

THE LEGAL CONTEXT OF EMPLOYMENT DISCRIMINATION IN MALAYSIA

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ABSTRACT

Discrimination may deprive people of their equal rights. In employment, discrimination causes people being denied of jobs, confined to certain occupations, offered with lower pay, refused the promotion and increment, and so on. Despite capabilities and abilities of performing the job, 'physical appearance' or other grounds such as sex, race and colour of skin are the attributes that taken into consideration when recruiting, hiring and offering the job which apparently unjust. This obviously creates barriers to employment. Therefore, promoting equality by eliminating various forms of discrimination is essential. Without the legislation outlawing employment discrimination in Malaysia and having agreed that equality and non-discrimination is a universally accepted principle, this article addresses the issue of employment discrimination that has become rampant in Malaysia by deliberating the subject matter from the legal context. The author begins the discussion by defining employment discrimination so as to give an understanding to the scope of coverage and further presented the types of discrimination by looking at the other jurisdiction, particularly the United Kingdom with special reference given to her anti-discrimination law namely Equality Act 2010. Taking this as a foundation, the analysis of employment discrimination in Malaysian is presented by analyzing the available reported cases. On top of that, some leading cases are being discussed. The author found out that even though Malaysia does not explicitly outlaw employment discrimination, the related case-laws and judicial decisions signified that the courts are prepared to hear the claims on the subject matter yet within a limited grounds. It is therefore recommended for the government, particularly the Ministry of Human Resource, to introduce a workplace anti-discrimination policy or guideline in order to deal with the issue.

Key words: employment discrimination, equality, legal, reported case, workplace

INTRODUCTION

The principles of equality and non-discrimination are the cornerstone of human rights that leads to social justice. It is the most fundamental human rights and described as the starting point of all liberties (Baderin, 2003). The global community agrees to promote equality and together eliminate various forms of discrimination by incorporating the idea in the Constitutions with the common terms used are "equality before the law" and "equal protection of the law". While equality means impartiality, discrimination is a differential or prejudicial treatment. Thus, equality and non-discrimination are basically two sides of the same coin (Blainpain, 1985).

The principles of equality and non-discrimination pervades international human rights frameworks including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights that protecting specific groups like children, women and people with disabilities. For instance, Article 1 of the Charter of the United Nations of 1945 proclaims: "All human beings are born free and equal in dignity and rights". The UDHR in Article 1 says: "All human beings are born free and equal in dignity and rights"; and Article 7: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination".

At the workplace, it has long been understood that discrimination on any grounds is a problem that creates barriers to employment. While employment is an essential needs of human being to make their lives, denying employment will be depriving someone of their lives. Realising this, the International Labour Organisation (ILO) has established the principle of non-discrimination through the Declaration of Philadelphia 1944 that affirms: "All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity." Founded on the Declaration that "poverty anywhere constitutes a danger to prosperity everywhere" (ILO, 2003), ILO has striven towards the principle of freedom from discrimination that constitute essential elements to improve conditions of workers. The principle was further approved through the 1998 Declaration on Fundamental Principles and Rights at Work and becomes the agenda of Decent Work (ILO, 1999). Therefore, promoting equality at the work place and combating employment discrimination are two essential parts of promoting decent work, the key element to achieving a fair globalisation and poverty reduction (ILO, 2008). The principle of decent work is further highlighted in the United Nations 2030 Agenda that aspires, among others, to reduce inequalities and increasing equalities through Goal 5 and Goal 10 of the Sustainable Development Goals (SDGs). On the account that discrimination can occur against gender, nationalities, disabilities, etc., the ILO however reported gender gaps remain one of the most pressing challenges with current global labour force participation rate for women is 49% and 76% for men (ILO, 2017).

