

DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM

DALAM NEGERI SELANGOR DARUL EHSAN

SAMAN PEMULA NO. MT – 21 – 248 – 2010

ANTARA

NOORFADILLA BINTI AHMAD SAIKIN ... PLAINTIF

DAN

1. CHAYED BIN BASIRUN
2. ISMAIL BIN MUSA
3. DR. HAJI ZAHRI BIN AZIZ
4. KETUA PENGARAH PELAJARAN MALAYSIA
5. MENTERI PELAJARAN MALAYSIA
6. KERAJAAN MALAYSIA ... DEFENDAN-DEFENDAN

DEFENDANT'S FURTHUR SUBMISSION

1. Declaration

1.1 In *Caxton (Kelang) Sdn Bhd v Susan Joan Labrooy & Anor* [1988] 2 MLJ 604 [TAB 1], Justice Siti Normah applied the general principles of declaratory orders as defined by P.W. Young in his book on the Declaratory Orders. At page 605/I – 606/D, Her Ladyship said:

"P.W. Young in his book on Declaratory Orders, 2nd Ed., defines a declaratory judgment as one that does not involve a cause of action in the usual sense and that six factors must be present before there can be a declaratory order. These are:

- (1) There must exist a **controversy** between the parties.
- (2) The proceedings must involve a **"right"**.

- (3) The proceedings must be brought by a person who has a proper or tangible interest in obtaining the order, which is usually referred to as "standing" or "**locus standi**".
- (4) The controversy must be subject to the **court's jurisdiction**.
- (5) The defendant must be a person having a **proper or tangible interest in opposing the plaintiff's claims**.
- (6) The **issue must be ripe**, i.e. it must **not be of academic interest, hypothetical or one whose resolution would be of no practical utility**.

1.2 The issue then is whether the Plaintiff had acquired a legal right as against the Defendant to grant her the locus standi to make this application. It is respectfully submitted that the '***Memo Penempatan Guru Sandaran Tidak Terlatih***' (exhibit CB-3) is not a contract of employment between the parties. In paragraph 13 of the affidavit affirmed by Chayed bin Basirun, it is specifically affirmed that the parties would subsequently execute the '***Surat Tawaran Jawatan dan Lantikan sebagai Guru Sandaran Tiudak Terlatih***' and the ***Surat Setuju Terima Tawaran Jawatan dan Lantikan sebagai Guru Sandaran Tidak Terlatih***' as in Exhibit "**CB-4**" and "**CB-5**".

1.3 The '***Memo Penempatan Guru Sandaran Tidak Terlatih***' is nothing more than a conditional offer made to the Plaintiff. It is not a binding contract between the plaintiff and the Defendants. The said conditional offer is subject to the Plaintiff complying with the terms of the offer or whether the Plaintiff is willing to accept the terms of employment.

- ***Soo Lip Hong v Tee Kim Huan [2005] 4 CLJ 119 [TAB 2]***

- 1.4 In paragraph 15 of Chayed bin Basirun's affidavit, it is affirmed that all the aspiring relief teachers have been informed that '**sekiranya terdapat calon yang sedang hamil maka calon tersebut tidak akan diterima untuk menjawat jawatan GSTT**'. This is in compliance with paragraph 4.2.2 of the **Pekeliling Perkhidmatan Kementerian Pelajaran Malaysia Bil. 1 Tahun 2007**, exhibit "CB-7". This is a specific term of the contract of employment which the Plaintiff cannot comply at that specific time.
- 1.5 It is also pertinent to note that under paragraph 3.1 of the Pekeliling 1 Tahun 2007, it is specified that GST and GSTT "**adalah bertaraf bukan kakitangan kerajaan**" and under paragraph 6, both the GST and the GSTT are on a **contractual basis, renewable on a monthly basis and may be terminated at any time when the services is no longer required.**
- 1.6 It is common ground that government can enter into private contracts of employment. The Court of Appeal in **Abd Rauf bin Alif v Suruhanjaya Pasukan Polis & Anor [2003] 1 MLJ 18 [TAB 3]** applied the Privy Council decision in **Government of Malaysia v Lionel [1974] 1 MLJ 3 [TAB 4]** on the distinction between dismissal of a public officer and the termination of an employee. Justice Gopal Sri Ram referred to and adopted the advice by the Board:

"The advice of the Board on that occasion was delivered by Viscount Dilhorne who said at p 5:

Under English law a servant may be summarily dismissed for disobedience to orders or misconduct or may have his employment terminated by notice or the payment of wages in lieu of notice. Under the laws of Malaysia a similar distinction between dismissal and termination of services appears to exist and in their Lordships' opinion **there is nothing in the Constitution which affects the right of the Government to**

terminate temporary employment in accordance with the terms of the engagement. Their Lordships do not agree with Ong CJ that reg 36 is to be regarded as invalid as inconsistent with the Constitution. (Emphasis added.)”

