HASNI HASSAN & ORS A

v.

MENTERI SUMBER MANUSIA & ANOR

COURT OF APPEAL, PUTRAJAYA B
ABDUL WAHAB PATAIL JCA
LIM YEE LAN JCA
MAH WENG KWAI J
[CIVIL APPEAL NO: W-01-397-2010]
21 JUNE 2012 C

CONTRACT: *Employment contract - Breach - Appellants' fixed term contracts not extended by second respondent - Contractual procedures - Whether followed - Questions of facts and law - Whether issues raised to be adjudicated by Industrial Court* D

LABOUR LAW: *Employment - Contract of employment - Appellants' fixed term contracts not extended by second respondent - Legitimate expectation - Failure of Minister to refer matter to Industrial Court - Whether second respondent followed contractual procedures before deciding not to extend appellants' contract - Whether issues raised to be adjudicated by Industrial Court* E

LABOUR LAW: *Industrial Court - Representation to Minister - Appellants' fixed term contracts not extended by second respondent - Failure of Minister to refer matter to Industrial Court - Whether Minister exercised discretion correctly - Whether Minister acted in excess of jurisdiction - Whether appellants' contracts contained questions of facts and law which ought to be referred to Industrial Court - Industrial Relations Act 1967, s. 20(3)* F

G

The appellants were employees of the second respondent. Sometime in 2003, the second respondent offered all senior management officers the option of either remaining under permanent employment or to accept the offer of fixed term contracts. In order to accept the fixed term contracts, the H employees would have to resign from their permanent employment. The appellants accepted the offer and voluntarily resigned from their permanent employment. The appellants' fixed term contracts was for a period of three years which commenced from 1 January 2004 until 31 December 2006. On 31 December 2006, the I appellants' fixed term contracts were not extended and lapsed due to effluxion of time. When the second respondent refused to

extend their contracts, the appellants deemed themselves to have been dismissed without just cause or excuse and lodged representations with the Industrial Relations Department. The Minister of Human Resource ('first respondent'), however, decided not to refer the representations to the Industrial Court for an award under s. 20(3) of the Industrial Relations Act 1967. Dissatisfied, the appellants filed an application for judicial review in the High Court for an order of *certiorari* to quash the first respondent's decision and for an order of *mandamus* requiring the first respondent to refer the said representations to the Industrial Court. The learned High Court Judge, however, dismissed the appellants' application and hence, this appeal. The issues that arose for consideration, were *inter alia:* (i) whether the second respondent was in breach when they refused to extend the contracts; (ii) whether the learned judge was correct in deciding that the first respondent had acted properly in refusing to refer the representations to the Industrial Court; (iii) whether the second respondent failed to comply with the terms and conditions of the fixed term contracts; and (iv) whether the appellants had a legitimate expectation to have their fixed terms contracts extended in accordance with cls. 1.3 and 8 of the fixed term contracts and that there had been a breach of that expectation when the second respondent did not carry out the assessments of their performance with a view of extending their contracts.

Held (allowing appeal with costs)
Per Mah Weng Kwai J delivering the judgment of the court:

(1) The first respondent was not merely to act as a "postman" between the Industrial Relations Department and the Industrial Court and to refer every representation to the Industrial Court. Only fit and proper cases ought to be referred by the Minister to the Industrial Court. However, where there has been procedural non-compliance and unfairness, a proper exercise of discretion by the first respondent would dictate a reference of the appellants' representations to the Industrial Court. (para 37)

(1a) The learned judge erred when he held that the first respondent had exercised his discretion properly and correctly based on the information and material available before him. The first respondent's decision not to refer the representations to the Industrial Court was irrational or

unreasonable in the circumstances and in excess of jurisdiction. Further, the first respondent misdirected himself in law and considered irrelevant matters. (paras 45 & 47)

