

Court of Appeal considered the difference between Transfer and Secondment

The Court of Appeal in the recent case of **Wan Abdul Hamid v ACP DMT Sdn Bhd**¹ considered an appeal wherein the main contention between parties was whether the appellant was transferred or seconded.

As a brief background, the Industrial Court in its Award² ruled that the Appellant was unfairly dismissed, as the Appellant was only seconded to the Saudi Arabian entity and the Company therefore remained his employer at the time of dismissal. The Industrial Court ordered the Company to pay the Appellant over RM765,000 in compensation.

The Company challenged the decision vide judicial review proceedings and the High Court³ quashed the Industrial Court Award on the basis that the latter had committed serious errors of law in arriving at its decision. The Company's position was that it never dismissed the Appellant as it was no longer his employer at the material time. The Appellant had in fact been transferred from the Company to the Saudi Arabian entity and the effect of a transfer is that the Saudi Arabian entity became his employer and no longer the Company.

The Court of Appeal unanimously concurred with the decision of the High Court. The Court of Appeal ruled that the Appellant was transferred to the Saudi Arabian entity and therefore the Company was not the employer for, *inter alia*, the following reasons:

- a) Documentary evidence as far back as 2012 had shown that the Appellant has been transferred to the Saudi Arabian entity;
- b) The Appellant was based in Saudi Arabia and there was no evidence that he continued to perform any functions for the Company in Malaysia;
- c) The Appellant was paid his salary by the Company but this arrangement was at his request and the Company was reimbursed by the Saudi Arabian entity; and

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- d) The Appellant was paid the End of Service benefit which was a statutory payment pursuant to the Laws of Saudi Arabia upon release from employment.

The above factors, according to the Court of Appeal, pointed to the fact that the Appellant had in fact been transferred and NOT seconded to the Saudi Arabian entity. In view of this, the Company could not have possibly dismissed the Appellant as it was no longer his employer. Moving forward, this case provides guidance on future disputes concerning the issue of transfer and secondment of an employee.

The decision was handed down by the Court of Appeal on 6 May 2024 and the Company was represented by Vijayan Venugopal and Wong Kian Jun.

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¹ No. W-01(A) -147-3/2022.

² No. 1745 of 2020.

³ No. WA-25-38-02/2021.