- 1.7 The Federal Court in *Haji Ariffin v Government of Pahang* [1969] 1 MLJ 6 [TAB 5] also held that the government may enter into a contractual relationship as in the private sector. Justice Suffian F.J. (as he then was) concluded his leading judgment as follows at page 17:

“To sum up — in my judgment, the Pahang State Government has the right to stipulate that a Kathi may be appointed subject to termination of service on notice or payment of salary in lieu. Such a condition is not inconsistent with the Constitution which indeed says that a member of the Pahang public service holds office at the pleasure of the Ruler. If it is inconsistent, then, notwithstanding such a condition, the Ruler may terminate the Kathi's appointment without notice or compensation; it does not mean that the Ruler may not terminate his service on notice or payment of salary in lieu. ***The exercise by the Ruler of such a contractual right to terminate is the same as the exercise by a private employer of a right to terminate the service of his employee under a contract containing a similar condition.*** While it is true that the Kathi whose service is terminated under such a contract has lost a steady job, the termination does not involve a penalty or punishment so as to make it a dismissal within the meaning of article 135(2) of the Constitution and it is not, therefore, necessary first to give him a reasonable opportunity of being heard. Dismissal as used in the public service is not any termination of service — it has a special meaning and involves a penalty or punishment.”

1.8 Therefore, it is respectfully submitted that **there is no binding contract** between the Plaintiff and the Defendants which would allow the Plaintiff to acquire legal rights in order to take this action against the Defendants. The ***government may enter into a private contract of employment with the Plaintiff***. However, in this case, since the ***Memo Penempatan is merely a conditional offer***, there is actually no binding contract between the Plaintiff and the Defendants. The issue of legitimate expectation to be employed does not arise in a contractual relationship. Legitimate expectation is a public law concept which should not be infused into a contractual relationship. Otherwise there will be a floodgate of claims for legitimate expectations for promotions, higher salaries, better perks etc.

2. Alternative Remedy

2.1 In paragraph 40 of her submission (pages 20 – 27), the plaintiff dealt with the ***issue of her employment with the Respondents***. We reiterate our position above that the Plaintiff is not in a contractual relationship with the Respondents, that ***there is no binding employment contract between the Plaintiff and the Defendants***. However, on this issue of employment as raised by the Plaintiff, we respectfully submit that **if** there is a valid contractual employment, then the Plaintiff should have sued the Defendants for a breach of contract and/or termination of the contract and not make this application for declaratory orders. The Court of Appeal in ***Sakapp Comodities (M) Sdn Bhd v Cecil Abraham (Executor of the Estate of Loo Cheng Ghee) [1998] 4 MLJ 651 [TAB 6]*** noted several instances where a declaratory order will not be granted.

“Thus, generally speaking, ***the court will not grant a declaratory judgment where an adequate alternative remedy is available*** (Manggai v Government of Sarawak & Anor [1970] 2 MLJ 41) or upon hypothetical issues or upon an issue of no practical consequence (Lim

Kim Cheong v Lee Johnson [1993] 1 SLR 313) or where it may be premature to grant a declaration (Rediffusion (Hong Kong) Ltd v A-G of Hong Kong & Anor [1970] AC 1136) or where a plaintiff is guilty of laches (Faber Merlin (M) Sdn Bhd v Lye Thai Sang & Anor [1985] 2 MLJ 380) or other inequitable conduct (City of London v Horner (1914) 111 LT 512) or where a 'cloaked declaration', that is to say, a declaration for a collateral purpose (Trawnik & Anor v Ministry of Defence [1984] 2 All ER 791) or with an improper motive, is sought (Everett v Griffiths [1924] 1 KB 941 at p 960).

- **Manggai v Government of Sarawak & Anor [1970] 2 MLJ 41 [TAB 7]**

3. Granting declaration is Discretionary

3.1 It is trite law that the power of the Court to grant declaratory orders is discretionary. In **Mohamed Noor bin Othman & Ors v Haji Mohamed Ismail bin Haji Ibrahim & Ors [1988] 3 MLJ 82 [TAB 8]** at p 84, the Supreme Court said:

"It is also an established principle consistently followed by our courts that the issuing of a declaration is discretionary. The power to issue a declaration should be exercised with circumspection with a proper sense of responsibility and ought not to be exercised unless the circumstances justify it."

