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## THE ELEMENTS OF A GENUINE FIXED-TERM CONTRACT: A REVIEW ON MALAYSIAN LEGAL FRAMEWORK

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### Abstract:

Fixed-term employment generally may be referred as an employment contract in which an organization hire an employee for a specific time period. The primary objective in offering a fixed-term employment contract is because the employer does not have to commit to the permanent employment of the incoming employee. There is no issue of unfair dismissal arises in the principle of fixed-term contract. The Court will determine whether the employment contract in dispute is in fact a genuine fixed-term contract or a permanent contract disguised as fixed-term instead. The employer is not obliged to renew the contract after its expiry and no reasons need be given for non-renewal once it was established that the employment contract is a genuine fixed-term employment. Furthermore, aside from various meaning of genuine fixed-term contract defined in Malaysian cases, it not may not always be successful to protect the employee. Thus, this paper focuses on the issue of the employees' rights and protection recruited under fixed-term contract in Malaysia by referring to the previous cases.

### Keywords:

Contract Of Service; Employment Law; Fixed-Term Contract; Job Insecurity

## Introduction

The non-standard employment in particular includes a fixed-term contracts is a growing global phenomenon that affects more than 30 % of the worldwide workforce (The Organisation for Economic Co-operation and Development (OECD), 2015). Besides, it is the most common

practice for employers in Malaysia to hire employees under a fixed-term contract (Sheena, 2020). This type of employment has gained its popularity in Malaysia among employers and has displaced the standard form of employment in recent years (Saad, 2011). The main objective in offering a fixed-term employment contract is because the employer does not have to commit to the permanent employment of the incoming employee.

Thus, it is important to note that, problems can arise if a fixed-term contract is not renewed after it has expired. In such a dispute, the worker will claim unfair dismissal and seek reinstatement from their employer. According to Thawley (2012), a fixed term contract or also known as temporary work is a class of employment where the correlation between the employer and the employee would last for a specific time or until a particular task have been completed.

Not surprisingly, a fixed-term employment defined as jobs based on contracts with a prearranged expiry date, is one of the most distinguishable demonstrations of job insecurity. In contrast to permanent employment, which used to be the standard employment relationship, fixed-term contracts can be expected to negatively affect individuals in many ways (Burchell, 1994). Fixed-term employees, hereinafter also referred to as temporary employees occasionally given the chance to participate in a career planning and training as well as stereotypically hold lower ranks in their workplaces (Virtanen et.al.,2003).

There is no issue of unfair dismissal arise in the principle of fixed-term contract. This is also implying that there was no termination or dismissal by the employer in the first place. The court in *Mohamed Tolba Said v Marsha Sdn. Bhd.* [2018] ILJU 142 described a fixed-term contract as one which has a definite beginning and a definite end. In common law, when a contract for a fixed-term expires, it terminates of itself. This conveys the meaning that it has not been terminated by either party. In the conventional sense, there is neither dismissal nor resignation. This is absolutely affirmed in Section 11 of the Employment Act 1955. Nevertheless, the employers should be aware that the Courts may question whether a particular fixed term contract is in fact a permanent contract or a genuine fixed-term contract in the event of an unfair dismissal claim in the Industrial Court brought by the employee.

The prime question is that the Court will determine whether the employment contract in dispute is in fact a genuine fixed-term contract or a permanent contract disguised as fixed term instead. The Court of Appeal in *Colgate Palmolive (M) Sdn. Bhd. v Yap Kok Foong* [2003] 3 CLJ 9 held that an employee in a genuine fixed-term employment contract leaves at the expiration of the fixed-term and that is just cause enough for the employer to formally bring an end to their employment relationship. Once it is established that there is a genuine fixed-term contract, the dissolution of the contract upon the expiry of its fixed term would clearly spell the end of the employee's tenure with the employer (*M Vasagam Muthusamy v. Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor* [2003] 5 CLJ 448).