(2) The clauses in the contract sets out the contractual procedures to be followed by the second respondent when deciding whether or not to extend the appellants' contract. Clause 1.3 of the fixed term contract used the word "shall" which *prima facie* would mean that the second respondent was obliged to consider the extension of the appellants' service which was subject to the assessment of their performance. (paras 21 & 26)

(3) The appellants' representations to the first respondent would depend on, *inter alia*, the interpretation of cls. 1.3 and 8 of the fixed term contracts. Such an interpretation of the contract was a question of law and the first respondent, in the proper exercise of his discretion, ought to have referred the representations to the Industrial Court. Further, the issue on whether the second respondent had complied with the conditions as set out in the fixed term contracts was an issue for the Industrial Court to adjudicate. (paras 29 & 30)

(4) The question of whether the fixed term contracts were genuine was a question of law which was to be decided by the Industrial Court and not by the first respondent. It was not for the first respondent to say that by accepting the fixed term contracts the appellants must have understood the risks of doing so and were bound by the terms therein. Further, in the absence of any assessment of performance, whether the appellants' services were to continue until a proper assessment was done itself raised a serious question of fact and law for the adjudication of the Industrial Court. (paras 31 & 32)

(5) The first respondent dismissed the allegation that the appellants were made targets for replacement by the second respondent. By doing this, the first respondent had transgressed his powers. Whether the appellants had been made targets for replacement was a question of fact and law which had to be determined by the Industrial Court. (para 35)

(6) The appellants' legitimate expectation was with valid basis and was well-founded. The appellants were entitled to a substantive benefit under the fixed term contracts. They had a right to have their contracts considered for extension. If that was done after the reports on the assessments of performance were made available and the Committee still decided not to extend the contract, then of course the appellants would have no ground to complain. Thus, the appellants were entitled to procedural fairness in full compliance of cl. 1.3 read with cl. 8 of the fixed term contracts before the second respondent could decide not to extend the appellants' contract. (paras 41)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu merupakan pekerja responden kedua. Pada tahun 2003, responden kedua telah membuat tawaran kepada semua pegawai pengurusan kanan berkenaan pilihan sama ada untuk meneruskan dengan pekerjaan kekal ataupun untuk menerima tawaran bagi kontrak terma tetap. Untuk menerima tawaran kontrak tersebut, pekerja-perkerja perlu meletak jawatan daripada pekerjaan kekal mereka. Perayu-perayu telah menerima tawaran itu dan secara sukarela telah meletak jawatan daripada pekerjaan kekal mereka. Kontrak terma tetap perayu-perayu adalah untuk tempoh tiga tahun yang bermula dari 1 Januari 2004 sehingga 31 Disember 2006. Pada 31 Disember 2006, kontrak terma tetap perayu-perayu tidak dilanjutkan dan tamat disebabkan oleh pelupusan masa. Apabila responden kedua gagal untuk melanjutkan kontrak mereka, perayu-perayu telah menganggap diri mereka sebagai dibuang kerja tanpa sebarang sebab atau alasan yang adil dan telah membuat representasi dengan Jabatan Perhubungan Perusahaan. Menteri Sumber Manusia ('defendan pertama'), walau bagaimanapun, memutuskan untuk tidak merujuk representasi tersebut ke Mahkamah Perusahaan bagi suatu award di bawah s. 20(3) Akta Perusahaan Perhubungan 1967. Tidak berpuas hati, perayu-perayu telah memfailkan permohonan semakan kehakiman di Mahkamah Tinggi bagi perintah *certiorari* untuk membatalkan keputusan responden pertama dan suatu perintah *mandamus* yang menuntut agar responden pertama merujuk representasi tersebut kepada Mahkamah Perusahaan. Yang arif Hakim Mahkamah Tinggi, walau bagaimanapun, telah menolak permohonan pihak perayu dan oleh itu, rayuan ini. Antara isu-isu yang dibangkitkan untuk pertimbangan adalah, (i) sama ada responden kedua ingkar apabila

