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

DEFENDAN-DEFENDAN

PLAINTIFF'S OUTLINE WRITTEN SUBMISION

(In respect of the Plaintiff's Originating Summons dated 7.5.2010)

Solicitors for the Plaintiff
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50450 Kuala Lumpur
[Ref: 20090815 EB]

CONTENT

A. INTRODUCTION

This submission is filed in support of the Plaintiff's Originating Summons dated 7.5.2010. It is to be read with the Plaintiff's Bundle of Authorities I and II **(PBOA I & PBOA II)**.

For ease of reference, the cause papers in this matter are as follows:

a. Originating Summons dated 7.5.2010 *(enclosure 1)*.

b. Plaintiff's Affidavit-in-Support affirmed by Noorfadilla binti Ahmad Saikin and Plaintiff's 2nd Affidavit-in-Support affirmed by Mohd Izwan bin Zakaria both on 6.5.2010 *(collectively marked as enclosure 2)*.

c. Memorandum of Appearance dated 1 June 2010 *(enclosure 3)*.

d. Notice of Appointment to hear the Originating Summons dated 9.6.2010 *(enclosure 4)*.

e. 1st Defendant's Affidavit-in-Reply affirmed by Chayed Bin Basirun on 29.9.2010 *(enclosure 5)*.

f. 2nd and 3rd Defendants' Affidavit-in-Reply affirmed by Ismail bin Musa on 29.9.2010 *(enclosure 6)*.

g. 4th, 5th and 6th Defendants' Affidavit-in-Reply affirmed by Haji Alimuddin bin Haji Mohd Dom on 14.10.2010 *(enclosure 7)*.

h. Plaintiff's Affidavit-in-Reply affirmed by Noorfadilla binti Ahmad Saikin on 23.11.2010.

i. Plaintiff's 2nd Affidavit-in-Reply affirmed by Mohd Izwan bin Zakaria on 23.11.2010.

B. UNDISPUTED FACTS

1. There was a shortage of teachers in Malaysia.

2. The Ministry of Education tried to overcome the problem by employing untrained teachers, also known as "*Guru Sandaran Tidak Terlatih*" **(GSTT)** to overcome this shortage of teachers.

See:
Exhibit IM-1 *in 2nd and 3rd Defendants' Affidavit-in-Reply, paragraph 2 and 3*
Exhibit AMD-1 *in 4th, 5th and 6th Defendants' Affidavit-in-Reply, paragraph 2 and 3*

3. The Ministry of Education **(the Ministry)** had previously issued a letter of approval (also known as a warrant) to all State Directors of Education, authorising them to elect and employ GSTT.

See:
4th, 5th and 6th Defendants' Affidavit-in-Reply, paragraph 7

4. A sample letter of approval/warrant for the year 2008 issued by the Ministry is exhibited as **Exhibit IM-1** in 2nd and 3rd Defendants' Affidavit-in-Reply and **Exhibit AMD-1** in 4th, 5th and 6th Defendants' Affidavit-in-Reply. The letter of approval/warrant states that the employment of GSTT is subject to the terms of "*Pekeliling Perkhidmatan Kementerian Pelajaran Malaysia Bil. 1/2007*" dated 27.2.2007 **(the Circular)**.

5. A copy of the Circular is exhibited as **Exhibit NAS-3** in Plaintiff's Affidavit-in-Support, **Exhibit CB-7** in the 1st Defendant's Affidavit-in-Reply, **Exhibit IM-8** in the 2nd and 3rd Defendants' Affidavit-in-Reply and **Exhibit AMD-2** in the 4th, 5th and 6th Defendants' Affidavit-in-Reply. The Circular states as follows:

> 3. <u>*Taraf GST dan GSTT*</u>

3.1 *GST dan GSTT adalah bertaraf bukan kakitangan kerajaan. Oleh yang demikian mereka tidak layak mendapat apa jua faedah atau kemudahan seperti yang diterima oleh guru-guru tetap kecuali kemudahan-kemudahan seperti yang tersebut di perenggan 4 di bawah.*

4. *Elaun dan Kemudahan yang layak diterima oleh GST dan GSTT*

...

4.1.1 ***Elaun bulanan*** *berdasarkan tangga elaun yang diluluskan oleh Jawatankuasa Kabinet Gaji dan telah dilaksanakan melalui ...*

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

...

4.2.2 ***Cuti Bersalin***

...

6. *Tempoh Perkhidmatan Guru-Guru Sandaran*

...

6.2 *Perkhidmatan GSTT adalah juga* ***berdasarkan sebulan ke sebulan*** *dan akan tamat pada 31 Disember tahun berkenaan atau ditamatkan pada bila-bila masa apabila perkhidmatan mereka tidak dikehendaki lagi oleh Jabatan Pelajaran Negeri/Jabatan/Bahagian berkenaan mengikut yang mana lebih berkaitan dengan kepentingan perkhidmatan.*

(emphasis ours)

6. To summarise:

(a) The purpose of employing a GSTT is to overcome the shortage of teachers.

(b) The nature of a GSTT employment is temporary in nature. The appointment is on a month to month basis, and a monthly allowance is paid.

(c) A GSTT may resign at any time.

The Defendants do not dispute the above as *per* paragraph 10 of the 4th, 5th and 6th Defendants' Affidavit-in-Reply.

See also the Plaintiff's Affidavit-in-Reply, paragraph 12

7. In respect of this matter before the Honourable Court, the then State Director of the Education Department of Selangor, i.e., the 3rd Defendant, received a letter of approval/warrant from the Ministry directing the relevant District Offices to employ persons for the GSTT position.

See:
1st Defendant's Affidavit-in-Reply, paragraph 6
2nd and 3rd Defendants' Affidavit-in-Reply, paragraph 7
4th, 5th and 6th Defendants' Affidavit-in-Reply, paragraph 5

8. It is within the 3rd Defendant's purview to employ GSTT for the Ministry, i.e., the 4th and 5th Defendants and indirectly, the Government of Malaysia, i.e., the 6th Defendant. The employer is the Ministry, i.e., the 4th and 5th Defendants. See:

8.1 in paragraph 5 of the letter of approval/warrant *per* **Exhibit AMD-1** in the 4th, 5th and 6th Defendants' Affidavit-in-Reply;

8.2 in clause 3.2 of the Circular *per* **Exhibit AMD-2** in the 4th, 5th and 6th Defendants' Affidavit-in-Reply; and

8.3 in clause 5.1.2 of the Circular *per* **Exhibit AMD-2** in the 4th, 5th and 6th Defendants' Affidavit-in-Reply.

The Defendants do not dispute the above.

9. The 2nd Defendant as the Education Officer of the Education Office of the Hulu Langat District **(PPDHL)** administratively executes the instructions of the 3rd Defendant. The 2nd Defendant was in charge of employing persons interested in the GSTT position for the Hulu Langat District. This is not disputed by the Defendants.

See:
2nd and 3rd Defendants' Affidavit-in-Reply, paragraph 1

10. In the period of 1.2.2008 to 31.3.2008, the Plaintiff applied to PPDHL for a GSTT position scheduled to start mid-January 2009.