### **Problem Statement**

The type of employment of fixed-term contracts had become a trend and caused a lot of problems such as unequal treatments and unfair dismissal (Mohd Rozaimy et al.,2019). The temporary employees are prone to the job and financial insecurity, miss out on employment benefits like training and often the first to lose their jobs in an economic downturn. (Nur Hidayatul et al.,2019). Also, the Industrial Court in *Han Chiang School, Penang Han Chiang Associated Chinese Schools Association v. National Union of Teachers in Independent*

Schools, W. Malaysia [1988] 2 ILR 611, held that in the case of a conventional fixed-term contract, the worker may have a grievance that he has not been hired by his employer under a fresh contract, but ordinarily an employer is not under any obligation in law to enter into a contract. At common law, therefore, there is simply no remedy.

Lord Lindsay in *British Broadcasting Corporation v Kelly-Phillips* [1997] IRLR 57 stated that fixed-term contracts are not defined by the legislature but the meaning of the phrase has been left to the courts. According to Nur Hidayatul et.al., (2019), no law directly regulates the fixed-term employment contract in Malaysia. In addition, there is no terminology of fixed-term contract in Employment Act 1955 (Aminuddin, 2006). The closest reference can be made to the term is in Section 11 (1) of the Employment Act 1955. The wordings of that section reflect the definition of a fixed-term employment contract (Nur Hidayatul et al., 2019). However, in term of the terminology on the genuine fixed-term contract is still silent in the Act.

The term of genuine fixed-term contract has been defined in various Malaysian cases. The Industrial Court in *Han Chiang School* further explained the meaning of genuine fixed term contracts "... 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."

Federal Court in recent case of *Ahmad Zahri Bin Mirza Abdul Hamid v Aims Cyberjaya Sdn. Bhd.* [2020] 1 LNS 494 held that the question of whether an employer had a genuine need for the service of an employee for a fixed duration may be divided into the following three considerations: (i) The intention of the parties; (ii) The employer's subsequent conduct during the course of the employee's employment; and (iii) The nature of the employer's business and the nature of work which the employee was engaged to perform. In this case the Federal Court was satisfied with the nature of the appellant's work that was an ongoing, continuous employment without a break and therefore in reality a permanent employee. From the case, it can be concluded that a contract of employment which renewed consecutively without application by the employee and without any intermittent breaks in between is a permanent employment.

Regardless of various meaning of genuine fixed-term contract in Malaysian cases, it not may not always be successful to protect the employee. For instance, in the case *Vincent Pillai Leelakanda Pillai v Subang Jaya Hotel Development Sdn. Bhd.* (Award No. 487 of 2018) the court decided that the question of being unjust dismissal does not arise due to the contract of employment between the plaintiff and the defendant was genuinely a fixed-term contract. Even though the employee is able to prove that there exists an unjust labour practice exercised by the employer, yet there was no chance for them to reinstated to the previous position (Nur Hidayatul et.al., 2019). Eventually the employee still remains unprotected and suffered unemployed.

The similar situation can be found in a recent case of *Norbaizura Binti Abdullah v Universiti Sultan Azlan Shah* (Award No. 941 of 2020). The Industrial Court in this case was held that contract was a genuine fixed-term contract and the employer was under no obligation to renew the employee's contract. In fact in this case, the employer also was not responsible to give reason of not renewing the contract even though the employee has serve to the institution for seven years. The court in *M. Vasagam Muthusamy v. Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor* [2003] 5 MLJ 262 held that, the employer was under no obligation to state any reasons for the non-renewal of a fixed-term contract as it was clear to both parties that the fixed-term contract was to expire by a specified date.

From the foregoing cases, it can be said that where the contract of employment is a genuine fixed-term, the question whether there was or was not a discharge does not arise merely because the contract terminates when its expiration date is reached. Once it is established that the employment contract is a genuine fixed-term employment, the employer is not obliged to renew the contract after its expiry and no reasons need be given for non-renewal.

In addition, there is no definite and clear legislation to protect the employee and therefore it is essential to conduct this study in order to identify the genuine fixed-term contract that serve justice to both the employee and the employer. Therefore, this study proposes to examine the elements of a genuine fixed-term employment and recommend a new legislation in order to provide rights and protection to the employee in Malaysia and to prevent mistreatment and exploitation by the employer.