From Malaysian legal context, the basic concept of equality before the law and equal protection of the law contained in Article 8 of the Federal Constitution. The Article generally prohibits discrimination against a person or class of persons, unless there is a

rational basis for such discrimination. Looking at the data, Malaysia was reported to be having a persistent gender inequality in both formal and informal sectors (UNDP, 2014); while for labour force participation rate, women was recorded 49.3% and men 77% (ILO, 2017), and unequal pay schedule is still prevalent when women earn less than men in all occupational sectors (Department of Statistics Malaysia, 2014). As compared to other developing countries like United Kingdom (UK), United States and Australia that having anti-discrimination laws, Malaysia does not own any, particularly that deals with employment; and yet issues and cases of discrimination persist. Hence, there is a need to have a closer look to the issue especially from the legal viewpoint.

Having agreed that equality and non-discrimination is a right-based and universally accepted principle, this paper examines employment discrimination in Malaysia by analysing available reported cases. The methodology used was a doctrinal approach where materials from the secondary sources were gathered encompassing articles, books, reports, cases, etc. in order to discover, explain, examine, analyse and present facts, principles, concepts or the working of certain laws. The provisions of the legislations were also referred to. The underlying aim is basically to gain and present new knowledge and ideas as well as to suggest change and reform (Anwarul Yaqin, 2007).

The paper begins with the elaboration to the meaning of employment discrimination and its types. Furthermore, consideration is given to the cases and provisions from other jurisdiction i.e. United Kingdom (UK), through her Equality Act 2010. Discussion on the employment discrimination in Malaysia is presented by deliberating cases that had been judicially reviewed and given judgment in court. The article then offers some recommendations and lastly draws a conclusion.

EMPLOYMENT DISCRIMINATION

Employment discrimination manifests all levels of employment, beginning from the moment of accessing the job, hiring, performing the job and during termination. This covers recruitment, advertisement, interviews; also terms and conditions of employment; training opportunities, promotion, performance, transfer, dismissal as well as retrenchment. In brief, discrimination in employment occurs when the criterion that have nothing to do with job performance are taken into consideration in determining one's opportunity to be employed; in the case of within or during the employment, those grounds are allowed for the assessment in order to disregard one's chance to be promoted and so on. It is the fact that work has greater significance because, other than providing a principal source of income, without work, people would be socially excluded and lose any sense of personal worth (Collins, 2010).

While "discrimination" is "the practice of treating one person or group of people less fairly or less well than other people or groups" (Collins Dictionary, 2018); Burton's Legal Thesaurus (2006) defined "discriminate" as "differentiation, disequalisation, inequality, injustice, unfairness" and went on further to define "employment discrimination" as "bias in the workplace, prejudice in an employment environment". These definitions basically have the negative idea that related discrimination with unfavourable treatment that lead to unfairness and injustice thus cause enmity at the workplace and working environment.

Victorian Equal Opportunity and Human Rights Commission (2018) defines discrimination as "treating, or proposing to treat, someone unfavourably because of a personal characteristic protected by law". According to Darby (2005), discrimination is "the treatment of a person in a less favourable way than another person is, has been or would be treated" on any of the grounds such as race, gender, disability, age, religious belief, etc. It is any situation in which a group and individual is treated differently based on something other than individual reason, usually their membership in a socially distinct group or category where such categories would include ethnicity, sex, religion, age or disability (Hongchintakul & Kleiner, 2001). The ILO (2007) considers discrimination as "a differential and less favourable treatment of certain individuals" because of any characteristics such as sex, race and religion, "regardless of their ability to fulfil the requirements of the job". Discrimination that occurs within the employment relationship (between employer and employee) or in the workplace (involve employer, among employees, including customers) is a reflection of a wider pattern of discrimination that inherent within society (Emir, 2012).

When doing the selection of employee/s, a choice must be based on certain grounds. The choice, whether objective or not; and the treatment, whether discriminatory or justifiable, would be depending on the grounds of making a selection. Here, is the selection based on the objective criteria such as experience, skills and qualifications; or unlawful criteria such as gender, age or disabled person (Willey, 2012)? The issue of employment discrimination would arise when other criteria (such as gender, race or age) that has nothing to do with job performance, is taken into account. For that reason, discrimination at work is concerned with the unequal and inequitable treatment of some employees irrespective of their ability to perform jobs (Emir, 2012). In short, employment discrimination occurs when employers make decisions based on the job applicant's or employee's characteristics that are not job-related.