See:
Plaintiff's Affidavit in Support, paragraph 10

11. On the 1.1.2009, the Plaintiff received a call from PPDHL to attend an interview on 2.1.2009 at 2.00 pm at PPDHL.

See:
Plaintiff's Affidavit in Support, paragraph 13
1st Defendant's Affidavit-in-Reply, paragraph 9
2nd and 3rd Defendants' Affidavit-in-Reply, paragraph 8

12. On 2.1.2009, the Plaintiff attended the interview at PPDHL. Plaintiff was asked to fill up certain forms before the interview. During the interview, questions posed to the Plaintiff included questions pertaining to her general knowledge, personal details, problem solving skills and residential address.

See:
Plaintiff's Affidavit in Support, paragraph 13
1st Defendant's Affidavit-in-Reply, paragraph 8
2nd and 3rd Defendants' Affidavit-in-Reply, paragraph 9

13. Before and during the said interview, the Plaintiff was not asked whether she was pregnant or not.

See:
Plaintiff's Affidavit-in-Reply, paragraph 12.5

14. On 11.1.2009, the Plaintiff received a text message from a PPDHL officer. The text message is reproduced as follows:

> *As'kum wbt...Berhubung permohonan GSTT, tuan/puan/cik diminta hadir ke Blok B, Pejabat Pelajaran Daerah Hulu Langat pada hari Isnin 12 Januari 08 mulai dari pkul 8:00pg hngga 9pg* ***utk mndapatkn Memo Penempatan ke sekolah2.*** *Sila brpakaian ssuai utk ke sekolah. Walau bgaimanapn, bg yg ada kelapangan pd hari ini, boleh jga brbuat dmikian mulai dr pukul 11.00pg hgga 4.30ptg.* ***Tahniah & terima kasih.***
>
> (emphasis ours)

See:

Plaintiff's Affidavit-in-Support, paragraph 15
1st Defendant's Affidavit-in-Reply, paragraph 12
2nd and 3rd Defendants' Affidavit-in-Reply, paragraph 13

15. On 12.1.2009 at 8.00 am, the Plaintiff was present at PPDHL as instructed. The Plaintiff was given a *"Memo Penempatan"* **(Placement Memo)** where it was stated that the Plaintiff will be posted to *"Sekolah Menengah Kebangsaan Tinggi Kajang"*. It is pertinent to note that the date the Plaintiff was to have reported to the said school had passed, i.e., 5.1.2009. This meant that as of 12.1.2009, there was still a need for the Plaintiff to fill the vacancy. The Defendants do not dispute these facts.

See:
***Exhibit CB-3** in 1st Defendants' Affidavit-in-Reply*
Plaintiff's Affidavit-in-Support, paragraph 16

16. The Plaintiff and a few others were then given a briefing on the terms of service of employment such as the requirement to give one month's notice for resignation. The Plaintiff was asked to report for duty immediately.

See:
Plaintiff's 1st Affidavit-in-Support, paragraph 17

17. Subsequently a PPDHL officer asked if anyone was pregnant. The Plaintiff and two others admitted that they were pregnant. (The Plaintiff at that time was three months pregnant.) The officer withdrew the Placement Memo of the Plaintiff.

See:
Plaintiff's Affidavit-in-Support, paragraph 17

18. The Plaintiff, through her husband wrote a number of e-mails to the Ministry requesting for an explanation. On 17.2.2010 the Ministry, i.e., on behalf of the 4th and 5th Defendants replied. The Ministry relied on the Circular to say that a pregnant woman cannot be employed to the GSTT post because:

(i) The period between the time of delivery to full health is too long (2 months).

(ii) A pregnant woman as a GSTT may not frequently be able to attend to her job due to various health reasons.

(iii) When she gives birth she needs to be replaced by new teacher who will require further briefings.

(iv) A GSTT post cannot be filled with "replacement" teachers.

The Ministry added that the purpose of employing GSTT is to help overcome the shortage of teachers and not to add to the problem.

See:

Plaintiff's Affidavit-in-Support, paragraph 19 and ***Exhibit NAS-2***

2nd and 3rd Defendants' Affidavit-in-Reply, paragraph 23-25

4th, 5th and 6th Defendants' Affidavit-in-Reply, paragraph 9.3 and 10

19. The Plaintiff through her solicitors wrote a letter dated 19.2.2009 to the Defendants demanding that her employment as GSTT be restored immediately. There was no written reply to this letter until today.

See:

Plaintiff's First Affidavit-in-Support, paragraph 21 and ***Exhibit NAS-4***

20. Despite attempts, the parties have not been able to resolve this dispute.

21. The Plaintiff filed this matter against the Defendants on 7.5.2010.

22. It must be noted that despite heavy reliance placed by the Defendants on the Circular to justify the withdrawal of the Placement Memo from the Plaintiff, it is *not* in any part of the said Circular that "pregnant women" cannot be employed as GSTT. This point by itself should be sufficient to rebut the Defendant's attempted justification.

See:
2nd and 3rd Defendants' Affidavit-in-Reply, paragraph 19
Circular per ***Exhibit AMD-2*** *in the 4th, 5th and 6th Defendants' Affidavit-in-Reply*

23. In sum, the essential facts are not in dispute, and the sole question of law to be answered is *whether the action/directive of the Defendants in refusing to allow pregnant women to be employed as GSST is gender discrimination in violation of Article 8 of the Federal Constitution.* The Plaintiff submits that it is so.

C. GROUNDS AND ARGUMENTS IN SUPPORT OF THE PLAINTIFF'S CLAIM

24. As at 12.1.2009, Plaintiff was 27 years old. She was about three months pregnant.

25. The gist of the Plaintiff's complaint is that the GSST post was revoked and withdrawn by the Defendants on the sole basis that the Plaintiff was pregnant. The Plaintiff submits that:

25.1 the Defendants have by their action of revocation and withdrawal violated committed gender/sex discrimination against the Plaintiff in violation of Article 8 of the Federal Constitution **(FC)**; and

25.1 further, deprived the Plaintiff of her right to livelihood protected by Article 5 FC.

I. Liberal interpretation of the fundamental liberties protected by the Federal Constitution

26. The Court is to adopt a broad and liberal approach when interpreting rights in Part II of FC. This is reflected in judicial expressions that a written constitution is "a living and organic thing which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat*"; and that it should be flexibly interpreted to accommodate changing circumstances.

See:

A-G for Ontario v. AG for Canada [1947] AC 127, Tab 1 PBOA I

27. In ***Dato Menteri Othman bin Baginda & Anor v. Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, Tab 2 PBOA I at pg 32***, Raja Azlan Shah Ag. LP (as he then was) said:

> *In interpreting a constitution two points must be borne in mind.* ***First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation.*** *Secondly, a constitution, being a living piece of legislation,* ***its provisions must be construed broadly and not in a pedantic way*** *– "with less rigidity and more generosity than other Acts" (see Minister of Home Affairs v Fisher). A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: "A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite*

consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms." The principle of interpreting constitutions "with less rigidity and more generosity" was again applied by the Privy Council in Attorney-General of St Christopher, Nevis and Anguilla v Reynolds."