gagal melanjutkan kontrak-kontrak tersebut; (ii) sama ada yang arif hakim betul dalam memutuskan bahawa responden pertama telah bertindak dengan betul apabila enggan merujuk representasi kepada Mahkamah Perusahaan; (iii) sama ada responden kedua gagal untuk mematuhi terma-terma dan syarat-syarat kontrak terma tetap; dan (iv) sama ada perayu-perayu mempunyai harapan yang sah supaya kontrak mereka dilanjutkan berdasarkan kl. 1.3 dan kl. 8 kontrak terma tetap dan terdapat kemungkiran terhadap harapan tersebut apabila responden kedua tidak membuat penilaian terhadap prestasi perayu-perayu dengan pandangan untuk melanjutkan kontrak-kontrak mereka.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Mah Weng Kwai H menyampaikan penghakiman mahkamah:

(1) Responden pertama tidak sekadar bertindak sebagai "posmen" antara Jabatan Perhubungan Perusahaan dan Mahkamah Perusahaan dan untuk merujuk semua representasi kepada Mahkamah Perusahaan. Hanya kes-kes yang bersesuaian sahaja yang boleh dirujuk oleh Menteri kepada Mahkamah Perusahaan. Walau bagaimanapun, di mana terdapatnya ketidakpatuhan prosedur dan ketidakadilan, pelaksanaan budi bicara responden pertama akan mengarahkan rujukan representasi perayu-perayu ke Mahkamah Perusahaan.

(1a) Yang arif hakim khilaf apabila beliau memutuskan bahawa responden pertama telah melaksanakan budi bicaranya dengan betul berdasarkan maklumat sedia ada di hadapan beliau. Keputusan responden pertama dalam tidak merujuk representasi ke Mahkamah Perusahaan adalah tidak rasional atau tidak munasabah dalam keadaan dan melampaui bidang kuasa. Tambahan lagi, responden pertama tersalah arah dari segi undang-undang dengan mempertimbangkan isu-isu yang tidak relevan.

(2) Klausa-klausa dalam kontrak membutirkan prosedur-prosedur kontrak yang mesti diikuti oleh responden kedua semasa memutuskan sama ada untuk melanjutkan kontrak pihak perayu. Klausa 1.3 kontrak terma tetap menggunakan perkataan "shall" yang, antara lain, bermaksud bahawa responden kedua mempunyai obligasi untuk mempertimbangkan pelanjutan khidmat perayu-perayu tertakluk kepada penilaian prestasi mereka.

(3) Representasi perayu-perayu kepada responden pertama bergantung kepada, antara lain, tafsiran kl. 1.3 dan kl. 8 kontrak terma tetap. Tafsiran kontrak sebegitu merupakan persoalan undang-undang dan responden pertama, dalam melaksanakan budi bicaranya, sepatutnya merujuk representasi tersebut kepada Mahkamah Perusahaan. Tambahan lagi, isu berkenaan sama ada responden kedua telah mematuhi syarat-syarat seperti yang dinyatakan dalam kontrak terma tetap merupakan isu yang perlu diputuskan oleh Mahkamah Perusahaan.

(4) Persoalan sama ada kontrak terma tetap adalah tulen merupakan persoalan undang-undang yang mesti diputuskan oleh Mahkamah Perusahaan dan bukannya oleh responden pertama. Ia bukanlah untuk responden pertama untuk menyatakan bahawa dengan menerima kontrak terma tetap, perayu-perayu sepatutnya memahami risiko dengan berbuat sedemikian dan terikat kepada terma-terma di dalamnya. Tambahan lagi, tanpa sebarang penilaian prestasi, sama ada khidmat perayu-perayu sepatutnya dilanjutkan sehingga penilaian dibuat dengan sendirinya membangkitkan persoalan fakta dan undang-undang untuk diputuskan oleh Mahkamah Perusahaan.