TYPES OF DISCRIMINATION

Discrimination can be direct or indirect. Direct discrimination or overt discrimination "occurs when one person treats another less favourably, on the grounds of gender, marital status or race, than she/he treats or would treat a person of another gender, marital status or race" (Painter & Putick, 2001). Referring direct discrimination as disparate treatment, Moran (2002) perceived it to exist when an employer treats an individual differently because that individual is a member of a particular race, religion, gender or ethnic group. Hence, direct discrimination "denotes unequal treatment based on the grounds of the victim's sex or marital status or on racial grounds" (Deakin & Morris, 2012). In brief, direct discrimination occurs when an actual or a prospective employee is directly discriminated against by another person or when there is less favourable treatment of

individuals they treat others due to protected characteristics, for example sex, race, ethnic or religion – points that judiciously has nothing to do with the performance of the job.

The Equality Act 2010 of the UK says “a prospective or actual employee is directly discriminated against by another person if they treat the individual less favourably than they treat others and this is because of a protected characteristic”. This is signifying two elements of direct discrimination: (a) “less favourably”, and (b) “protected characteristics”. Less favourable treatment means treating someone in a worse way than another person, thus indicates the treatment as different and disadvantageous (Grant, 2002). For example a female employee is not given a promotion but her male colleague with less skill is offered the position. To give effect to the word “discrimination”, a mere different treatment may not equate to less favourable treatment. In *R v Birmingham City Council ex parte EOC* [1989] A.C. 1155, the Council was claimed for providing lesser grammar school places for girls compared to boys. The Council contended that there was no evidence that grammar schools were better than the other schools and therefore no less favourable treatment had been caused to the girls. In reaching the decision, the House of Lords had formulated a simple test for establishing direct discrimination namely (Painter & Puttick, 2001): (i) was there an act of discrimination? If the answer is in the affirmative; (ii) but for the complainant’s gender (or race), would he/she have been treated differently, i.e. less favourably? Hence, the question of “why” is irrelevant but whether the treatment is less favourable and on the protected characteristics. What direct discrimination concerns is equal treatment. The question whether an employer has acted reasonably or not is irrelevant in establishing whether there has been less favourable treatment (*Zafar v Glasgow City Council* [1998] I.R.L.R. 36).

Another significant question is, less favourable against whom? This answer requires for the element of ‘comparison’, i.e. comparing the one who has been treated less favourably with the other who has not. Adapting this idea, the laws offer the treatment of a person of one sex to be compared with the other opposite sex, a married person with a person of the same sex who is unmarried, and the treatment of a member of racial group with that of all other persons.

Furthermore, direct discrimination only applies where a protected characteristic is involved. For example if a worker is discriminated against because of having tattoos, it is not discriminatory under the Act because tattoo is not one of the protected characteristics. It is discrimination when someone at 50 years of age being treated less favourably because age is a protected characteristics. In *James v Eastleigh Borough Council* [1990] 2 AC 751, Mr. and Mrs. James, both aged 61, went for a swim in Eastleigh Borough Council’s baths. While Mrs. James was allowed in free, Mr. James had to pay. He brought a claim of direct sex discrimination where a slight majority of three to five judges agreed with the claim. Although the rationality for having such requirement had been established, that is, for considering the state pension age (where women at 60 and men at 65 thus resulting them earning less when compared to those employed), it contravened the essence of anti-discrimination law because the policy was gender-based which had caused less favourable treatment to men. Deakin and Morris (2012) suggested that, other than relying on a ground which was based on an individuals’ sex, the Council may offer free admission to those who were actually retired from full time employment. While this idea seems apposite to keep away from the claim of direct discrimination, it may invite the possibility of the claim of indirect discrimination. In *Achbita v G4S Secure Solutions*, the European Court of Justice found that a Muslim woman who was fired over her wish to wear an Islamic headscarf at her job in Belgium did not suffer from direct discrimination because her employer had a general rule against religious or political displays, therefore the woman wasn’t treated differently than other workers (Press Release No. 30/17, 2017).