## Literature Review

### *Definition of A Fixed Term Contract and Genuine Fixed Term Contract*

Section 3 of the Ireland's Protection of Employees (Fixed Term Work) Act 2003 defined fixed-term employee as a person who entered into a contract of employment with an employer under which the end of the contract is determined by an objective condition such as the attainment of a specified date, the completion of a specified task or the occurrence of a specified event. In Malaysia under Section 11 (1) of the Employment Act 1955 provides that a contract of service for a specified period of time or for the performance of a specified piece of work shall, unless otherwise terminated in accordance with this Part, terminate when the period of time for which such contract was made has expired or when the piece of work specified in such contract has been completed.

According to *Dixon v British Broadcasting Corporation* [1979] I.C.R. 281, the court emphasized that a fixed term contract must be for a specific period. The court in *Mohamed Tolba Said v Marsha Sdn. Bhd.* [2018] ILJU 142 described a fixed term contract as a one which has a specific beginning and a specific end. An employee in a genuine fixed term employment contract leaves at the expiration of the fixed term and that is just cause enough for the employer to formally bring an end to their employment relationship (*Colgate Palmolive (M) Sdn. Bhd. v Yap Kok Foong* [2003] 3 CLJ 9).

In *Toko Inomoto & Ors v Industrial Court & Anor* [2017] 1 LNS 201, the court held that genuine fixed term contract would come to a natural end due to effluxion of time. The court in *Kesatuan Pekerja-Pekerja Resorts World, Pahang v. M. Vasagam Muthusamy* [1999] 1 ILR 369 held that in the contract of genuine fixed-term contract, it is a normal practice that the

contract automatically comes to end of itself unless it is expressly renewed. In ordinary, there is neither rescission nor termination and the letter not to renew the employee was not a letter of termination. It was purely a letter of non-renewal.

In Malaysia, the Employment Act 1955 or in any other Acts did not provide clearly on the definition for a genuine fixed-term contract. Nevertheless, case law interprets a genuine fixed-term contract as the parties, that both employer and employee acknowledge that there is no agreement to renew the contract upon expiration (Donovan, 2015). This has been decided by the Industrial Court in *Han Chiang School* further explained the meaning of genuine fixed term contracts "... there are genuine fixed-term contracts, where both parties recognise there is no understanding that the contract will be renewed on expiry".

### ***The Current Legal Protection and Gap***

In *Han Chiang High School v. National Union of Teachers in Independent Schools, West Malaysia* [1988] 2 ILR 611, a worker who is employed on a sequence of fixed term contracts may observed by the Industrial Court to be a permanent employee. In considering whether a fixed-term contract is genuine, courts also deliberate the subsequent conduct of the employer as well as the total duration of the employee's employment as in the case of *Sime UEP Development Sdn. Bhd. v Chu Ah Poi* [1996] 1 ILR 256. In this case, the company hired an employee on a fixed-term contract of one year which was then renewed annually for three more years. At each expiry, the company automatically renewed the contract without the employee having to apply for an extension. The company also granted the employee salary increases at each contract renewal. During the four years of his employment, the employee was involved in various projects.

For the next term the company did not renew the contract. The Labor Court found that the fixed-term contracts were not genuine and the company's subsequent conduct and the employee's overall length of service showed in fact that his employment was open-ended. However, in particular, there are no limitations or justification requirements on the use of fixed-term contracts, no limit on the maximum number of successive fixed-term contracts and no limit on the maximum total duration of fixed-term contracts found in applicable employment laws. (Hanita, 2011).

In the case of *Holiday Villages of Malaysia Sdn Bhd v Mohd Zaizam Mustafa* [2006] 2 LNS 0812, the court held that the claimant indeed in permanent employment on the reason that he was given a new contract without the need to reapply a new one. In this case the claimant has been employed as seasonal employee and subject to fixed term contract which would range from three to six months or for a season and the claimant was subsequently employed for six consecutive seasons. In *Malaysia Airlines Bhd v Micheal Ng Liang Kok* [2000] 3 ILR 179 at 186E, the court considered the claimant as a permanent employee on the ground that the position was not in nature a temporary operation.