It is in light of this kind of ambulatory approach that we must construe our Constitution.

(emphasis ours)

28. This approach was approved by the Federal Court recently in ***Lee Kwan Woh v. PP [2009] 5 CLJ 631, Tab 3 PBOA I at pg 639-640. Shamim Reza Abdul Samad v. PP [2009] 6 CLJ 93, Tab 4 PBOA I at pg 98-99*** and ***Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507, Tab 5 PBOA I***.

29. In applying the liberal approach, the Court is to take heed that guidelines that are applicable to the construction of ordinary statutes do not apply at all towards interpreting the FC. In ***Lee Kwan Woh, Tab 3 PBOA I at pg 638***, Gopal Sri Ram FCJ said:

Hence, it ought not to be interpreted by the use of the canons of construction that are employed as guides for the interpretation of ordinary statutes. Indeed it would be misleading to do so. As Lord Diplock said in Hinds v. The Queen [1976] 1 All ER 353, at pg 359:

"To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would, in their Lordships' view, be misleading..."

30. Part II of the FC (which includes Articles 5 and 8) are human rights as classified by the Parliament itself.

See:

Section 2 of the Human Rights Commission of Malaysia Act, ***Tab 6 PBOA I at pg 5*** (interpretation of "human rights" refers to fundamental liberties as enshrined in Part II of the FC)

31. The Court is also under a duty to take a prismatic approach when interpreting these human rights. On no account should the literal approach be taken as it is a narrow approach and violates the very first principle aforestated.

32. The prismatic approach is but a mere recognition that these human rights as enshrined in the FC each house a multitude of other rights that are also protected.

33. An example of the prismatic approach is illustrated in ***Lee Kwan Woh,*** ***Tab 3 PBOA I at pg 639***:

> *In our view, it is a duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II. Indeed the prismatic interpretation of the Constitution gives life to abstract concepts such as "life" and "personal liberty" in art. 5(1)."*

See also:

(a) ***Shamim Reza Abdul Samad v. PP [2009] 6 CLJ 93***, ***Tab 4 PBOA I***, where the prismatic approach was adopted and it was held that Article 5(1) includes the right to a fair trial.

(b) ***Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507***, ***Tab 5 PBOA I***, where the prismatic approach was adopted and it was held that "personal liberty" under Article 5(1) includes the right to livelihood.

(c) ***Lange v. Australian Broadcasting Corporation [1997] 189 CLR 520***, ***Tab 7 PBOA I***, where the High Court held that a requirement of the freedom of communication is an implication to be drawn from certain sections of the Australian Constitution.

34. The liberal and prismatic approach in interpreting the FC enables a Court to identify, through the process of derivation, the rights and liberties implied within concepts expressly provided in our FC.

II. Pregnancy is a form of gender discrimination within Article 8(2) FC

35. The Plaintiff submits that her legal status and character as a woman and her rights flowing therefrom are protected from discrimination by Article 8 FC. See ***Tab 15 PBOA I at pg 17***

36. Article 8 reads as follows:

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

(2) *Except as expressly authorised 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.*

(emphasis ours)

37. The Plaintiff's case fits squarely within the prohibition of discrimination based on gender under Article 8(2) FC as emphasised above:

(a) the Plaintiff applied for and was appointed/granted employment as a teacher with a public authority namely the 3rd, 4th and 5th Defendants through their State-level offices;

(b) the only reason the Plaintiff's Placement Memo was revoked and withdrawn was because she was pregnant; and

(c) only women can become pregnant and therefore, pregnancy is a form of gender discrimination.

38. The authority of ***Public Prosecutor v. Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116,*** ***Tab 8 PBOA I at pg 119*** is instructive on the application of Article 8(2):

Article 8(2) contains a specific and particular application of the principle of equality before the law and equal protection of the law embodied in Article 8(1). Therefore, discrimination against any citizen only on the grounds of religion, race, descent or place of birth or any of them in any law is prohibited under Article 8(2) and such discrimination cannot be validated by having recourse to

the principle of reasonable classification which is permitted by Article 8(1) (Srinivasa Aiyar v Saraswathi Ammal AIR 1952 Mad 193 195 at p. 195; Kathi Raning Rawat v State of Saurashtra AIR 1952 SC 123 at p 125).

In cases not covered by Article 8(2), the general principle of equality embodied in Article 8(1) is attracted whenever discrimination is alleged, and if accordingly discrimination is alleged on a ground other than those specified in Article 8(2), the case must be decided under the general provisions of Article 8(1). Article 8(1) and (2) must be read together, their combined effect is not that the State cannot discriminate or pass unequal laws, but that if it does so, the discrimination or the inequality must be based on some reasonable ground (Article 8(1)), and that, due to Article 8(2), religion, race, descent or place of birth alone is not and cannot be a reasonable ground of discrimination against citizens. The word 'discrimination' in Article 8(2) involves an element of unfavourable bias.

The use of the word 'only' in Article 8(2) connotes that what is discountenanced is discrimination purely and solely on account of all or any one or more of the grounds mentioned in that clause. A discrimination based on any of these grounds and also on other grounds is not affected by Article 8(2) though it may be hit by Article 8(1). (Anjali v State of West Bengal AIR 1952 Cal 825 829 at p. 829)

The prohibition of discrimination based on "gender" was added to Article 8(2) post ***Datuk Harun bin Haji Idris*** and came into force on 28 September 2001 (*see:* ***Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors [2005] 3 MLJ 681, Tab 11 PBOA I at pg 686.)*** Therefore, the statement cited above regarding Article 8 (2) must be read in light of 2001 amendment.

38.1 Further in ***Ahmad Tajudin bin Ishak v. Suruhanjaya Pelabuhan Pulau Pinang [1997] 2 CLJ 225, Tab 35 PBOA II at pg 237*** it was held:

> *Article 8(2) of the Federal Constitution also provides that there shall be no discrimination against citizens in the appointment to any office or employment under a public authority which according to learned Counsel would encompass all stages of service from initial appointment to termination including promotion, fixation of seniority, termination gratuity and the like.*
>
> *The intent of the Article denotes that all employees shall be treated alike under like circumstances both in privileges and obligations and it must be ensured that there is equality among equals and that persons similarly placed are not discriminated and denied of equal treatment. Here, the respondent's action in conferring the powers of auxiliary police sergeants on only 46 of the security assistants was to the appellant an act which was discriminatory violative of the principles of natural justice, unfair, arbitrary and amounted to a denial of fair opportunities.*

38.2 In ***Datuk Haji Harun bin. Haji Idris v. Public Prosecutor [1977] 2 MLJ 155, Tab 36 PBOA II at pg165 (right column),*** Suffian LP said that: "*...The prohibition of unequal treatment applies not only to the legislature but also to the executive — this is seen from the use of the words "public authority" in clause (4) and "practice" in clause (5)(b) of Article 8.*"

39. The Plaintiff submits that pregnancy is a form of gender discrimination within the meaning of Article 8(2) FC.

39.1 Article 1 of CEDAW defines the term "discrimination against women" to mean "*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and*

women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." The Plaintiff urges the Court to adopt this definition of 'discrimination against women' as it comprehensively deals with direct (intended) discrimination, as well as indirect (unintended or has the impact of) discrimination.

