

Determining if an Employee is Transferred or Seconded

The issue of whether an employee is transferred or seconded can sometimes prove rather contentious. In a transfer, the employment relationship is transferred to the new employer (i.e. the original company is no longer the employer), whereas in a secondment situation, the employee remains under the employment of the original company but may perform work for the secondee company.

In the recent Kuala Lumpur High Court case of **ACP DMT Sdn Bhd v Wan Abdul Hamid & Anor** (WA-25-38-02/2021), one of the main issues which arose was whether the employee was transferred or seconded.

As a brief background, this was a Judicial Review Application whereby the Company (“Applicant”) challenged the Industrial Court Award which had ruled that the Claimant (“Respondent”) was unfairly dismissed by the Applicant.

The Applicant’s position was that it had never dismissed the Respondent as it was no longer his employer at the material time. The Applicant contended that the Respondent had been transferred to a Saudi Arabian entity and the effect of the transfer was the Saudi Arabian entity became his employer and no longer the Applicant. However, the Industrial Court ruled that the Respondent was only seconded to the Saudi Arabian entity and therefore the Applicant remained his employer.

In the Judicial Review application before the High Court, we submitted the following facts in support of our argument:-

- a) The documentation indicated that the Respondent was transferred as opposed to being seconded to the Saudi Arabian entity.
- b) The Respondent was physically based in Saudi Arabia.
- c) The Respondent was released from employment by the Saudi Arabian entity and was paid the End of Service Benefit, which was a statutory payment pursuant to the Laws of Saudi Arabia.

Employment & Administrative Law

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The above facts were consistent with the argument that the Respondent was transferred to the Saudi Arabian entity and that the Saudi Arabian entity was the employer at the material time. Therefore, the Applicant could not possibly have dismissed the Respondent as it was no longer his employer.

The High Court ruled in favour of the Applicant and was of the view the Industrial Court had committed serious errors of law in arriving at its decision. Consequently, the Industrial Court Award was quashed. The High Court decision was handed down on 16 February 2022 and the Respondent has since filed an appeal to the Court of Appeal.

This case will be of assistance to other cases involving transfers and/or secondment, in particular where the employee is based outside of Malaysia.

The Applicant in this case was represented by:



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