(5) Responden pertama telah menolak dakwaan bahawa perayu-perayu dijadikan sasaran untuk penggantian oleh responden kedua. Dengan berbuat sedemikian, responden pertama telah melampaui kuasanya. Sama ada perayu-perayu telah dijadikan sasaran untuk penggantian merupakan persoalan fakta dan undang-undang yang mesti ditentukan oleh Mahkamah Perusahaan.

(6) Harapan sah perayu-perayu mempunyai asas yang kukuh. Perayu-perayu berhak ke atas faedah substantif di bawah kontrak terma tetap. Mereka mempunyai hak untuk memastikan kontrak mereka dilanjutkan. Jika ia dibuat selepas laporan penilaian prestasi dibuat dan Jawatankuasa masih memutuskan untuk tidak melanjutkan kontrak, maka perayu-perayu sememangnya tidak mempunyai alasan untuk mengadu. Oleh itu, perayu-perayu berhak ke atas keadilan prosedur berikutan pematuhan kl. 1.3 dibaca dengan kl. 8 kontrak terma tetap sebelum responden kedua boleh memutuskan untuk tidak melanjutkan kontrak perayu-perayu.

Case(s) referred to:

John Peter Berthelsen v. Director-General of Immigration, Malaysia & Ors [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 SC ***(refd)***

Methodist Church in Malaysia, The v. Lee Chin Yok [2004] 3 ILR 334 IC ***(refd)***

Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor [1998] 1 CLJ 227 CA ***(refd)***

Minister of Labour & The Government of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(refd)***

Law Pang Ching & Ors v. Tawau Municipal Council [2010] 2 CLJ 821 CA ***(refd)***

R v. North & East Devon Health Authority ex p Coughlan [2001] QB 213 ***(refd)***

R v. Secretary of State for Social Services ex parte Khan [1973] 2 All ER 104 ***(refd)***

R (on the application of Bancoult v. Secretary of State for Foreign & Commonwealth Affairs [2008] UKHL 61 ***(refd)***

Radha Krishnan Kandiah v. Menteri Sumber Manusia Malaysia & Anor [2009] 1 LNS 1311 HC ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, s. 20(3)

For the appellant - Edward Saw; M/s Josephine, LK Chow & Co
For the 1st respondent - Wan Suhaila Mohd; SFC
For the 2nd respondent - Siva Kumar Kanagasabai (Lee Li Hoong with him); M/s Skrine

[Appeal from High Court, Kuala Lumpur; Judicial Review No: R4(2)-25-434-2007]

Reported by Kumitha Abd Majid

JUDGMENT

Mah Weng Kwai J:

Brief Facts

[1] On 31 December 2006, the appellants' fixed term contracts of employment with the second respondent were not extended and lapsed due to effluxion of time. When the second respondent refused to extend the contracts of employment the appellants deemed themselves to have been dismissed without just cause or

excuse and lodged representations with the industrial relations department. On 23 November 2007, the first respondent decided not to refer the representations to the Industrial Court for an award under s. 20(3) of the Industrial Relations Act 1967 (the Act).

[2] Being dissatisfied with the first respondent's decision the appellants filed an application for judicial review for an order of *certiorari* to quash the decision of the first respondent and an order of *mandamus* requiring the first respondent to refer the said representations to the Industrial Court.

[3] On 31 May 2010, the learned judge dismissed the appellants' application with costs.

[4] Being dissatisfied with the learned judge's decision, the appellants appealed to the Court of Appeal.

Background Of The Case

[5] The appellants were employed since the 1970s by Jabatan Telekom Malaysia. Jabatan Telekom Malaysia was privatised in 1987 and was succeeded by the second respondent, a Government Linked Company (GLC). The appellants continued working and became employees of the second respondent with continuity of service as a result of the privatisation. The appellants rose through the ranks and became general managers in various departments.

[6] Sometime in 2003, to improve the performance of GLCs, the second respondent offered all senior management officers the option of either remaining under permanent employment or to accept the offer of fixed term contracts. Employees would have to resign from their permanent employment before accepting the fixed term contracts. In consideration thereof such employees would be paid higher salaries and receive increased benefits and allowances.