39.2 *Paragraph 5 of General Recommendation 28 by the CEDAW Committee,* ***Tab 9 PBOA I at pg 2-3*** states:

> *Although the Convention only refers to sex-based discrimination, interpreting article 1 together with articles 2(f) and 5(a) indicates that the Convention covers gender-based discrimination against women. The term sex refers to biological differences between men and women. The term gender refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the attribution of power and rights favouring men and disadvantaging women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors can likewise be changed by culture, society and community. The application of the Convention to gender-based discrimination is made clear by the definition of discrimination contained in article 1. This definition points out that any distinction, exclusion or restriction which has the purpose or effect of denying women the exercise of human rights and freedoms is discrimination even when discrimination was not intended. This would mean that an identical or neutral treatment of women and men might constitute discrimination against women if such treatment resulted in or had the effect of women being denied the exercise of a right because there was no recognition of a pre-existing gender-based disadvantage and inequality that women face.*

39.3 Discrimination based on pregnancy or one's marital status is gender discrimination within the meaning of Article 8(2) FC. In ***Brooks v. Canada Safeway Ltd. Allen et al. v. Canada Safeway Ltd.; Women's Legal Education and Action Fund (LEAF), Intervener, 59 D.L.R (4th) 322, Tab 10 PBOA I at pg 338***, Dickson C.J.C who delivered judgment for the Supreme Court of Canada said:

> *In retrospect, one can only ask – **how could pregnancy discrimination be anything other than sex discrimination**? The disfavoured treatment accorded Mrs. Brooks, Mrs. Allen and Mrs. Dixon flowed entirely from their state of pregnancy, a condition unique to women. They were pregnant because of their sex. **Discrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant.***
>
> *... It is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex...*
>
> (emphasis ours)

40. The Plaintiff submits that the Beatrice Fernandez test is satisfied to found liability against the Defendants.

40.1 In ***Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors [2005] 3 MLJ 681, Tab 11 PBOA I at pg 688***, the Federal Court held that to "*invoke art 8 of the Federal Constitution, the applicant must show that some law or action of the Executive discriminate against her so as to controvert her rights under the said Article*" (see paragraph [13]). The Plaintiff submits that the Defendants (as

the Executive) by revoking and withdrawing the Placement Memo because the Plaintiff became pregnant constitute a violation of Article 8(2) FC.

(i) Definition of "public authority"

40.2 Under Article 160 FC, the term "public authority" is defined as "... the Federal Government, ... a statutory authority exercising powers vested in it by federal or State law, ..." The Education Act 1996 is federal law which established and gives powers, *inter alia,* to the Director General of Education (i.e., the 4th Defendant) [see section 3], to a State Director of Education (i.e., the 3rd Defendant) [see section 4] and to an Education Officer of each State and district in a State (i.e., the 2nd Defendant) [see section 4]. The said Defendants are statutory authorities which exercise public powers, duties, functions and operate on public funds. Appointments to offices of the said Defendants are subject to public control. Thus, all the Defendants in this matter fall within the definition of constituting a "public authority".

See ***Merdeka University Berhad v. Government of Malaysia [1982] 2 MLJ 243,*** ***Tab 29 PBOA II at page 250***, where the Supreme Court said:

> *The operative word in the definition in Article 160(2) must necessarily be the word "authority", and for a person or body to constitute such an entity there must be some public element and utility in its constitution, operation, functions, powers and duties. Viscount Simon L.C. said at page 178 in Griffiths v. Smith with regard to the managers of a non-provided public elementary school that the body of managers are a statutory body created by the relevant statutes for the discharge of public duties and therefore a public authority and are not analogous to companies acting for profit as in Attorney-General v. Company of Proprietors of Margate Pier and Harbour.*

...

A university established under the 1971 Act even if private clearly has the requisite public element, as it is subject to some degree of public control in its affairs and involves a number of public appointments to office in its framework, acts in the public interest and is eligible for grants-in-aid from public funds.

...

(ii) Appointment to any office or employment

40.3 It is clear that the Placement Memo ***(Exhibit IM-4** in the 2nd and 3rd Defendants' Affidavit-in-Reply)* is evidence of the appointment of the Plaintiff to employment as a teacher.

40.4 The meaning of "employment" can be derived from these sources:

(i) Shorter Oxford English Dictionary ***Tab 30 PBOA II at page 817***

1. The action of employing; the state of being employed. The service of another person

2. Occupation, business; paid work; an activity in which a person is engaged; A person's trade, profession or occupation.

(ii) Butterworths Australian Legal Dictionary ***Tab 31 PBOA II at page 415***

A relationship in which parties agree that one party will perform for another in exchange for remuneration, subject to certain terms and conditions contained in the contract of employment, and in industrial awards, agreements or legislation. The employment relationship imports certain rights and duties for the parties which do not exist in other contracts for work. Generally, "employment" means working under a

contract of service. It has different definitions in various statues for different purposes. For example, under (CTH) Sex Discrimination Act 1984 s4 it includes work under a contract for services. It may also include work as an unpaid worker ((ACT) Discrimination Act 1991 s4), or work as a self-employed person ((SA) Workers Rehabilitation and Compensation Act 1986 s3). It may refer to work of the employee, rather than to the contract: *Hall v Centreway Café Co Pty Ltd* [1916] VLR560.

(iii) *Black's Law Dictionary*, 7th Ed. Page 545. ***Tab 32 PBOA II at page 545***

1. The act of employing; the state of being employed.
2. Work for which one has been hired and is being paid by an employer.

(iv) *Words, Phrases & Maxims; Legally & Judicially Defined* ***Tab 33 PBOA II at page 163***

The act of employing; the state of being employed; business, calling, commission, occupation, office; profession, service, vocation, that which engages the head or hands; object of industry; appointment; engagement. The word 'employment' includes services or occupation in which a person works for another and in which there is a relationship of employer and employee. *Kisan Supadu Ingale v Ehuswal Municipality* AIR 1966 Bom 15 AIR 1966 Bom 18.

The matters relating to employment include all matters in relation to employment both prior and subsequent to the employment which are incidental to the employment and form part of the terms and conditions of such employment. *Faisinghari v Union of India* AIR 1967 SC 1427 AIR 1967 SC 1431.

When a person was doing a thing not in the way of business but on his own pleasure (as talking with a friend) and suffered an injury, it would not

be an accident *arising out of and in the course of "Employment"* (*Smith v Lanc & Y Ry* [1899] I QB 141) As to what are accidents arising out of and in the course of Employment. *See* Workmen's Compensation Act 1923 and cases decided thereon)
(sources from P. Ramanathan Aiyar's The Law Lexicon 2nd Edition)

The "employment" is the contract of service between the employer and the employee where under the employee agrees to serve the employer subject to his control and supervision (*Chinatamani Rao v State of Madhya Pradesh* AIR 1958 SC388). The Office of Governor of a State is not an employment under the Government of India within the meaning of Art319 (d) of the Constitution. Therefore appointment of an ex-member of a State Public Service Commission as the governor of the State is not invalid. (*HG Pant v University of Rajasthan* AIR 1978 Rajasthan 72).