According to Zulazhar et al., 2018, if there is specific Act or Statute, only then the law will protect those employees who have been identify in it and left those who are not to stand and fight for themselves. In addition, if an employee is not covered by the Act, then he will have to rely on the terms and conditions of his contract to accord him equal treatment and protection. In accordance to Section 30(5) of the Industrial Relations Act 1967, the court has power as a court of social justice to disregard the express terms and conditions of the employment contract



and shall act according to the equity, good conscience and substantial merits of the case (Ashgar and Farheen, 2012). However, the claim by the fixed-term contract employee may not always be successful even though the Industrial Court is the court of social justice (Mohd Rozaimy et. al., 2018). Furthermore, Mohd Rozaimy et.al.,(2018) concluded that the Employment Act 1955 has left out and denied most of fixed-term contract employee's rights and protection in the employment. This can relate to the case of *Jon Paul Dante v Malaysian Philharmonic Orchestra* [2012] MLJU 1295 where the employee fails to recourse him to continue the employment even in fact he has been treated unfairly by the employer.

In most of the cases, the court made a finding that the fixed-term contract has formally brought an end to the employment relationship and there was no obligation for the company to states reasons for the non-renewal of the said contract. This can be seen in the case of *Colgate Palmolive (M) Sdn. Bhd. v. Yap Pak Foong* [2001] 3 CLJ 9 and *M. Vasagam Muthusamy v. Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor* [2003] 5 MLJ 262. Also, in *Asian Supply Base Sdn. Bhd. v. Terry Mogindol* Award No. 1592 of 2004 [2005] 1 ILR 708, the court has found that the contract in question is a genuine fixed-term contract of employment and the question of whether or not there was wrongful discharged does not arise.

### ***A Legal Benchmark to Employment Protection***

The increase in atypical employees such as part-time, fixed-term and temporary workers, has become a major issue in employment law and labour market policy worldwide. In harmony with the developments of case law, several European countries introduced legislation in the 1980s regulating the abuse of fixed-term contracts and requiring non-discrimination between fixed-term and permanent employees (Horiya, N. & Takashi, A. 2010). Ireland has introduced Protection of Employees (Fixed Term Work) Act in 2003. This law came into force on 14 July 2003 and aims to ensure that workers on fixed-term contracts are not treated less favourably than comparable workers on permanent contracts. In addition, the law also aims to abolish the practice of employing workers on successive fixed-term contracts.

A case from Department of Employment Affairs and Social Protection and Anna Concarr FTD184, involved a case where the employee alleged that the employer had breached Section 19(1) of the Protection of Employees (Fixed Term Work) Act 2003, after more than four years of continuous fixed-term employment contract. The employee argued that the fixed-term contract of employment had become a contract of indefinite duration by operation of law by virtue of section 9(3) of the Act. The court in this case referred to EU Directive 99/70/EC and emphasised that the wording of Section 9 needed to be carefully examined.

Moreover, the court pointed out that the overall purpose of the wording Section 9 was to regulate the circumstances in which a fixed-term contract could be renewed. Thus, the court held in this case that there was no breach of Section 9 where fixed term contract was not renewed. This means that when contracts are renewed that the provisions of Section 9 benefit and protect the employees. This makes sense as the Directive and the law are there to protect workers when it comes to successive extensions of fixed-term contracts. This need to be compared to the case of *Donegal County Council and James Sheridan* FTD 185. In this case, the worker had been employed on a fixed-term basis for more than four continuous years and had several fixed-term contracts. In this case, the employee had been given a full-time permanent contract at the time of the hearing.

In parallel with the demand for fixed-term contracts in the employment market, the Parliament of United Kingdom has developed many laws that directly and indirectly protect fixed-term workers. These laws include the Contract of Employment Act 1963 and 1972, the Equal Pay Act 1970, the Employment Protection (Consolidation) Act 1968 and many others. Despite all these laws, fixed-term workers were still treated unfairly and discriminated against until the government enacted the Fixed-Term Employees (Prevention of Unfavourable Treatment) Regulations 2002 and the Agency Workers Regulations 2010 (Nur Hidayatul et.al.,2019).