[7] The appellants accepted the offer and voluntarily resigned from their permanent employment and accepted employment under the fixed term contracts for a period of three years commencing from 1 January 2004 and ending on 31 December 2006. The fixed term contracts afforded the appellants some form of security in employment in light of the procedures to be followed by the

second respondent when deciding whether these fixed term contracts would be extended or not, subject to cl. 1.3 read together with cls. 8.1, 8.2 and 8.3 of the fixed term contracts.

[8] In August 2006 the second respondent decided without prior notice or consultation, not to extend the appellants' contracts of employment after 31 December 2006.

The Appellants' Case

[9] The appellants contended that their fixed term contracts were not really "genuine fixed term contracts" and that their non-renewal amounted to unfair dismissal for purposes of a representation under s. 20 of the Act. The appellants further contended that the second respondent failed to assess their performances in accordance with cl. 8 and that the second respondent's decision which was "based on factors other than KPIs", was clearly in breach of the terms and conditions of service contained in the fixed term contracts.

The First Respondent's Case

[10] The first respondent in exercising his discretion decided that the appellants' representations were not fit (tidak wajar) to be referred under s. 20(3) of the Act.

The Second Respondent's Case

[11] The second respondent on the other hand submitted that they did not terminate the appellants' contracts of employment but that the contracts had ended due to effluxion of time. (See *R v. Secretary of State for Social Services ex parte Khan* [1973] 2 All ER 104) and that they were not obliged to renew the appellants fixed term contracts.

Decision Of The Court

[12] On 21 June 2012, this court on reading the record of appeal, the written submissions of counsel for the appellants and both the respondents and upon hearing the oral submissions of counsel aforesaid had allowed the appeal with costs.

[13] The first and second respondents have now applied for leave to appeal to the Federal Court.

A **Grounds Of Decision Of The Court**

[14] The first issue to be determined by this court is not so much of whether the fixed term contracts were "genuine" fixed term contracts or not but whether the second respondent was in
B breach when they refused to extend the contracts but instead allowed them to lapse through effluxion of time.

[15] The next issue to be determined was whether the learned judge was correct in holding in law and in fact that the first respondent had acted properly and correctly when refusing to
C refer the representations to the Industrial Court for an award.

[16] The second respondent had genuine intentions when they offered the fixed term contracts to their senior management. The intention was to increase performance and productivity and in turn
D the senior management would be able to earn higher incomes. This was in line with the government's initiative to improve the performance of GLCs. This was part of a business plan and there was no ulterior or sinister motive on the part of the second respondent when they offered the fixed term contracts. The fixed
E term contracts were not a guise to "shorten" the employment of the appellants on their previous permanent contracts.

[17] Needless to say, the appellants who held senior managerial positions in the second respondent voluntarily opted for the fixed
F term contracts and resigned from their permanent employment without any coercion on the part of the second respondent. Not all senior management who were offered the fixed term contracts accepted the offer but the appellants did.

G **[18]** Having said that, the court has to determine whether the second respondent failed to comply with the terms and conditions of the fixed term contracts when deciding not to extend the contracts and whether this amounted to an unfair dismissal without just cause or excuse.

H **[19]** The second respondent maintained that the non-renewal of the fixed term contracts was a management prerogative which the Industrial Court ought not to interfere with and accordingly the first respondent had acted within his jurisdiction by not referring the representations to the Industrial Court for an award. (See
I *Methodist Church in Malaysia, The v. Lee Chin Yok* [2004] 3 ILR 334).