(sources from Anandan Krishnan):
In other words I am invited to accept the construction of the word which has been placed upon it where it appears in Schedule E to the Income Tax Act 1918. I cannot accept this view. According to the Concise Oxford Dictionary the meaning of the word 'employment' is a 'a person's regular trade or profession', and I think the primary meaning of the word is related more closely to the conception of occupation than to the conception of contract. Apart, therefore, from authority I would consider the word 'employment' in its context in our section 31 as covering any gainful occupation. And in so far as English authorities can be relied upon in construing our Ordinance I think the case of *Davies v Braithwaite*[1931] 2 KB 628 is against the appellant's contention... 'employment' when used, as it is, in section 31 in connection with a profession or vocation means the way in which a man employs or occupies himself.

(Re A Tax-Payer [1956] MLJ 94 at 95 per Spencer Wilkinson J)

To use the words of Denman J in *Partridge v Mallandaine* [1886] 18 QBD 276-278,

I am not disposed to put so limited a construction on the word 'employment' as that suggested in argument. I do not think that employment means only where one man is set to work by others to earn money; a man may employ himself so as to earn profits in many ways.

For example, a man may be the manager of a firm of which he is the sole proprietor. As such manager he may pay himself a yearly salary. In addition to his salary, of course, there may be his profits from his business at the end of the year. Will it be wrong to say that he derives his income by way of salary from employment even though he is his own employer? I do not think so. In my opinion, the word 'employment' is sufficiently wide to include within its meaning the holding of an office. In *MacMillan v Guest* [1942] AC 561, 566 Lord Wright said: "the word 'employment', in my opinion, has to be construed with and takes its colour from the word 'office'.

(CD v Comptroller of Income Tax [1967] 2 MLJ 166 at 167 per Gill J)

(v) *Stroud's Judicial Dictionary of Words and Phrases, 7th edition.* ***Tab 34 PBOA II at page 834***

'Employment'. This term is also capable of many shades of meaning within the statutory provisions thus:

1. A person under notice of termination may have "lost employment", *Cartlidge v Chief Adjudication Officer* [1986] 2 W.L.R. 558;
2. 'employment' may mean a particular field or industry rather than a particular job, *Clark v Society of Graphical and Allied Trades 1982* [1986] I.C. R. 12;

3. 'employment' may be wholly outside the United Kingdom notwithstanding that a person was engaged in Southampton, *Wood v Cunard Line* [1990] I.R.L.R. 281
4. the appointment of a general practitioner does not constitute employment, *Ealing, Hammersmith and Hounslow Family Health Services Authority v Shukla* [1993]I.C. R. 710;
5. persons employed in separate establishments may be in the same 'employment', *British Coal Corporation v Smith* [1994] I.C.R. 810;
6. 'employment' may refer to a particular contract of service rather than a series of different contracts, *Preston v Wolverhampton N.H.S. Trust* [1998] I.C.R.227;
7. 'includes an office', Income and Corporation Taxes Act 1988 (c.1) Sch 12A, para.1 (2).

See also:

(a) ***Chew Swee Hiang v. Attorney General of Singapore & Anor [1991] 1 MLJ 284,*** ***Tab 37 PBOA II at page 291***, the Singapore High Court held that:

> *The law on the point of employment and the test applicable as to whether there is a relationship of employer and employee is to be found in Halsbury's Laws of England (4th Ed) p 313 para 501:*
>
> > *'The test used to be a simple one: an employer possessed the right not only to control what work the employee was to do, but also the manner in which the work was to be done. However, this test required revision in the light of decided cases. It has been said that there were four indicia of a contract of service:*
> >
> > *(1) the employer's power of selection of his employee;*
> >
> > *(2) the payment of wages or other remuneration;*

(3) the employer's right to control the method of doing the work; and

(4) the employer's right of suspension or dismissal.'

(b) In ***Ipoh Town Council & Anor v. Ng Khoon Khoon [1960] 26 MLJ 165***, ***Tab 38 PBOA II at page 165***, the Court said that in respect of an employment of an officer by a Government or State, the practicable test should be who pays the salary of the officer. In our case, the salary of the Plaintiff would have clearly been paid by the Defendants.

40.5 The challenge under Article 8(2) FC is against the act of revocation/withdrawal of the Placement Memo by the Defendants solely because the Plaintiff was pregnant. The said act of revocation/withdrawal violated, and made illusory, the Plaintiff's right under Article 8(2) not to be discriminated against because she was pregnant. As such, the said act is illegal and unconstitutional.

41. The test to determine whether a constitutionally guaranteed right has been violated is set out in ***Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor [1992] 1 CLJ 72 (Rep)***; ***Tab 12 PBOA I at pg 73***, where the Supreme Court said:

In testing the validity of the state action with regard to fundamental rights, what the court must consider is whether it directly affects the fundamental rights or its inevitable effect or consequence on the fundamental right is such that it makes their exercise ***ineffective and illusory****.*

(emphasis ours)

The Plaintiff respectfully submits that as she was unable to work as a GSST and teach to earn an income because the Defendants revoke and withdrew the Placement Memo, the Plaintiff's right to non-discrimination under Article 8(2) has been rendered ineffective and illusory. On this ground alone the Plaintiff could succeed in this matter.

III. Plaintiff has the right to livelihood under Article 5 FC which has been violated by the Defendants

42. The Plaintiff further submits that she has the right to livelihood under Article 5 FC. Article 5 reads as follows: ***Tab 15 PBOA I at pg 15-16***

> *Liberty of the person.*
>
> *(1) No person shall be deprived of his life or personal liberty save in accordance with law.*

43. Article 5 FC includes the right to livelihood is established in ***Lee Kwan Woh, Tab 3 PBOA I at pg 643*** where Gopal Sri Ram FCJ held as follows:

> *[14] When art. 5(1) is read prismatically and in the light of art. 8(1), the concepts of "life" and "personal liberty" housed in the former are found to contain in them other rights.* ***Thus, "life" means more than mere animal existence and includes such rights as livelihood and the quality of life*** *(see Tan Tek Seng's case).*
>
> (emphasis ours)

44. Also in the case of ***Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507, Tab 5 PBOA I at pg 520-521***, the Federal Court held as follows:

There can be no doubt that the appellant's ***right to membership of the general body, that is to say the Malaysian Bar falls within the concept of "personal liberty****. The mere fact that the body in question is statutory in nature makes no difference. An advocate solicitor who has been admitted to practise law can only do so if he or she is a member of the Malaysian Bar. In order to be eligible to commence practice, the advocate and solicitor must obtain a practising certificate and pay the subscription and other dues to the Malaysian Bar. He or she may earn his or her livelihood only if he or she is approved for practise in the sense already described. All this is required by the Act and the relevant subsidiary legislation made under it.* ***Hence what the Act confers upon an advocate and solicitor is not a mere privilege; it is a right to earn a livelihood. And it is this right which the personal liberty vested in a member of the Malaysian Bar carries with it****. Included in the bundle of rights that form part of the membership of the Malaysian Bar is the legitimate expectation to participate in the Bar Council elections and, if elected, to serve on that body.* ***Accordingly, the legitimate expectation to serve on the Bar Council is also a right protected by the personal liberty clause of art 5(1)****. What s. 46A does in pith and substance is to directly impact on this right of the appellant and render it ineffective or illusory. Put slightly differently, the inevitable effect or consequence of s. 46A is to render the appellant's constitutional right to serve on the Bar Council ineffective or illusory. This satisfies the test in Dewan Undangan Negeri Kelantan v. Nordin bin Salleh. The appellant has therefore been deprived of his constitutionally guaranteed right...*

(emphasis ours)

45. The Defendants' actions have rendered the Plaintiff's right to livelihood dependent on her decision regarding the number and spacing of her children. The Plaintiff cannot choose to be pregnant if she wants the GSTT position. This has rendered her right to livelihood

ineffective and nugatory and is in breach of her right to livelihood pursuant to Article 5 FC.

