FOREIGN WORKERS

The Law And Practice In Malaysia

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CLJ Publication
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Generally, most contracts are entered into for business affairs and have commercial inclinations. Together with the various types of contracts, the contract of employment has been viewed as an ordinary commercial contract. The application of contractual principles in employment relationship was enunciated by prominent English jurists of the early nineteenth century namely, Sir Henry Maine, an English comparative jurist and historian, through his theory of 'progressive society' and by Bentham, also an English philosopher and jurist, through his philosophy 'the utilitarian principles.' Since the creation of the contractual relationships, the concept of exchange of something for another, be it goods, services, labour and the likes, have all been treated as an ordinary commercial contract.¹

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¹ This Chapter is contributed by Ashgar Ali Ali Mohamed.

¹ A contract is an agreement between two or more persons by which legal rights and obligations are created. The formation of a contract of employment involves two elements: offer and acceptance. A contract of service is a bilateral contract which imposes mutual obligations. The servant owes the duty of obedience and due respect whereas the master must provide protection and good treatment. See Limland v. Stephen (1801) 3 Esp. 269, 270; 170 ER 611 and Norrie P., Status and Contracts of Employment in the Field of Public Education in Saskatchewan (1991) 55 Saskatchewan Law Review 365, 368. In High v. British Railways Board [1979] IRLR 52, at 54. Talbot J stated: 'A contract is the product of agreement between parties, providing for rights and obligations, and therefore one must look to the contract in question in order to determine this particular point.' Again, in Mifsud v. MacMillan Bathurst Inc (1989) 63 DLR (4th) 714, 719 (Ont. CA), McKinley JA observed: 'The relationship between the parties is contractual. Where there is no written contract it is necessary first to determine what terms are implied in the specific contract involved, and those terms are not those which the court considers reasonable, but rather what the parties would have agreed to when forming the contract, had they turned their mind to the type of situation which later transpired.'