The other form of discrimination operates in a more subtle and indirect manner. Known as indirect discrimination, it concerns the disadvantaged group – “situations where the attainments of a particular group are, on average, lower than those of another group” (Connolly, 2004). Indirect discrimination occurs when a company’s policies, procedures or rules which apply to everyone has the effect that people with a certain protected characteristics are put at a disadvantage when compared with those who do not share it. If an employer formulates rules or requirements which, although applicable to both genders and all racial groups, they actually operate to the disadvantage of one gender or one group. Indirect discrimination therefore consists of acts or practices which are fair in form but unequal in impact (Painter & Puttick, 2001). Tomei (2003) refers it “to norms, procedures and practices that appear to be neutral but whose application disproportionately affects members of certain groups”. For instance, an advertisement that fixes height requirement would result in an exclusion of a group of persons, either men or women. It occurs when the discriminator applies a condition or requirement that appears to apply to all groups equally but its effect is discriminating against one group of victims. Initially, this concept of indirect discrimination aims to prevent employers from applying conditions which are not necessary for the job but would have the effect of excluding the proportionately high number of people from one particular group (Upex & Shrubsall, 1995). In *Price v Civil Service Commissioners* [1978] I.R.L.R. 3, the court found that the age limit of 28 imposed on applicants for clerical posts in the civil service was indirectly discriminatory because it failed to consider the common work patterns of women at that particular time who tend to take a career break to raise a family which resulted in fewer women than men that were able to comply with the condition. It is to be noted that for indirect discrimination to occur, the person claiming discrimination must personally be put at a particular disadvantage.

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With the ratification to the Convention on the Elimination of Discrimination Against Women (CEDAW), the word “gender” was inserted in Article 8(2) to comply with Malaysia’s obligations so as to reflect the view that women were not discriminated (Mohamed, 2016). Although the amendment aims to avoid discrimination towards gender or specifically women, according to Atikah (2018), workplace discrimination is still common involving language spoken, race issue, gender, religion and age. The discussion here is divided into two parts: firstly, to present selected court cases on discrimination; and secondly, to focus on judicial approaches by reflecting the essential elements of discrimination as denoted in the Equality Act 2010.

(a) Reported Cases

Within the context of equality right as enshrined in Article 8(1) of the Constitution, the equality provision does not inhibit law from characterising and differentiating people but equality must exist between or among those put in the same category. Hence, all laws shall not be applied uniformly to all persons in all circumstances. In the employment context, when involving individuals' relationship, Malaysia has neither law nor explicit provision outlawing employment discrimination. Despite this, a number of cases were recorded in court while some complaints were made to the Ministry of Human Resources. Rather than being known as discrimination, some of them are classified as unfavourable or unfair treatment.

A case on gender discrimination in Malaysia was brought up in *Beatrice Fernandez v Sistem Penerbangan Malaysia & Anor* [2005] 2 C.L.J. 713 when the applicant, a stewardess in MAS, was terminated for being pregnant in accordance with a collective agreement which was binding on all stewardesses of the airline. The Federal Court held, *inter alia*, that the constitutional law, as a branch of public law, only addresses the contravention of an individual's rights by a public authority. When the rights of a private individual are infringed by another private individual, constitutional law will take no recognisance of it. Moreover, the collective agreement also provided a different retirement age for different categories of female employees which could apparently be alleged as gender discrimination. This case revolved on the issue of collective agreement which contains the terms that discriminate women.

With such a saddened decision, the case of *Noorfadilla binti Ahmad Saikin v Chayed bin Basirun and Ors* [2012] 1 CLJ 769 has proven that the right against discrimination has its place in Malaysia when the High Court held that the refusal to employ a woman on the grounds of pregnancy alone is a form of gender discrimination and unconstitutional under Article 8 of the Federal Constitution. Despite this highly commended decision, in a recent case of *Airasia Berhad v Rafizah Shima binti Mohamed Aris* [2014] MLJU 606, the Court of Appeal held that a provision in a training agreement does not restrain marriage and/or prohibit pregnancy if the respondent completes her training in the manner stipulated in the agreement, thus does not discriminate against the rights of women.