IV. Applying the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) as an aid in interpreting Article 5 and Article 8 FC

46. The Plaintiff submits that this Court should apply the CEDAW principles as an aid in interpreting the rights of the Plaintiff under Articles 5 and 8 FC.

47. CEDAW was adopted by the United Nations General Assembly in 1979, and is often described as an international bill of rights for women. It defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. Malaysia is a State Party to CEDAW and ratified it on 5.7.1995. Currently, there are 4 reservations remaining that Malaysia has yet to withdraw, none of which affects the instant case.

See:
Depository Notification dated 28 July 2010, ***Tab 13 PBOA I***
CEDAW Declarations and Reservations list, ***Tab 14 PBOA I at pg 2***

48. The Plaintiff submits that the Courts should refer to CEDAW in clarifying and defining the terms "equality" and "discrimination against women". These two terms underpin the understanding of the provisions in Articles 8(1) and (2) of the Federal Constitution regarding concepts of equality and non-discrimination consonant with modern day Malaysia. To paraphrase Lord Hoffman in ***Boyce v. The Queen [2004] UKPC 32, PC*** that concepts and values had been different in the past, and might again be different in the future. The provisions of our Federal Constitution necessarily co-opt judges to the enterprise of giving life to the abstract statements of fundamental rights and liberties.

See:

List III – the Concurrent List, Ninth Schedule, Federal Constitution, ***Tab 15 PBOA I at pg 189*** *where social welfare, social services subject to Lists I and II; includes protection of women, children and young persons.*

49. There is precedent for this. In Australia in the case of ***Minister for Immigration and Ethnic Affairs v. Teoh, (1995) 128 ALR 353,*** ***Tab 16 PBOA I at pg 361-362*** Mason, CJ., speaking for himself and Deane, J. said:

> *It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. [Chow Hung Ching v. The King (1948) 77 CLR 449; Bradley v. The Commonwealth (1973) 128 CLR 557; Simsek v. Macphee Koowarta v. Bjelke-Peterson (1982) 148 CLR 636; 40 ALR 61; Kioa v. West (1985) 159 CLR 550; Dietrich v. The Queen (1992) 177 CLR 292; J.H. Rayner Ltd. v. Dept. of Trade [1990] 2 AC 418]. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of Parliament, not the Executive. [Simsek v. Macphee, (1982) 148 CLR, at 641-642]. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law. In this case, it is common ground that the provisions of the Convention have not been incorporated in this way. It is not suggested that the declaration made pursuant to S. 47(1) of the Human Rights and Equal Opportunity Commission Act has this effect.*
>
> ***But the fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the Courts should***

favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party *[Chu Kheng Lim v. Minister for Immigration (1992) 176 CLR 1], at least in those cases in which the legislation is enacted after, or, in contemplation of, entry into, or ratification of, the relevant international instrument.* ***That is because Parliament, prima facie, intends to give effect to Australia's obligation under international law.***

It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law [Polites v. The Commonwealth].

Apart from influencing the construction of a statute or subordinate legislation, an international convention may play a part in the development by the Courts of the common law. ***The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the Courts as a legitimate guide in developing the common law...***

But the Courts should act in this fashion with due circumspection when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law. Judicial development of the common law must not be seen as a back door means of importing an unincorporated convention into Australian law. *A cautious approach to the development of the common law by reference to international conventions would be consistent with the approach which the Court have hitherto adopted to the development of the common law by reference to statutory policy and statutory materials [Lamb v. Cotogno (1987) 164 CLR 1 at 11-12). Much will depend upon the nature of relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles of our domestic law.* (emphasis by us)

50. The above case was applied in India in ***Vishaka v. State of Rajasthan, AIR 1997 SC 3011***, ***Tab 17 PBOA I at pg 3013-3014***, where Verma C.J.I said:

> *In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Arts. 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein.* ***Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee****...*
>
> *The obligation of this Court under Art 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of the judiciary envisaged in the* ***Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region****. These principles were accepted by the Chief Justices of the Asia and the Pacific at Beijing in 1995 as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The objectives of the judiciary mentioned in the Beijing Statement are:*
>
> *"Objectives of the Judiciary:*
>
> *10. The objectives and functions of the judiciary include the following:*
>
> *(a) to ensure that all persons are able to live securely under the Rule of Law;*
>
> *(b)* ***to promote, within the proper limits of the judicial function, the observance and the attainment of human rights;***
>
> *(c) to administer the law impartially among persons and between persons and the State."*

Some provisions in the "Convention on the Elimination of All Forms of Discrimination against Women", of significance in the present context are...

The Government of India has ratified the above resolution on June 25, 1993... At the ***Fourth World Conference on Women in Beijing****, the Government of India has also made an official commitment, inter alia, to formulate and operationalize a national policy on women which will continuously guide and inform action at every level and in every sector; to set up a Commission for Women's to act as a public defender of women's human rights; to institutionalize a national level mechanism to monitor the implementation of the Platform for Action.* ***We have, therefore, no hesitation in placing reliance on the above for the purpose of construing the nature and ambit of constitutional guarantee of gender equality in our Constitution.***

The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of judiciary forms a part of our constitutional scheme. ***The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.*** *The High Court of Australia in Minister for Immigration and Ethnic Affairs v. Teoh, 128 ALR 353, has recognised the concept of legitimate expectation of its observance in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia.* (emphasis by us)

51. It is also pertinent that in the case of ***Vishaka***, the Court when interpreting the Indian Constitution by emphasized the obligation of the Indian Government in these two other international statements:

(a) the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, where the principles of the independence of the judiciary were accepted by the Chief Justice of India, and

(b) *Fourth World Conference on Women in Beijing* where the Government of India had made an official commitment.

The Plaintiff wishes to draw the Court's attention that Malaysia is also a party to the Beijing Statement and Fourth World Conference on Women in Beijing.