### ***Fixed Term Employment Contract and Job Insecurity***

Nearly in all European countries, fixed-term contract is the most leading form of non-standard employment. This type of employment which include a fixed-term contract provide organizations with a floor of flexibility, but it poses demands on employees in the form of job insecurity (De Witte, 1999). The employees belonging to the flexibility reserve usually have less job security, lower earnings and fewer other job rewards compared to permanent core workers (Michael et.al., 2007).

This job insecurity relates to the employee's perception about potential involuntary job loss. Fixed-term contracts are central to definitions of insecurity based on atypical or precarious work (Laura et.al.,2017). Moreover, (OECD, 2014) reports that less than 50 % of the fixed-term employees are employed in a permanent position three years later. Not to mention, studies stipulate that repeated period of fixed-term employment have a particularly negative effect on the possibility of receiving a permanent employment contract (Gagliarducci, 2005).

Additionally, there is clear evidence that people working on fixed-term contracts experience higher levels of affective job insecurity (Munoz et.al.,2010). Employees with fixed-term contracts face higher uncertainty about their future employment than permanent employees do. They cannot be certain whether their employer will extend their contract (Nicolas et.al.,2021). According to stress theory, anticipating the life event of job loss and loss of financial resources implied by a fixed-term contract can trigger stress and thus make people worry.

Besides, (Berton et.al.,2007) demonstrates that receiving a fixed-term employment does not raise the employees' chances to obtain a permanent position in the future. This was also supported by (De Cuyper et.al.,2009) that a fixed-term employees experience more job insecurity than permanent employees. On top of that, fixed-term workers frequently receive lower pay and fewer benefits, occasionally given the chance to participate in a career planning and training as well as stereotypically hold lower ranks in their workplaces (Virtanen et.al.,2003).

In conclusion, based on the above discussion, a specific provision in term of the elements and criteria of genuine fixed-term contract in protecting employee's security of tenure is absence in the Malaysian legal framework far from the protection in the United Kingdom. However, the term and meaning of genuine fixed term contract has been defined in various Malaysian cases. Even though some of the cases also considered several elements in determining a genuine fixed-term in the employment contract, it is nonetheless the case.

Federal Court in a very recent case of Ahmad Zahri Bin Mirza Abdul Halim v AIMS Cyberjaya Sdn Bhd [2020] 5 MJL 58 decided that an employment contract successively renewed without the application by the employee is in fact a permanent employment. Indeed, in this case it is

very clear that the court is in favour with the employee because of the element of 'successive renewal of the contract by the employer' applies. Still, no protection to the employee who their employer employs the concept of genuine fixed-term as illustrated in the case of Mohamed Tolba Said v Marsha Sdn. Bhd. [2018] ILJU 142.

Above all, regardless of various meaning of genuine fixed-term contract in Malaysian cases, it may not always be successful to protect the employee. For instance, in the latest case of Norbaizura Binti Abdullah v Universiti Sultan Azlan Shah (Award No. 941 of 2020). The Industrial Court held that the contract was a genuine fixed-term contract and the employer was under no obligation to renew the employee's contract. In fact, in this case, the employer also was not responsible to give reason of not renewing the contract even though the employee has served to the university for seven years. Consequently, the issue of unfair dismissal does not arise if the court considers the case a genuine fixed-term as there was no termination or dismissal by the employer.

Thus, the ultimate focus of this paper is to propose a definite element that will be safeguarding those workers from a job insecurity plus mistreatment by the employer as they have served to the company for several years. As for the recommendation, an introduction of a new legal framework is essential in order to provide rights and protection to the employee and to serve justice to both employer and the employee. Furthermore, these rights and protections is also very important to the workers that are maltreated by employers who use the principle of so-called genuine fixed-term contract as a defence.

### **Discussion & Conclusions**

In conclusion, based on the above discussion, a specific provision in term of the elements and criteria of genuine fixed-term contract in protecting employee's security of tenure is absence in the Malaysian legal framework far from the protection in the United Kingdom. However, the term and meaning of genuine fixed term contract has been defined in various Malaysian cases. Even though some of the cases also considered several elements in determining a genuine fixed-term in the employment contract, it is nonetheless the case.

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