(b) Element of discrimination – Reflecting The Equality Act 2010

Malaysian laws offer no interpretation to the word discrimination particularly within employment context. While discrimination is not specifically defined, Malaysia does not condone discrimination in respect of employment and occupation. As a response to the UK interpretation, Malaysian judicial decisions and review will be looked upon so as to give direction to discrimination law in Malaysia and to reflect the requirements of discrimination as denoted in the Equality Act 2010. As mentioned, the element of 'less favourable treatment' is essential to establish discrimination indicating the discriminatory practices. Here, the phrase 'less favourable' is somewhat familiar to cases of dismissal, retrenchment, constructive dismissal, victimisation and also discrimination. Instead of being a prerequisite for discrimination claim, the cases showed the term "less favourable" appeared in the employee's allegation towards the employers for their "unfavourable" action/treatment towards the workers. Furthermore, the 'less favourable' treatment requires the element of "comparing" where it is the role of the tribunal to 'compare' the discriminated employee with the non-discriminated whom basically in parallel rank.

In *Supercomal Wira and Cable Sdn. Bhd. v Anjana Devi A/P Satiavelu and Others* [2003] MLJ 729, the High Court found that "there was clear discrimination by the appellants against the respondents when action was only taken against the five respondents" (while 95% of the employees breached the order of Line Leader by having lunch outside the lunch hour). However, the court ruled the action as "clearly breached the principles of natural justice" because the discrimination was prompted "against the respondents without any reasonable grounds". In so far as the discrimination claim is concerned, the issue had apparently been encountered confirming it as an actionable claim. In this case, the court has in some way applied the comparable basis when compared the five discriminated employees (claimants) and the other 95% employees who had breached the order by having lunch outside lunch hour. This indicated that similar approach was applied in determining 'less favourable' treatment in the context of discrimination. Nevertheless, the grounds for discrimination, either sex or race, that is essential for establishing unlawful discrimination without which the action is baseless, was absent.

In *Integrated Forwarding & Shipping Bhd. v Rozia Abdullah* [2000] 1 ILR 338, the claimant complained that she was not treated the same compared to two of the company's previous employees who were paid retirement benefits. The court held that it was a wrong exercise of discretion by the company that does amount to discriminatory practice thus constitutes unfair labour practice. Moreover, the case on the allegation of victimisation and discrimination in *Leo Burnett Advertising Sdn. Bhd. v Agnes Ann Rodriguez* [2003] 1 ILR 95. The claimant alleged that the company did not grant her any increment and bonus for the year 1995 and 1996. She was also not given an *angpow* in 1997 when nearly all other employees were granted the same. The Industrial Court held that *angpow*, bonuses and year increment are company's discretionary payments based on the employees' performance. Failure of the company to grant these to the claimant was not discrimination because the claimant was not the only employee who was exempted from receiving them and "there is no evidence adduced by the claimant to prove that the company had deliberately discriminated against her in favour of others who were equal to her in position, salary, job function and work performance".

The Court of Appeal in *Ahmad Tajuddin Ishak v Suruhanjaya Pelabuhan Pulau Pinang* [1997] 1 MLJ 241 (*Ahmad Tajuddin Ishak*) had compared each and every one with the auxiliary police constable in answering whether there has been unfair treatment among the security assistants working for the respondent. According to the Court, all of them were in the same salary scale; each of them received the same amount of take-home pay at the end of each month; they were all given the same opportunity to apply

for the post of auxiliary police sergeants but they chose not to apply. Therefore, there had been no breach of Article 8 of the Constitution.

