. CLW-3 admitted that this letter of 11th August 2016 was issued at the request of the Claimant to assist him in this case. However, both CLW-3 and the Claimant could not prove by way of documentary evidence that this extension of the Claimant's contract being a mere formality was communicated to the Claimant when the letter of offer was issued on 16th October 2011 or even when the First Contract was executed. By CLW-3's own admission, the letter dated 11th August 2016 was clearly an afterthought.

[41] The Claimant also contends that a collateral contract had come into existence by virtue of the verbal representation made by CLW-3 to the Claimant, wherein the collateral contract with regards to the permanency of the Claimant's employment will override the fixed term nature of the contracts that the Claimant had signed. However, the Claimant's contention does not stand in light of the authorities which have decided that where a fixed term is expressly stated in the employment contract and accepted

by the employee, then the Court ought not to venture beyond the stated terms in the said contract and in the process fouling the parol evidence rule enshrined in Sections 91 and 92 of the Evidence Act 1950.

[42] In the case of **FINANCIAL MEDIATION BUREAU v. AUDREY YEOH PENG HOON & ANOR [2016] 1 LNS 1057** it was held by Su Geok Yiam J:-

> "*Furthermore, neither the (*Han Chiang High School Penang Han Chiang Associated Chinese Schools Association v. National Union of Teachers In Independent Schools, W. M'sia [1988] 2 ILR 611*) case nor the (*Malaysian Airlines Berhad v. Michael Ng Liang Kok [2000] 3 ILR 179*) case state or even remotely suggest that the provisions of sections 91 and 92 of the Evidence Act do not at all come into play in cases where the Industrial Court is required to determine whether a fixed term contract is a genuine fixed term contract or otherwise.*
>
> *On the contrary, despite the fact that specific reference was not made to sections 91 and 92 of the Evidence Act 1950, the High Court in (*Thangasamy Brown DN Gnanayutham v. Pelabuhan Tanjong Pelepas Sdn Bhd [2005] 3 CLJ 83*) (which was upheld by the Court of Appeal) did state that where a fixed term is expressly stated in the offer of employment and unreservedly accepted by the employee, the Court sees no reason to go beyond the terms as stated in the offer of employment, which was the ultimate expression of the contracting parties*".

[43] And in **TOKO INOMOTO & ORS v. MAHKAMAH PERUSAHAAN MALAYSIA & ANOR [*supra*]** it was held by the High Court that any assurances of being re-hired would be limited by the operation of the parol evidence rule in Section 92 of the Evidence Act 1950. The Claimant bears the evidential burden of proving the existence of such a collateral contract.

[44] The Court however finds that the Claimant has failed to discharge the evidential burden to prove that he had been given the assurance by the Company that his contract of employment would be permanent in nature.

The First Contract

[45] The First Contract dated 15th January 2012 provides under Clause 2.2 that the Claimant's employment as a Teacher in KYUEM was for a specific period commencing 1st February 2012 and terminating on 30th June 2014, i.e. a fixed period of 2 years and 4 months. He was also given a salary of RM8,736.00 per month and a fixed Overseas Allowance of RM3,639.00 per month, and the Claimant testified during trial that he never received any salary increment throughout the duration of the contract period.

[46] In determining whether a contract of employment is a genuine fixed term contract, the test is that the contract must be for a specific period and with a defined beginning and a defined end. In the case of **ROYAL SELANGOR YACHT CLUB v. JEYASINGAM JOSEPH JOSEPH FERNANDEZ [2007] 8 MELR 415**, it was held by the Industrial Court:-

> "*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* Wiltshire County Council v. National Association of Teachers in Further and Higher Education and Guy [1980] I.C.R. 455 at 462, *Lawton LJ. said that "a 'fixed term'... means a term which has a defined beginning and a defined end.*"

[47] Looking at the First Contract, with its period of employment stated with certainty to commence on 1st February 2012 and terminating on 30th June 2014, the test for a fixed term contract has been satisfied. The letter of offer dated 16th October 2011 too does not suggest that the employment contract was on a permanent basis. The Claimant also admitted during cross-examination that it is not stated anywhere in the First Contract that it was a permanent employment.