3.2 In **Datuk Syed Kechik v Government of Malaysia [1979] 2 MLJ 101 [TAB 9]**, Lee Hun Hoe CJ said:

"In granting a declaration, the court has to consider the utility of the declaration claimed and the usefulness of the declaration on the one hand

as against the inconvenience and embarrassment that may result on the other hand”

- 3.3 If these declaratory orders are granted, it would create inconveniences and embarrassment as the courts will be imposing terms and conditions into contractual relationship between parties. It is respectfully submitted that the Plaintiff is seeking the Court’s assistance to enforce a contract of employment with the Respondent. This is akin to forcing the Respondents to employ the Plaintiff against their terms and wishes. In ***Ng Hock Cheng v Pengarah Am Penjara*** [1998] 1 MLJ 153 [TAB 10], the Federal Court held at page 159:

“Then again, there is the *elementary principle that court will not normally decree a specific performance of a contract of personal service or its terms thereof.*”

4. Constitutional Issues

- 4.1 In the Court of Appeal decision in ***Beatrice Fernandez v Sistem Penerbangan Malaysia & Anor*** [2004] 4 CLJ 403 [TAB 11], the issue is whether the Collective Agreement is *ultra vires* article 8 of the Federal Constitution. In his judgment, Justice Abdul Hamid Mohamad said at page 408/d:

“A collective agreement is not " law " in the context of art. 8. It is a contract when taken cognizance of by the Industrial Court, is enforceable as an award of that court. In other words, it is similar to a court order. Even a court order is not " law " in the context of art. 8. It is only an order binding on the parties therein. Similarly, a collective agreement, though taken cognizance of by the Industrial Court is only binding on the parties therein, though enforceable by the Industrial Court.”

- 4.2 Justice Abdul Hamid’s decision was upheld by the Federal Court in ***Beatrice Fernandez v Sistem Penerbangan Malaysia & Anor*** [2005] 2

CLJ 713 [TAB 12], where Justice Abdul Malek Ahmad PCA said at page 720/e:

“To invoke art. 8 of the Federal Constitution, the applicant must show that some law or action of the Executive discriminates against her so as to controvert her rights under the said article. Constitutional law, as a branch of public law, deals with the contravention of individual rights by the Legislature or the Executive or its agencies. Constitutional law does not extend its substantive or procedural provisions to infringements of an individual's legal right by another individual. Further, the reference to the "law" in art. 8 of the Federal Constitution does not include a collective agreement entered into between an employer and a trade union of workmen.”

4.3 As submitted earlier, the contract of employment, *if any*, is a private arrangement between the parties. It is similar to the Collective Agreement and does not attract article 8 of the Federal Constitution.

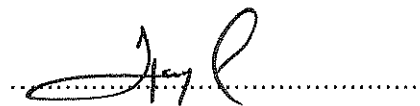
4.4 Further, the term of the GST & GSTT contract is similar to the Collective Agreement in **Beatrice Fernandez** case, with regards to the issue on **pregnancy**. The purpose of the GSTT is to employ relief teachers to take over the classes from teachers on maternity leave, on courses or medical leave. The purpose of the GST & GSTT is very specific. **As such, there cannot be a situation where the pregnant relief teacher, relieving a teacher on maternity, had to be relieved by another relief teacher.** The GSTT is a special project to allow our children to continue with their education when their teachers are on maternity leave. As held by Justice Abdul Malek Ahmad PCA at page **720/g**:

“Likewise, there are special conditions applicable peculiarly in this occupation, which the first respondent as the **employer was entitled to impose.**”

5. Conclusion

- 5.1 It is respectfully submitted that this application is misconceived as there is no binding contract of employment between the Plaintiff and the Defendants. As such, the Plaintiff has no locus to take this action against the Defendants.
- 5.2 On the Plaintiff's submission that there is a contract of employment, ***which is denied***, the proper course of action is to sue on the termination of the purported contract or a breach of the purported contract. The legal rights of the Plaintiff, if any, arise out of the contract and the Plaintiff should sue on those terms.
- 5.3 Based on the Federal Court decision in **Beatrice Fernandez**, article 8 of the Federal Constitution does not apply to a contractual relationship.
- 5.4 In any event, ***the peculiar nature of the GST & GSTT contracts mandated the exclusion of certain categories of employees in order to achieve its purpose, namely an uninterrupted and continuous education for our children and to allow working women time off to deliver the next generation.*** In the end, **it is for the benefit of the working mothers.**
- 5.5 To conclude, we respectfully submit that this application be dismissed with costs.

Dated this 22th day of June 2011



SENIOR FEDERAL COUNSEL

For and on behalf of the Defendants

This Submission of the Defendants is filed by the Senior Federal Counsel for and on behalf of the Defendants whose address for service is at Bahagian Guaman, Aras 3, Blok C3, Parcel C, Pusat Pentadbiran Kerajaan Persekutuan, 62512 PUTRAJAYA.

[PN/WKL/HQ/SN/08(P)/54/2010]