DISCUSSION AND RECOMMENDATION

Employment discrimination was claimed to be rampant in Malaysia. This should be confirmed with the data by the UNDP (2014), ILO (2017) and the Department of Statistics Malaysia (2014). As reported by Women's Aid Organisation (WAO), more than 40% of women polled from across Malaysia have experienced job discrimination due to their pregnancy when employers made their positions redundant, denied promotions, placed them on prolonged probation, demoted and terminated their jobs (WAO, 2016). A number of studies found that women in Malaysia are under-represented in many technical and professional fields and significantly under-represented in the higher levels of management and decision-making (Sharifah Shahirah Syed Sheikh, 2010; Koshal, Gupta & Koshal, 1998; Hutchings, 1996; Lee & Nagaraj, 1995). In a recent highlighted issue, the Malaysian Association of Hotels (MAH) defended its members' policy that prohibiting their frontline staff from wearing the *hijab* or headscarf and claimed it an international practice which followed a standard operating procedure and policy. Previously, there were complaints when Muslim men were not allowed to take break for Friday prayer. It was also reported that some employers interviewed or hired only candidates with fluent Mandarin or certain language. Discriminatory practices can also be found in job advertisements. All these though can be classified as discrimination at the workplace, are reasoned as the employers' policies or common practices of the industries. Despite this argument, the situations showed the practices of direct and indirect (overt) discrimination at the workplace. To reflect this to the idea of equality as the most fundamental human rights principle, such a practice is an absolute wrong.

Looking at the court cases, most were involving pregnancy thus can be associated with gender because only women can get pregnant. While employment discrimination occurs when the employer takes other criteria (such as race) that has nothing to do with job performance, pregnancy could be arguably associated with the performance. Having said this however, the infavourable/discriminatory treatment should not necessarily be done directly to the victims (i.e. direct discrimination) but also by having or introducing certain policy that discriminatory to certain group/s of people as in the case of indirect discrimination. For that reason, as Emir (2012) and Willey (2012) concluded, discrimination at work deals with the unequal and inequitable treatment of employees irrespective of the ability to perform jobs. As far as the cases of gender discrimination in Malaysia is concerned, the stand was not conclusive when the courts are having different judgments due to the diverse circumstances of the case. While the cases has shed some light on the issue, the definitive answer is yet to be reached where the author believes this to be owing to the absence of a clear definition to the word discrimination itself. Despite this, Malaysia does not condone discrimination in respect of employment and occupation.

From the above cases, the term 'less favourable' is rather familiar in different claims including discrimination. Furthermore, it is noticed that the element of 'comparison' has been exercised intuitively by the courts in order to assess the 'less favourable' aspect. This would establish that "discrimination usually occurs when equals are treated unequally or when unequals are treated equally" that mentioned in *Ahmad Tajuddin Ishak* (page 257).

Based on these findings, it would be good if the concept of employment discrimination can be clearly defined and understood further in order to give awareness both to the workers and employers. It is therefore recommended for the government to have a proper policy on this issue so as to be a guideline for the industry. Otherwise the employers would believe that their practices are right as long as they follow the standard operating procedure or policy standard.

CONCLUSION

Elimination of discrimination at work is important for the efficient functioning of the labour markets and for business competitiveness because employees who enjoy equal treatment would in some way lead to better labour relations with positive implications for overall productivity of the organisations. By some means, this would contribute to higher economic growth and political stability of a country. For the individuals, non-discrimination may hinder retention and even promote their well beings. As far as Malaysia is concerned, without legislation outlawing employment discrimination, Malaysian courts are prepared to hear the claims although within a limited scope. Perhaps a proper approach to the concept is workable if the word discrimination is clearly and appropriately defined. To deal with the issue when Malaysia has no explicit explanation so far makes claims of employment discrimination unworkable even though less favourable incidences are, to some extent, prevalent in the workplace particularly when they arise in more covert and subtle ways. Meanwhile, legislative interference with the purpose of protecting the employees is vital to ensure the effectiveness of the labour standards (Hassan, 2008). At this point, discrimination at work, without a doubt, resulted in inequality, unfairness and diversity in labour market outcomes. From the legal perspective, this is against the principle of equality as it denies one's right; in the labour context, it denies employees' right.

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