

DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM

DALAM NEGERI SELANGOR DARUL EHSAN

SAMAN PEMULA NO: MT-21-248-2010

Dalam perkara Aturan 7, Aturan 15 Kaedah 16 dan Aturan 28 Kaedah-Kaedah Mahkamah Tinggi 1980

DAN

Dalam perkara seksyen 41 Akta Spesifik Relif 1950

DAN

Dalam perkara Artikel-Artikel 4, 5 dan 8 Perlembagaan Persekutuan

DAN

Dalam perkara Konvensyen Untuk Menghapuskan Diskriminasi Dalam Semua Bentuk Terhadap Wanita 1979/81 (*“convention on the Elimination of All Forms of Discrimination Against Women 1979/81”*) dan Akta Pekerjaan 1955

DAN

Dalam perkara penarikan balik dan/atau pembatalan lantikan Noorfadilla Binti Ahmad Saikin sebagai Guru Sandaran Tidak Terlatih

DAN

Dalam perkara permohonan untuk, antara lainnya, deklarasi dan gantirugi

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,
KEMENTERIAN PELAJARAN MALAYSIA
5. MENTERI PELAJARAN MALAYSIA,
KEMENTERIAN PELAJARAN MALAYSIA
6. KERAJAAN MALAYSIA ...DEFENDAN-DEFENDAN

DEFENDANT'S WRITTEN SUBMISSION

May it please Yang Arif,

The Applicants through the application of Originating Summons had sought several reliefs, mainly:

- (1) Declaration on legal rights, status and character of a pregnant woman i.e. the Plaintiff (as on 12.1.2009) and that the Plaintiff deserved to be appointed as "Guru Sandaran Tidak Terlatih" (GSTT);
- (2) Declaration that the act done on 12.1.2009 by the Defendants in reclaim and/or cancel the appointment of Plaintiff as "Guru Sandaran Tidak Terlatih" (GSTT) is unconstitutional, was wrong in law, null and void; and
- (3) Declaration that under paragraph 4.2.2 Surat Pekeliling Perkhidmatan Kementerian Pelajaran Malaysia Bil. No. 1 Tahun 2007 dated 27.2.2007 that states;

4.2 Kemudahan-Kemudahan yang tidak layak diperolehi oleh GST dan GSTT

....

4.2.2 Cuti Bersalin

....

is unconstitutional, was wrong in law, null and void;

- (4) General Damages;
- (5) Interest on the general damages as at 8% from this date until the date of full payment or on the rate that the Court deems fit for the Defendants to pay to the Plaintiff;
- (6) An inquiry and assessment of the general damages will be held to determine the general damages to be paid by the Defendants to the Plaintiff;
- (7) Cost to be paid by the Defendants to the Plaintiff; and
- (8) orders and/or any consequential reliefs or other reliefs that is deem fit by this Court.

ISSUE TO BE DISPUTED

1. **GENDER DISCRIMINATION**
International Law Application - CEDAW
2. **PRINCIPLES OF LEGITIMATE EXPECTATION**
 - **Article 18 Universal Declaration of Human Rights**
 - **Bangkok and Vienna Conventions**

- **Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW')**

3. ULTRA VIRES THE ARTICLE 5 AND 8 OF THE FEDERAL CONSTITUTION

**4. PEKELILING PERKHIDMATAN KEMENTERIAN PELAJARAN MALAYSIA
BIL. 1/2007**

SUBMISSION

1. GENDER DISCRIMINATION

Plaintiff's contention that the Defendants act in retracting the "Memo Penempatan" is one of discrimination act and it is against the Convention On Elimination of All Forms of Discrimination Against Woman 1979/81 (CEDAW). The act of retracting the "Memo Penempatan" is such an irresponsibility act by the Defendants and it is an act to discriminate pregnant woman.

1.1 INTERNATIONAL LAW APPLICATION - CEDAW

1.1.1 Defendants humbly urge this Court to the issue even though as a member of the United Nation (UN) and had rectified certain Conventions and one of it CEDAW, but Malaysia as a sovereign country do not solely had to follow it without synchronized it with the laws of Malaysia especially the Federal Constitution that is the highest law in Malaysia.

1.1.2 It is inherent that that International law was developed on two (2) strong fundamental principles that is-

(a) Every country is sovereign, and

(b) No country can impose any condition (dictate terms) to other country without the other country's consent.