[48] Furthermore, the Claimant also admitted that he was paid the yearly completion bonus provided under Clause 5.1.3 of the First Contract. The yearly completion bonus was only paid to fixed term contract employees. The Employee Handbook, which is also applicable to permanent employees, however is silent on such similar benefits.

The Second Contract

[49] Once again, Clause 2.2. of the Second Contract dated 20th February 2014 provides that the Claimant is to be employed as a Teacher in KYUEM for a specific period commencing from 1st July 2014 and terminating on 30th June 2016, i.e. a fixed period of 2 years.

[50] The Claimant contends that there was no break in his employment with the Company whereby the Second Contract was executed even before the First Contract expired and that his employment had continued seamlessly. However, the fact that the contract was renewed without any break cannot by itself convert a fixed term contract

into a permanent one (**ROBERT HENRY HAWKINS v. RUSCH SDN BHD & RUSCH ASIA PACIFIC SDN BHD [2010] 4 ILR 175**).

[51] The Claimant agreed during cross-examination that the Second Contract does not state that he was employed on a permanent contract of employment. Furthermore, at the time when the Second Contract was entered into, CLW-3 was no longer the Headmaster of KYUEM. Paul Rogers (COW-1) had succeeded CLW-3 as the Headmaster of KYUEM and had overseen the drafting and preparation of the Second Contract pertaining to the Claimant's employment. COW-1 had testified during trial that he was concerned over the quality of the Claimant's voice being weak and distracting. After being assured by the Claimant that it would be sorted out via surgery, COW-1 then proceeded to offer the Second Contract to the Claimant. It is pertinent to note that no evidence was produced before this Court that throughout the said negotiations between COW-1 and the Claimant leading to the execution of the Second Contract that the Claimant had challenged, protested or claimed that his employment contract was in fact a permanent one. Thus, the Claimant had full knowledge and accepted the fact that his employment contract was on a fixed term basis.

[52] It is also to be noted that no similar letter such as the letter of offer dated 16th October 2011 (which was issued prior to the First Contract) was issued before the Second Contract was executed. The Second Contract did not have any provision for renewal.

[53] The Claimant admitted that he was paid the yearly completion bonus provided under Clause 5.1.5 of the Second Contract, again evidencing the fact that the Claimant was a fixed term employee.

[54] There is not a single shred of evidence that suggests that the Second Contract was a permanent contract of employment.

Why was the Claimant placed under a fixed term contract of employment?

[55] The Claimant, being a British citizen, was subject to Malaysian immigration laws pertaining to his employment with the Company. His contracts of employment were contingent upon the issuance of a valid residential visa and Work Permit/Employment Pass. The Claimant agreed during trial that without a new residential visa and Work Permit/Employment Pass, he would not have commenced employment under the two contracts with the Company. Both the Claimant and CLW-3 admitted that, being expatriates, their respective employment with the Company were subject to them being issued a valid residential visa and a Work Permit/Employment Pass.

[56] The Claimant also agreed during cross-examination that the Company was not in the position to employ him on a permanent basis or to guarantee automatic renewals of the contracts as, being an expatriate, his employment was subject to the issuance of a valid residential visa and Work Permit/Employment Pass. Thus, there could be no understanding for a permanent employment under such circumstances.

[57] This legal requirement of the Claimant having to obtain a valid residential visa and Work Permit/Employment Pass in order to work in Malaysia is also embodied in Clause 3.1.2 of both the First Contract and the Second Contract:-

> "*3.1 The appointment of the Teacher is subject to:-*
>
> .....
>
> *3.1.2* ***a valid residential visa and work permit being issued for the Teacher***". (Emphasis added)