See:

Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (as amended at Manila, 28 August 1997); ***Tab 18 PBOA I at pg 8***

Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995, statement made by Datin Seri Dr. Siti Hasmah Bt Haji Mohd Ali, Head of the Malaysian Delegation at the Plenary of the UN Fourth World Conference on Women in Beijing, China, on Wednesday, 6 September 1995; ***Tab 19 PBOA I***

52. The Malaysian Government's commitment to CEDAW can be seen further when Article 8(2) of the FC was amended to include non-discrimination based on gender to incorporate CEDAW. As such, all the CEDAW cases, jurisprudence and principles are applicable through Article 8(2) FC.

See:

Combined initial and second periodic reports of State Parties for CEDAW, Malaysia; ***Tab 20 PBOA I at pg 12***

53. In line of the above authorities, Plaintiff submits that there is no impediment for the Courts to refer to CEDAW in interpreting Articles 5 and 8 of the FC.

54. The Plaintiff finds further support in the *Vienna Convention on the Law of Treaties 1969*, ***Tab 21 PBOA II at pg 11***. Article 26 provides:

> *Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*

55. CEDAW is a treaty in force, and so the Government of Malaysia must respect, protect and fulfill women's right to non-discrimination and to the enjoyment of equality. The Plaintiff submits that the obligation is on all 3 branches of government: the Executive, the Legislature and the Judiciary.

See:
Paragraph 9, General Recommendation 28, ***Tab 9 PBOA I at pg 3***

56. The above position is fortified in the Federal Court decision in ***Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals [2002] 4 MLJ 449*** ***Tab 22 PBOA II at pg 514*** where it was said:

> *Since such principles [Universal Declaration of Human Rights 1948] 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.***
>
> (emphasis ours)

This is what exactly happened when Malaysia ratified CEDAW – it now has the force of law which this Court must enforce.

57. The Plaintiff has a legitimate expectation that CEDAW will be applied by the Government of Malaysia. The pledges and commitments made by the Malaysia to the United Nations Human Rights Council (***the Human Rights Council***) in March 2010 in its bid to be elected again into the Human Rights Council is instructive:

> *29.2 The Government continues to ensure that Malaysian practices are compatible with the provisions and principles of the Convention on the Rights of the Child, Committee on the Elimination of Discrimination Against Women (CEDAW)*

See:

The letter from the Permanent Mission of Malaysia to the Permanent Missions of the Members States of the United Nations dated 9 March 2010, ***Tab 23 PBOA II***

58. Article 24 of CEDAW itself sets out the legal obligations of Malaysia:

> *States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.*

Once again, the Plaintiff submits that these obligations are to be fulfilled by the Executive, the Legislature and the Judiciary of Malaysia.

59. In 1988, there was a high level judicial colloquium on the Domestic Application of International Human Rights Norms (***the Colloquium***) in Bangalore, India. The Chief Justice of Malaysia at that time was one of the participants of the Colloquium. One of the

outcomes of the Colloquium was the Bangalore Principles. It set out values and principles that judges should adhere to in carrying out their duties. Of particular relevance here is:

Value 5: Equality

Principle: Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Application:

5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").

5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3 A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

60. The Convenor of the Colloquium summarised the discussions, *inter alia*, as follows:

7. It is within the proper nature of judicial process and well established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

See:

See Ross, S.D., Women's Human Rights: The International and Comparative Law Casebook, 2008, University of Pennsylvania Press, Philadelphia, ***Tab 24 PBOA II at pg 377.***

The Plaintiff submits that the Courts should have recourse to CEDAW as it aids Malaysia to respect, protect and fulfill the rights of women in defining equality and discrimination against women.

61. In 2005, more commitments were made by Malaysia in the *Putrajaya Declaration and Programme of Action on the Advancement of Women in Member Countries of the Non-Aligned Movement,* ***Tab 25 PBOA II***. Among them were as follows:

> *4. Recognise the need for full and accelerated implementation of the United Nations Convention on the Elimination of All Forms of Discrimination against Women by States parties to the Convention;*
>
> *...*
>
> *16 (m). Strengthen the incentive role of the public sector as employer to develop an environment that effectively affirms and empowers women;*
>
> *16 (p). Facilitate the creation of sustainable jobs and livelihood opportunities to improve women's position in the labour market and ensure favourable working conditions for all women, including migrant women, consistent with all their human rights;*
>
> *...*
>
> *43. Gender mainstreaming in all legislation, policies, and programmes is an essential process to women's empowerment and their full participation in all spheres of society. It facilitates the integration of women's differing experience and needs into the development process, as well into the society and helps to change the negative social norms that discriminate*

against women. NAM member States recognise that effective gender mainstreaming is critical to the empowerment of women and to the achievement of gender equality.

44. We hereby commit ourselves to:

a) Take all necessary measures, including in the area of law, policy, programme and activities to eliminate discrimination against women within public and private sectors;

b) Implement affirmative actions, where needed, to accelerate de facto equality rights of women in all spheres;

c) Raise awareness about women's right to equality and the importance of women's participation and representation in all spheres and at all levels in order to eliminate obstacles to women's equality;"

62. In line with the above authorities, Plaintiff submits that there is no impediment for the Courts to refer to CEDAW in interpreting Article 8 of the FC.

63. There are 3 key aspects of CEDAW: (i) its use of the concepts of substantive equality, (ii) non-discrimination and (iii) the legal obligations of State Parties. These will be elaborated below.

V. Plaintiff's legal rights, status and character under Article 5 and Article 8 of FC – Relevant provisions of CEDAW and its application in interpreting Article 5 and Article 8 of the FC

64. The following are the relevant provisions of CEDAW:

Article 11

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. *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;***

   .....

Article 16

1. *States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*

   .....

(e) *The same right to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;*

.....

See:

CEDAW, Tab 26 PBOA II

65. As submitted above there are three fundamental rights which may be derived from a plain reading of Article 5 and 8 of the FC. These are the Plaintiff's right to (i) personal liberty; (ii) equality before the law; and (iii) non-discrimination on the ground of gender.

66. It has been submitted that the Court must take a liberal and prismatic approach when interpreting these fundamental rights for the purposes of determining the legal rights, status and character of the Plaintiff as a married and pregnant woman. It has also been submitted that the Court may refer to CEDAW to aid itself in its interpretation of these rights.

67. By referring to the relevant provisions of CEDAW quoted above and by applying the liberal and prismatic approach when interpreting Article 5 and 8 of the FC, the Plaintiff submits as follows:

(a) Plaintiff's right to "personal liberty" by virtue of Article 5 includes the right to enter into a marriage with a spouse of her choice and the right to decide freely and responsibly on the number and spacing of her children.

(b) Plaintiff's right to "equality before the law" by virtue of Article 8(1) includes the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment – if she were similarly situated as men in this particular instant. The Plaintiff will submit that it is due to her

biological difference of being able to be pregnant, she is not similarly situated as men. We will elaborate further on the issue of substantive equality below.

(c) Plaintiff's right "not to be discriminated based on gender" by virtue of Article 8(2) includes the right NOT to be discriminated/dismissed on the ground of her status of being a pregnant woman, as only women are capable of being pregnant.

VI. Breach of Article 5 and 8 of the FC: Defining gender equality

Breach of Article 8 FC

68. The type of equality the Plaintiff is asserting under Article 8(2) FC is gender equality i.e., between men and women. Traditionally, the understanding of equality is to treat "likes alike".