[20] The appellants' arguments are based on the reading of cl. 1.3 together with cls. 8.1, 8.2 and 8.3. The mentioned clauses provide as follows:

> 1.3. An extension of service at the end of the three (3) year period shall be considered subject to the assessment on the Personnel's performance and recommendation by the Personnel's superior accordingly and decided by a committee comprising of the Chief Executive of TM, Senior Vice President of Group Human Resource and the Personnel's direct supervisor. In the absence of such an assessment and recommendation, the Personnel's service shall continue under the present contract until proper assessment of the Personnel's performance is conducted.
>
> 8.1. Key Performance Indicators (KPIs) are specific performance standards and shall be agreed upon by both parties. These KPIs in turn will be translated into tangible objectives and measures for the Personnel to achieve.
>
> 8.2. Individual performance shall be based on both the Personnel's KPI achievement and competency.
>
> 8.3. In order to ensure fairness and just cause, any non-achievement of the agreed upon KPIs shall be justified and deliberated. The Personnel's performance shall be reviewed and mitigated at least twice a year.

[21] The clauses set out the contractual procedures to be followed by the second respondent when deciding whether to extend the appellants' contract or not.

[22] Firstly, the appellants must have achieved their KPIs for the purpose of assessment of their performance under cl. 8. If the KPIs have not been achieved then the criteria must be "justified and deliberated". Performance of the appellants was to be assessed at least twice a year.

[23] Secondly, for purposes of extension of the fixed term contracts after the assessments of performance have been carried out, the appellants' respective superiors would have to make recommendations to a committee comprising of the Chief Executive Officer, the Senior Vice President of the Group Human Resource and the respective direct supervisors.

[24] If the assessments have not been carried out by the time the fixed term contracts were coming to an end, then cl. 1.3 provides that the "personnel's service shall continue under the present contract until proper assessment of the personnel's performance is conducted."

[25] The appellants complained that the second respondent did not comply with the fixed term contracts when they arbitrarily decided not to extend the appellants' period of employment. In fact, the second respondent did not clearly state that the assessments of performance of the appellants were carried out before the decision not to renew was made.

[26] It will be noted at this juncture that cl. 1.3 in line one itself uses the word "shall" which *prima facie* would mean that the second respondent was obliged to consider the extension of the appellants' service subject to the assessment of their performance.

[27] The appellants' argument was that the assessment procedures for KPI under cl. 8 must be applied to assess the appellants' performance for purposes of renewal under cl. 1.3. On the other hand, counsel for the respondents argued that cl. 8 is not to be read together with cl. 1.3 as the former deals with "variable pay program" which is not an issue in this case.

[28] The second respondent further submitted that the decision on whether to renew the appellants' fixed term contracts lay with the committee. As there was no express provision in the fixed term contracts as to the manner in which the committee was to carry out its deliberations, the committee had a wide discretion to determine whether or not to renew the appellants' contracts. Performance of the appellants was not the sole criteria for renewal and the committee could certainly consider other factors. In any event, it was argued that the appellants' respective superior officers were in the committee and would have been in a position to advise on the appellants' performance. The fact that the committee decided not to renew the fixed term contracts does not mean that the committee did not correctly assess the performance of the appellants. The committee as the decision making body has the prerogative to decide whether or not to renew the fixed term contracts of the appellants in the interest of the second respondent.

[29] The court is of the view that the appellants' representations to the first respondent would depend largely on the interpretation of cl. 1.3 and cl. 8 and in particular whether cl. 1.3 is to be read together with cls. 8.1, 8.2 and 8.3. Such an interpretation of the contract is a question of law and the first respondent in the proper exercise of his discretion ought to have referred the representations to the Industrial Court.

[30] The issue of whether the conditions set out in the fixed term contracts have been complied with by the second respondent is an issue for the Industrial Court to adjudicate. The appellants had contended that no assessment of their performance was carried out for year 2006 and that the second respondent had failed to produce any evidence on affidavit to show that the performance of the appellants had been properly assessed. The second respondent has failed to produce any evidence of any recommendation made by the respective direct supervisors of the appellants to the committee and that the committee had deliberated on them. The first respondent had laboured under a lack of evidence and this has affected the objectivity of the first respondent's decision making process. (See *Radha Krishnan Kandiah v. Menteri Sumber Manusia Malaysia & Anor* [2009] 1 LNS 1311.