[58] Counsel for the Claimant relied on the oft-quoted case of **HAN CHIANG HIGH SCHOOL/PENANG HAN CHIANG ASSOCIATED CHINESE SCHOOLS ASSOCIATION v. NATIONAL UNION OF TEACHERS IN INDEPENDENT SCHOOLS, W. M'SIA [1988] 2 ILR 611** to support the Claimant's contention that his fixed term contracts with the Company was for all intents and purposes a permanent employment disguised as a fixed term employment contract. In the **HAN CHIANG** case, some 83 teachers were employed in the Han Chiang High School on a fixed term basis for a period of two years at any one time. 53 teachers then joined the Union of Teachers in Independent Schools. The Minister of Education ordered that the school accord recognition to the Union. Immediately thereafter, the teachers were told that their service agreement would expire within a month's time and thanked them for their service to the school. The Industrial Court held that the system of fixed term contracts in the school was employed not out of genuine necessity but as a means of control and subjugation of its teaching employees. The learned Industrial Court Chairman, Dato' Wong Chin Wee, held:-

"In a framework of statute-guaranteed security of employment however, where the termination of a workman's employment without just cause or excuse may be subject to an award of reinstatement by the Industrial Court (see Section 20 of the Act , and the case of Dr. Dutt v. Assunta Hospital *in Federal Court Civil Appeal No. 276 of 1980 for the section's origins, interpretation and* raison d'etre*) it would be an obvious loophole if any employer could evade the statutory protection by making a series of contracts of finite duration with his workmen. In other words, employers could engage their workmen on a succession of fixed-term contracts of, say, three months duration each and simply fail to re-engage particular workmen whom they wanted to get rid of, without having to face a claim for reinstatement. This would, to quote from* Dr. Dutt*'s case, make nonsense of the whole purpose and intent of and stultify, the Act as well as offend well-known principles of interpretation of statutes.*

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. These are the types of work envisaged in Section 11 of the Employment Act, 1955, which may be embodied in contracts of service for a specified period of time. This type of fixed-term contracts are therefore to be differentiated from the so-called fixed-term contracts which are in fact ongoing, permanent contracts of employment.

In deciding whether a contract is genuinely fixed-term or not, English tribunals were told:

> *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 ongoing, 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 the Act. (*Terry v. East Sussex County Council, 1976, I.C.R. 536*, per Phillips J.)*

The learned judge's sound advice is applicable to our own situation. Fixed-term contracts are not excluded from the provisions on security of employment in our Act, and this security "extends as much to non-union employees as to union employees."

The learned Industrial Court Chairman went on to hold:-

> "*...the Court finds that* ***the system of fixed-term contracts in the School was employed not out of genuine necessity but as a means of control and subjugation of its teaching employees***.
>
> *For the aforestated principles and reasons, the Court finds that the employments of the 35 Claimants are ordinary employments dressed up in the form of fixed-term contracts. These are not genuine fixed-term contracts. There exist between the Claimants and the School ordinary contracts of "permanent" as opposed to "temporary" one-off employment. As such, they come within the framework of the law on workmen's right to security of employment and the right not to be dismissed without just cause or excuse*". (Emphasis added)

[59] The facts of the **HAN CHIANG** case however are distinguishable from the case here in that in **HAN CHIANG** the teachers were Malaysian citizens who were dismissed for their desire to create a union, and the school took the steps to exercise their control and subjugation over the said teachers. In the case at hand, there was a necessity to place the Claimant on fixed term contracts due to his status as an expatriate and thus subject to Malaysian immigration laws in obtaining the necessary residential visa and Work Permit/Employment Pass. The Company was in no position

to guarantee permanent employment as the granting of the residential visa and Work Permit/Employment Pass was solely at the discretion of the Immigration Department of Malaysia, was valid for a limited period of time and in fact could even be cancelled at any point in time of its duration if any of the attached conditions were breached by the holder of the Pass. Thus, the practice of granting fixed term period of employment to foreign employees.

[60] Even though the Claimant's job functions were on-going, that in itself would still not override the fact that foreign employees' employment in Malaysia is contingent upon the issuance of a valid residential visa and Work Permit/Employment Pass by the Immigration Department of Malaysia, pursuant to the Immigration Regulations 1963. In the case of **LILLY INDUSTRIES (M) SDN BHD v. BILLY WAYNE SELSOR [2006] 3 ILR 1507** the learned Industrial Court Chairman, N. Rajasegaran, stated the following:-

> "*The claimant's employment in the company was made possible and given legal status by the issuance of periodic employment passes by the Malaysian Immigration authorities. As Wood Pro Manager, he was given an employment pass for the period 2 February 2000 up to 19 January 2002. His employment beyond the date of 19 January 2002 was unassured and depended on the Immigration authorities issuing him further employment passes. As to whether he would be issued any is a matter of speculation. Also, the mysteries of the workings of the Immigration authorities remain unknown to me. The claimant is therefore put in a position no different from that of a workman employed under a fixed term contract of employment. And that fixed term employment was for the duration of his employment pass*".