[Please see the preamble of the Vienna Convention on the Law of Treaties] [TAB B Defendant's BOA]

1.1.3 Under Article 19 of the said treaty, every signatory is allowed to make reservations in any international instrument. Under CEDAW, we have made our reservations. From this reservation, we contended that the claim by the Plaintiff that there arises a 'legitimate expectation' on part of the offer to work as GSTT is of no basis.

2. PRINCIPLES OF LEGITIMATE EXPECTATION

2.1 Article 18 Universal Declarations of Human Rights [UDHR] [TAB C Defendant's BOA]

2.1.1 Since Malaysia is a member of the United Nations, Malaysia is obliged to comply with the provisions of the Charter of the United Nations. The **Universal Declaration of Human Rights** (UDHR) further defines human rights and fundamental freedoms as enshrined in various provisions of the UN Charter.

2.1.2 However, it is respectfully submit that the UDHR is only a declaration and as such it is a non-binding legal instrument. It does not impose mandatory obligation to the Member States. In this connection, Malaysia has only moral obligations to comply with the minimum standards of human rights provided for in the UDHR. The two cases pertinent to this issue are –

- (i) **Merdeka University Bhd v. Government of Malaysia [1981] 2 MLJ 356 [TAB E Defendant's BOA]**
- (ii) **Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Ors [2002] 4 MLJ 449 [TAB F Defendant's BOA]**

In **Merdeka University Bhd v. Government of Malaysia**, Justice Abdoolcader held at page 366:

"The Universal Declaration of Human Rights was proclaimed and adopted on December 10, 1948 by the General Assembly of the United Nations. It is not a legally binding instrument as such and some of its provisions depart from existing and generally accepted rules. It is merely a statement of principles devoid of any obligatory character and is not part of our municipal law".

- 2.1.3 In the Federal Court decision of **Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Ors**, Justice Siti Norma said at page 513: 514.

"In my opinion, the status and the weight to be given to the 1948 Declaration by our courts have not changed. It must be borne in mind that the 1948 Declaration is a resolution of the General Assembly of the United Nations and not a convention subject to the usual ratification and accession requirements for treaties. By its very title it is an instrument which declares or sets out statement of principles of conduct with a view to promoting universal respect for and observance of human rights and fundamental freedoms. Since such principles are only declaratory in nature, they do not, I consider, have the force of law or binding on member states. If the United Nations wanted those principles to be more than declaratory, they could have embodied them in a convention or a

treaty to which member states can ratify or accede to and those principles will then have the force of law.”

- 2.1.4 It is also the contention of the Council (see paras 13/pg6) that because UDHR has been given statutory recognition in section 4(4) of the Human Rights Commission of Malaysia Act, 1999, therefore “there is now a legitimate expectation ... that the rights enshrined in the Universal Declaration of Human Rights, so far as those not inconsistent with the fundamental liberties guaranteed to us in the Federal Constitution, will be respected and given due regard by all the organs of State in Malaysia..”
- 2.1.5 This very issue was posed before the Federal Court in Mohamed Ezam's case and it was **rejected by the Federal Court**. Justice Siti Norma held at page:

*“Merdeka University Bhd was decided in 1981. This **begs the question as to whether acceptance of the 1948 Declaration as a non-legally binding instrument has changed by virtue of s 4(4) of the Human Rights Commission of Malaysia Act**. In my opinion, the status and the weight to be given to the 1948 Declaration by our courts have not changed. It must be borne in mind that the 1948 Declaration is a resolution of the General Assembly of the United Nations and not a convention subject to the usual ratification and accession requirements for treaties. By its very title it is an instrument which declares or sets out statement of principles of conduct with a view to promoting universal respect for and observance of human rights and fundamental freedoms. Since such principles are only declaratory in nature, they do not, I consider, have the force of law or binding on member states. If the United Nations wanted those principles to be more than declaratory, they could have embodied them in a convention or a treaty to which member states can ratify or accede to and those principles will then have the force of law.*

The fact that regard shall be had to the 1948 Declaration as provided for under s 4(4) of the Human Rights Commission of Malaysia Act makes no difference to my finding. This is so as my understanding of the pertinent words in the subsection that 'regard shall be had' can only mean an invitation to look at the 1948 Declaration if one is disposed to do so, consider the principles stated therein and be persuaded by them if need be. Beyond that one is not obliged or compelled to adhere to them. This is further emphasized by the qualifying provisions of the subsection which states that regard to the 1948 Declaration are subject to the extent that it is not inconsistent with our Constitution".