[31] The question of whether the fixed term contracts are genuine is a question of law to be decided by the Industrial Court and not by the first respondent. It is not for the first respondent to say that by accepting the fixed term contracts the appellants must have understood the risks of doing so and were bound by the terms therein. No doubt the appellants were bound by the fixed term contracts and so were the second respondent. It was not up to the first respondent to say that the allegation by the appellants that their contracts were not genuine fixed term contracts was without basis and hence an after thought. By doing so, the first respondent had taken into account wholly irrelevant matters.

[32] Further, the court is of the view that, in the absence of any assessment of performance, whether the services of the appellants are to continue until a proper assessment is done itself raises a serious question of fact and law for the adjudication of the Industrial Court. The Industrial Court will have to determine whether in the absence of assessment of performances of the appellants and in light of cl. 1.3 the fixed term contracts can be deemed to have lapsed through the effluxion of time.

[33] The assessments of performance of the appellants for 2004 and 2005 have no bearing for the year 2006. The performance of the appellants must be assessed for each year. Before the committee can make any decision it must have before it the assessment for 2006 or at the very least the assessment of the appellants based on the months from January to August 2006. This was a contractual requirement which the committee had to observe. The first respondent was wrong in deciding that the committee could arrive at a decision without the benefit of an assessment of the performance of the appellants. It is incorrect for the first respondent to hold that the second respondent had to wait until the first quarter of 2007 to make an assessment on the appellants when the second respondent could have made an assessment based on the months of January to August 2006. And if the assessments were not completed by 31 December 2006, the service of the appellants would continue under cl. 1.3.

[34] While the second respondent admits that a formal process of assessment was not necessary and therefore not done, it seems to suggest that an informal process was undertaken when the appellants' respective direct supervisors who were part of the committee, would have provided the committee with their own assessment of the appellants. Whether this informal process if any, was carried out behind closed doors and to the exclusion of the appellants, would be sufficient to comply with cl. 1.3 is an issue to be determined by the Industrial Court.

[35] The appellants had also alleged that they were made targets for replacement by the second respondent. The first respondent dismissed this allegation as a mere assumption. The court is of the view that by doing so, the first respondent had transgressed his powers. Whether the appellants had been made targets for replacement was a question of fact and law which have to be determined by the Industrial Court.

[36] The court is mindful that the first respondent is not obliged to refer each and every representation to the Industrial Court. In *Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor* [1998] 1 CLJ 227, the Court of Appeal held:

> The Act does not require the Minister to refer each and every representation to the Industrial Court as Section 20(3) of the Act confers a discretion on him. The Courts will interfere only when there is evidence that his discretion has been exercised unlawfully. This discretion is vested in the Minister and not in the courts.

> Hence, when this discretion is challenged, the courts must be vigilant and resist any temptation to convert the jurisdiction of the court to review into a reconsideration on the merits as if it is an appeal.

And in *Minister of Labour & The Government of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195, the Supreme Court had this to say on the scope of the Minister's discretion to wit:

> There is no question that the power of the Minister under Section 20(3) of the Act is wide and the language used by the Legislature would seem to confer on the Minister a wide discretion whether to refer or not to refer a dispute to the Industrial Court depending on the facts of each case; provided of course he has acted *bona fide* without improper motive and he has not taken into account extraneous or irrelevant matters. He has an unfettered discretion but it should not be exercised so as to frustrate the object of the statute itself.

[37] The court wholly agrees with counsel for the respondents that the first respondent is not merely to act as a "postman" between the industrial relations department and the Industrial Court and to refer every representation to the Industrial Court. Only fit and proper cases ought to be referred by the Minister to the Industrial Court. But where there has been procedural non compliance and unfairness a proper exercise of discretion by the first respondent would dictate a reference of the appellants' representations to the Industrial Court.