[61] The issue of whether a foreign employee can be given a permanent employment came up recently before the Court of Appeal in **AIMS CYBERJAYA SDN BHD v. AHMAD ZAHRI BIN MIRZA ABDUL HAMID [Court of Appeal Civil Appal No. W-02(A)-287-02/2017]** where it was held (*vide* the judgment of Dr. Badariah Binti Sahamid, JCA):-

> *"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.*
>
> *In respect of an expatriate employee, authorities have held that there cannot be a permanent employee. 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 Rajendran 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 the 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'.*
>
> *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".

[62] The Claimant, being a foreign employee, could not reasonably expect himself to be in permanent employment in Malaysia for an infinite period of time when he knew fully well that his employment was subject to him obtaining the residential visa and Work Permit/Employment Pass periodically. The First Contract and the Second Contract clearly did not provide for such a situation.

[63] Thus, the Court finds that the Company had discharged its burden of proof to show, on a balance of probabilities, that the First Contract of Employment dated 15th January 2012 and more importantly the Second Contract of Employment dated 20th February 2014 between the Claimant and the Company were indeed genuine fixed term contracts.

(ii) If it was not a genuine fixed term contract, whether there was a dismissal and, if so, was it done with just cause and excuse

[64] As stated above, the Court finds that the Claimant's employment contract with the Company was on a fixed term basis.

[65] Since the Court finds that the employment contract was a genuine fixed term contract, therefore the question of there being a dismissal does not arise. The Claimant's employment contract period had clearly expired on 30th June 2016 and was

not renewed thereafter. The Claimant's tenure of employment with the Company had simply come to an end due to effluxion of time. There is no obligation on the Company to inform or explain the reasons for the non-renewal of the Claimant's fixed term contract of employment. In the case of **M VASAGAM MUTHUSAMY v. KESATUAN PEKERJA-PEKERJA RESORTS WORLD, PAHANG & ANOR [2003] 5 CLJ 448** it was held by Faiza Tamby Chik J:-

> *"It is noted that the first respondent's reason for not renewing the said contract was because it was able to carry on its functions without the services of the executive secretary, having had the benefit of the first respondent's expertise in union matters. The Industrial Court was of the view that this reason was good enough for not renewing the applicant's contract. It is also noted that the applicant's contention that the reason advanced by the first respondent for the non-renewal of the applicant's contract implied redundancy was rejected by the Industrial Court itself. I come to the conclusion that* ***the fact that a finding was reached and that there was a genuine fixed term contract between the first respondent and the applicant would make the whole issue of whether or not there were good reasons to not renew the said contract irrelevant****".* (Emphasis added)

[66] Further, in **TOKO INOMOTO & ORS v. MAHKAMAH PERUSAHAAN MALAYSIA & ANOR [2017] 1 LNS 201** it was held:-

> *"If the Court comes to the conclusion that the fixed-term contracts are genuine, then the issue of dismissal would no longer arise. This is because their services with the Company would come to a natural end due to effluxion of time. In such situations, the Company just has to notify the Claimants of the fact that their employment relationship will be coming to an end in accordance with their respective fixed-term contracts. There is no need to explain the non-renewal".*

[67] As the Court finds that the employment contract was a genuine fixed term contract and thus the issue of dismissal does not arise, likewise the issue of reinstatement becomes a non-issue.

VI. Conclusion

[68] The Claimant's fixed term employment contract had come to a natural end on 30th June 2016 due to effluxion of time. There is thus no issue of unfair dismissal in this case.

[69] The Claimant's case is hereby dismissed.

HANDED DOWN AND DATED THIS 21ST DAY OF MARCH 2019.

(PARAMALINGAM A/L J. DORAISAMY)
CHAIRMAN
INDUSTRIAL COURT, MALAYSIA
KUALA LUMPUR