



DALJIT SINGH PARTNERSHIP
ADVOCATES & SOLICITORS

達日星律師事務所



Joshua Kong
Senior Associate

LL.B (Cardiff)
Barrister at Law
(Middle Temple)

Corporate & commercial
disputes, fraud, defamation
and other civil litigation
matters.

Employee: Fixed-term or permanent?



Are you a permanent employee or a fixed term employee?

In recent times, many organisations have hired entire work forces on a fixed term contract basis. These employees, while they may have permanent and vital roles in their organisations, remain as fixed term employees “on paper”.

Permanent employees enjoy greater employment rights and benefits compared to fixed-term employees, such as the right not to be fired without just cause and the right to not have one’s employment contract terminated without sufficient prior notice. On the other hand, fixed term employees are automatically terminated at the end of their fixed term.

Let us place ourselves in the shoes of Mr Tan, a seasonal employee of an Island Resort in Peninsular Malaysia’s east coast. Mr Tan works 8 months each year and has 4 months down time during the “monsoon season”. In those 4 months, Mr Tan continues to work for the Island Resort as a “temporary staff member” to maintain and upkeep the Resort. He has been with the Resort for 10 years.

Mr Tan appears to be a fixed term employee. But is he really?

According to the Federal Court’s recent decision in **Ahmad Zahri bin Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd [2020] 5 MLJ 58**:



- (a) The Courts are not bound to accept that an employment contract is a fixed term one based solely on the words used in the contract; and
- (b) The Courts will consider the following factors in deciding whether it is a genuine fixed term contract:
 - a. The intention of the parties (employer and employee);
 - b. The employer's subsequent conduct; and
 - c. The nature of the business / nature of the employee's work.

To determine whether Mr Tan is a fixed term employee or a permanent one will depend on the facts and circumstances surrounding his employment. For example, the Courts may find that Mr Tan is a permanent employee in (a combination of) the following circumstances:

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- (a) The Island Resort pays his EPF and SOCSO ¹;
- (b) The Island Resort provides Mr Tan with a payment package reserved for permanent employees ²;
- (c) The Island Resort automatically renews Mr Tan's fixed term contract at the end of its term (especially if this is done over a continuous period of time) ³;
- (d) The Island Resort allows Mr Tan to continue working even though his fixed term contract has lapsed ⁴; and
- (e) Maybe The Island Resort made Mr Tan sign fixed term contracts, even though his scope of work is one of a permanent employee, with intentions to assert control against Mr Tan ⁵.

(*this is not an exhaustive list*)

The Courts will also consider the nature of the employer's business and whether there was a genuine need for fixed term contract employees / seasonal employees ⁶.

So, are you a permanent employee or a fixed-term employee?

¹ Charles Asservatham Abdullah v The Zenith Hotel Sdn Bhd [2018] 2 LNS 2349.

² Vallo a/l Mutto v Avicennia Capital Sdn Bhd [2020] ILJU 171.

³ Han Chiang High School / Penang Han Chiang Associated Chinese School Association v National Union of Teachers in Independent Schools, West Malaysia & Industrial Court of Malaysia (1990) 1 ILR 473.

⁴ Holiday Villages of Malaysia Sdn Bhd v Mohd Zaizam bin Mustafa (Case No. 4/4-456/01).

⁵ Han Chiang High School (Supra)

⁶ Holiday Villages of Malaysia Sdn Bhd v Mohd Zaizam bin Mustafa (Supra).