2.2 Bangkok and Vienna Declarations

2.2.1 Pertaining to both the **Bangkok** and the **Vienna Declarations**, these are considered as "soft law" under the international law, which are equally non-binding on the States. "The term 'soft law' refers to quasi legal instrument which do not have any binding force, or whose binding force is somewhat 'weaker' than the binding force of traditional law, often referred to as 'hard law'. In this context of international law, the term 'soft law' usually refers to agreements reached between parties, usually states, **which do not amount to international law in the strictest sense**. Soft laws are non-treaty obligations which are therefore non-enforceable."(Source: en.wikipedia.org). In the premises, applying the principles in the cases of **Merdeka University** and **Mohamad Ezam**, we respectfully submit that the said Declarations are not legally binding and Malaysia has only moral obligations to comply with the provisions as quoted by the BC.

2.3 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

- 2.3.1 Malaysia acceded to CEDAW in 1995 but has made reservations to several Articles, including Article 11. Based on our submission in paragraphs 2.1 until 2.2 above, we respectfully submit that the application from the Plaintiff is equally untenable.
- 2.3.2 The principles that can be derived from there is that “unless and until it is incorporated into our municipal law, the treaty is not binding and the court could not be compelled to enforce it”.
- 2.3.3 Malaysia ratified CEDAW on 5th July 1995 but made some reservation to the provisions under CEDAW and this also includes Article 11 of the Convention.

Article 11 of CEDAW reads [TAB D Defendant's BOA];

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:
 - (a) The right to work as an inalienable right of all human beings;
 - (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
 - (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service

and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) *The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.*

2.3.4 By looking at the Convention itself, it is very certain that the Convention itself provide the provision on the protection of health and safety in working conditions.

2.3.5 It does not want the health and safety to be abandoned as it is a question of rights to everybody especially to the woman as the function of reproduction.

2.3.6 As submitted here, this question of health and safety is the focal point why a pregnant woman is not allowed to be a part of the GSTT candidates as the Government do not have the allowances and services rights to the pregnant woman in these programs. Another crucial point is that the main objective to have this GSTT post is to cater the problem of shortage in the permanent teacher that had to undergo their courses in order to have the school functioning that is why this GSTT came into the picture.

2.3.7 We turn back to our policy and the “Surat Pekeliling Perkhidmatan Kementerian Pelajaran Malaysia Bil. 1 Tahun 2007” [refer to Affidavit of Tan Sri Dato’ Haji Alimuddin Bin Haji Mohd Dom at exhibit “AMD-2”], the Pekeliling itself clearly mentioned the provisions and conditions of GSTT in which the GSTT candidates is not entitle to have certain allowance and services right where it stated there at para 4.2 :

Kemudahan-Kemudahan yang tidak layak diperolehi oleh GST dan GSTT

4.2.1 Rawatan Perubatan di Luar Negeri

4.2.2 Cuti Bersalin

4.2.3 Pinjaman Perumahan/Kenderaan

2.3.8 Furthermore, the contention made by Plaintiff that the Defendant’s action in retracting the offer made to her for reason of her being pregnant is in violation of CEDAW, it is our humbly submission that Malaysia interprets the provisions of Article 11 a reference to the prohibition of discrimination on the basis of equality between men and woman only. Thus, issue on the right and legal status of Plaintiff as a pregnant woman whom being refused to be appointed as GSTT is of no effect under CEDAW.

2.3.9 The Article 11 of the Convention continues to say on;

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

2.3.10 If Malaysia do have to follow this Article, it is a must for the Government to provide the facilities regarding the pregnant woman but as Malaysia only makes the Convention as a reference it do not have any effect to strictly follow it.

2.3.11 The Pekeliling 2007 is the policy made to regularize the appointment of this GST and GSTT so that it will not defeat the purposes on why by contract the scheme been upheld.

2.3.12 The appointment of GST and GSTT vide Pekeliling is a policy decision made by Government mainly to overcome the lack of teacher in school throughout Malaysia and for the purpose to ensure the learning and educational process of students will not be affected by the reasons of maternity leave or sick leave regarding pregnancy occur. When something had been clearly stated inside a Pekeliling, it shows that this Article of CEDAW is only a reference and not to be fulfill solely.

3. ULTRA VIRES THE ARTICLE 5 AND 8 OF THE FEDERAL CONSTITUTION

3.1 Amendment to Article 8(2) of the Federal Constitution on August 1, 2001 to include the word "gender" relates to the principle of non-discrimination and gender equality between men and women but not between pregnant woman and non-pregnant woman. Article 8(2) FC was amended to ensure that there will be no discrimination based on gender.