[38] The second respondent had also submitted that as the appellants had resigned from their employment there was no continuity of service from their permanent employment to their fixed term employment and referred to cl. 15.1 of the fixed term contracts which states as follows:

> Both parties agree that this agreement shall supersede and is separate and distinct from all previous contracts and arrangements between the parties. For avoidance of doubt, the Personnel's immediately preceding contract employment shall cease to have effect on 1st January 2004 and the terms of this Agreement shall have no relation to and shall not be read as being part of the terms of Personnel's previous employment contract with TM.

[39] No doubt it is clear that with the appellants' resignation from their permanent employment their tenure of service would be wholly governed by the fixed term contracts. It is noteworthy that nothing is carried on from the terms of the permanent employment. But what must not be overlooked is that the term of employment of the fixed term contracts could well be beyond the three years depending on whether the contracts have been extended under cl. 1.3. The rationale of cl. 1.3 must be kept distinct from the provision of cl. 15.1. All that the appellants had to show in the judicial review was that the second respondent had failed to comply with the provisions of cl. 1.3.

Legitimate Expectation

[40] The appellants submitted that they had a legitimate expectation to have their fixed term contracts extended in accordance with the provisions of cl. 1.3 and cl. 8 and that there has been a breach of that expectation when the second respondent did not carry out the assessments of their performance with a view of extending their contracts.

[41] The court is of the view that the appellants' legitimate expectation was with valid basis and was well founded. The appellants by virtue of the doctrine was entitled to a substantive benefit under the fixed term contracts. They had a right to have their contracts considered for extension. If that was done after the reports on the assessments of performance were made available and the committee still decided not to extend the contract then of course the appellants would have no ground to complain.

[42] In the recent decision of the House of Lords in *R (on the application of Bancoult v. Secretary of State for Foreign & Commonwealth Affairs* [2008] UKHL 61 (speeches handed down on 22/10/08) Lord Carswell, while electing to remain silent on the limits of the doctrine of substantive legitimate expectation, accepted that substantive enforceable rights could be conferred by the doctrine of legitimate expectation. Lord Carswell went on to say that he was content for present purposes to accept that breach of such an expectation can give rise to an actionable claim and to consider the issue on that basis. The principles governing what is now known as substantive legitimate expectations were outlined in the English Court of Appeal case of *R v. North & East Devon Health Authority ex p. Coughlan* [2001] QB 213 in a judgment which has now become very familiar.

[43] And in *Law Pang Ching & Ors v. Tawau Municipal Council* [2010] 2 CLJ 821, Gopal Sri Ram JCA (as he then was) referred to the case of *John Peter Berthelsen v. Director-General of Immigration, Malaysia & Ors* [1986] 2 CLJ 409; [1986] CLJ (Rep) 160; [1987] 1 MLJ 134 where the Supreme Court held "that a foreign national who was in this country by virtue of an employment pass had a legitimate expectation to receive procedural fairness before the cancellation of his pass by the relevant authority".

[44] Likewise in this case, the appellants are entitled to procedural fairness in full compliance of cl. 1.3 read with cl. 8 before it could be decided by the second respondent not to extend the appellants, fixed term contracts.

Conclusion

[45] The learned judge erred when he held that the first respondent had exercised his discretion properly and correctly based on the information and material available before him.

[46] It was incorrect for the learned judge to hold that the first respondent was entitled to determine that cl. 1.3 does not require the second respondent to follow the procedure laid down in cl. 8 to assess the performance of the appellants for the purposes of KPI, when considering whether to renew the fixed term contracts under cl. 1.3.

[47] The first respondent's decision not to refer the representations to the Industrial Court was thus irrational or unreasonable in the circumstances and in excess of jurisdiction. The first respondent misdirected himself in law and considered irrelevant matters or failed to take into account relevant matters.

[48] The appellants' representations require an interpretation and/or a determination of the provisions of cl. 1.3 read together with cl. 8, which in turn would determine whether the fixed term contracts should have been extended after the proper assessments had been made or whether they would have been allowed to terminate through the effluxion of time.

[49] In the result, the appellants' appeal was allowed with costs.