3.2 Article 8(2) stated **[TAB A Defendant's BOA]**;

Article 8. Equality.

(1) All persons are equal before the law and entitled to the equal protection of the law.

(2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

3.3 Constitutional Interpretation : By ascertaining the Intention of the Founding Fathers/ Framers of the Constitution

3.3.1 It is our respectful submission that this Honourable Court should apply the 'intentionalism' approach in constitutional interpretation in order to ascertain whether Art. 8(2) includes the right of a pregnant woman to an employment where the government has impose and provide certain policy to recourse a problem in education system.

3.3.2 This 'intentionalism' approach is to decide the questions of constitutional law according to the intention of the framers of the Constitution. This approach was adopted by Abdul Hamid LP in **Teoh Eng Huat v. Kadhi, Pasir Mas & Anor (supra) [1990] 1 CLJ (Rep) 277 [TAB G Defendant's BOA]**. In this case His Lordship adopted the opinion of Lord Denning on constitutional interpretation "*... to ascertain for ourselves what purpose the founding fathers of our constitution had in mind when our constitutional laws were drafted..*"

3.3.3 It is beyond doubt that when the framers of our Constitution declared the equality right under Article 8 and allowed legislation to be passed on employment law (Employment Act 1955). However, in **Beatrice a/p At Fernandez v. Sistem Penerbangan Malaysia & Anor [2005] 2 CLJ 713 [TAB H Defendant's BOA]**, Federal Court unanimously held that; (pg 721)

"In the circumstances, in construing art. 8 of the Federal Constitution, our hands are tied. The equal protection in cl. (1) of art. 8 thereof extend only to persons in the same class. It recognizes that all persons by nature, attainment, circumstances and the varying needs of different classes of persons often require separate treatment. Regardless of how we try to interpret art. 8 of the Federal Constitution, we could only come to the conclusion that there was obviously no contravention. We are also in agreement with the views expressed by Suffian LP in Dato' Haji Harun bin Haji Idris v. Public Prosecutor [1977] 2 MLJ 155 at pp. 165 and 166 on this point."

3.3.4 Therefore as a pregnant woman, Plaintiff is subject not only to the general laws but also those of a policy made by the administrative body that been entrusted by the government to control and monitor the smooth system in education.

4. PEKELILING PERKHIDMATAN KEMENTERIAN PELAJARAN MALAYSIA BIL. 1/2007

- 4.1 It is our humbly submission that "the Pekeliling" made regarding GST and GSTT is to solve the shortage problem of teachers faced by Ministry throughout Malaysia and to ensure that the learning and education system in our country is not affected by the said problem.
- 4.2 Therefore by taking a pregnant woman to fill up the post will defeat the purpose of the GST and GSTT itself. This is because the requirements and conditions laid down by the Ministry do not favor them especially in taking maternity leave.
- 4.3 This is the policy decision made by the policy maker to ensure equality for everybody is upheld, i.e. not only to the teacher but the student as well.
- 4.4 Education Department will face a problem in finding a replacement for the GSTT who being absence due to medical checkup and to the delivery itself. Furthermore, the right of pupils in pursuing their knowledge findings in the education system will be entirely affected.
- 4.4 We firmly stated in our affidavits that the "Memo Penempatan" given to the Plaintiff is not an agreement or an offer and therefore is not a binding contract. The "Memo Penempatan" serve merely as a letter of posting the GSTT and it is not an offer letter. Until and unless the Plaintiff has report duty to the respective school and be given the actual offer letter, Plaintiff cannot contended that she is permanently offered with that post.
- 4.5 The act of asking further either the GSTT candidates is pregnant or not shows that the offer is not been prearranged.

4.6 We humbly submit that the fact that Plaintiff being pregnant does not totally bar her to reapply for the post after delivery. Plaintiff is still entitled to the GSTT post and Plaintiff's action against the Defendants is of no effect.

5. CONCLUSION

5.1 We repeat our submissions and further state that any references to international conventions especially CEDAW are irrelevant in considering the application made by the Plaintiff in getting the post of GSTT.

5.2 In view of all our submissions, we pray that this application by the Plaintiff to be dismissed with costs.

Dated 31st January, 2011.



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Senior Federal Counsel
Attorney General's Chambers

This **Written Submission** is filed by the Senior Federal Counsel on behalf of the Defendants whose address for service is at Bahagian Guaman, Jabatan Peguam Negara Malaysia, Aras 3, Blok C3, Parcel C, Pusat Pentadbiran Kerajaan Persekutuan, 62502 PUTRAJAYA.

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