> *Its principle aim is to avoid differential treatment of similarly situated persons. Different treatment is seen as a problem in and of itself, primarily because it subjects members of a similar group to different treatment, rather than guarding against unfair advantage within the same group of persons. By logical extension, different treatment in law is justified for those who are not "alike" or for those differently situated. The main challenge to operationalizing this approach to equality has been in the determination of whether a group is "alike" or "different". The identification of differences within a group and not the origins, basis and results of these differences, is seen as central to the implementation of equality. Once "difference" is acknowledged or recognized, then different treatments can follow. Conversely, if no difference is seen, then different treatment must not be allowed.*

See:

Partners For Law In Development, CEDAW: Restoring Rights to Women, 2004. ***See Tab 27 PBOA II at pg 24***

69. Based on this traditional understanding, two approaches are commonly used for gender equality:

(a) Formal model of equality

Gender differences are ignored, and men and women are treated alike. This is also known as the 'sameness' approach. It believes that any recognition of gender differences in law amounts to the negative stereotypes attached to women that reinforce their subordination to men. Since men and women are to be regarded as the same, any legislation or policy that treats women differently are deemed to have violated the principle of equality. This approach is problematic as it does not take into account biological differences between women and men. Its aim to treat women the same as men: this reinforces dominant standards based on male experiences and interests. "The predominance of men in law making along with the ideology of gender combine to contribute in developing and sustaining male standards when in fact the social and economic realities of women is not similar to that of men."

The formal (sameness) approach was adopted in ***Beatrice Fernandez*** where it was held that there was no discrimination against the Plaintiff when she was dismissed as a result of her pregnancy since all air stewardesses of her class were treated the same i.e., all of them had to resign if the became pregnant, or they will be dismissed.

See:
Partners For Law In Development, CEDAW: Restoring Rights to Women, 2004. ***See Tab 27 PBOA II at pg 24***

(b) Protectionist model of equality

With this approach, gender differences are recognised, and they are reinforced by sanctioning different treatment. Also known as the 'differences' approach, men and women are acknowledged to be differently situated. "This model views biological difference and social assumptions as a standard for the roles and capacities attached to men and women. This difference for them justifies differential treatment of men and women, since "likes are to be treated alike". Indian Constitutional law is informed by this interpretation of equality. The problem in relation to this approach arises not in the recognition of difference, but in how it treats the difference. This approach recognises women as a group different from men because of the social assumptions that perceive women as weak, subordinate and in need of protection. The different treatment this approach proposes is based on this assumption. Rather than focusing attention on the external, structural and systemic causes of the subordination of women and in trying to correct them, this approach endorses the negative gender values attached to women. It is called 'protectionist' because it accepts women's subordination as natural, inherent and unchangeable, rather than challenging the prevalent assumptions about women."

This protectionist approach was clearly taken by the Defendants in this instant case. By adopting this approach, the Defendants denied the Plaintiff her rights to equality before the law and the equal protection of the law under Article 8(1) FC.

See:

Partners For Law In Development, CEDAW: Restoring Rights to Women, 2004. ***<u>See Tab 27 PBOA II at pg 24</u>***

(c) Substantive model of equality

This approach focuses on the assumptions behind the differences, and their outcomes or results for women in order to help identify and correct disadvantages. This is the approach adopted by CEDAW. "This is not simply concerned with equal treatment in

law, but rather, with equality in terms of the actual impact of the law. A substantive definition of equality takes into account and focuses on diversity, difference, disadvantage and discrimination. This approach recognizes difference between men and women – but instead of accepting this difference as given, it examines the assumptions behind the difference in trying to assess the disadvantage resulting from it and to develop a 'different treatment' or a response that dismantles the disadvantage. It seeks to eliminate existing discrimination faced by disadvantaged groups at the individual, institutional and systemic levels, through corrective and positive measures. Its principle concern is to ensure that the law corrects the imbalance and impacts on the outcome by assuring equal opportunities, access, and benefits for women. In doing so, it seeks a paradigm shift 'equal treatment' to 'equality of outcomes'".

We submit that this is the correct approach to be taken by this court.

See:

Partners For Law In Development, CEDAW: Restoring Rights to Women, 2004. ***<u>See Tab 27 PBOA II at pg 24</u>***

70. ***Beatrice*** is to be distinguished as the different models of equality were not canvassed before the Court especially on the question of which model was best when gender discrimination is raised. Furthermore, the Court held that the amendment to Article 8(2) FC only came into force on 28 September 2001 – after the filing of the case. We further submit that the comments made by the Abdul Malek Ahmad, PCA, regarding the application of classification under Article 8(1) FC were *obiter*. Here, we are more concerned with Article 8(2) FC.

71. Each case must be looked at **individually**, and by adopting the protectionist approach, the Defendants fell into the trap of assuming all pregnant women behaved in a certain manner, and are incapacitated in a particular way. No evidence was led to show that these assumptions are true in general, and that they apply to the Plaintiff in particular.

72. As the claim is to be considered under gender equality, the Plaintiff submits that the comparator group is that of men. Since men cannot become pregnant, this is an instance where due to biological differences, men and women must be treated differently, but not in a manner where there is discrimination resulting in a negative and unequal outcome: the Plaintiff could not enjoy her right to work in her profession of choice.

See:

Partners For Law In Development, CEDAW: Restoring Rights to Women, 2004. ***See Tab 27 PBOA II at pg 24***

73. The Plaintiff submits that she is a victim of direct discrimination. In our case here, Plaintiff was pitted against other candidates who were a mixture of men, non-pregnant women and pregnant women. The Plaintiff was subsequently dropped from the GSTT position (together with two other women who were also pregnant) due to certain characteristics attributed to her group, and the main characteristics of her group were that they were women and pregnant. This is a clear case of discrimination based on gender – a class of discrimination which is not allowed under Article 8(2) of the FC.

74. The Plaintiff submits that pregnancy is **not** a bona fide occupational qualification for teachers. The Defendants have stated that a GSTT requires carrying out physical activities that were not suitable for pregnant women. This is an example of gender stereotype: the Defendants have not adduced any evidence to show that pregnant women are not capable of physical activities. The Plaintiff urges the court to take judicial notice that many women continue with tough physical work whilst still pregnant such as women paddy planters and factory line workers. Furthermore, there are many full time teachers in Malaysia who are pregnant and continue to work as teachers. A woman does not suddenly become incapable of doing physical work as a teacher merely because she is appointed as a GSTT and is pregnant.

75. The other reasons given by the Defendants in withdrawing the appointment of the Plaintiff were:

(i) The period between giving birth to the time when she regains her health is too long (2 months).

(ii) A pregnant GSTT may not be able to attend to her job due to various health reasons.

(iii) When she gives birth she needs to be replaced by new teachers who will require further explanation.

(iv) GSTT cannot be replaced with new teachers.

75.1 Reason (ii) is another statement based on gender stereotyping. No evidence has been adduced by the Defendants to support their claim, and the Plaintiff submits that it is not a *bona fide* occupational qualification.

75.2 The reasons stated in paragraphs (i), (iii) and (iv) are also not *bona fide* occupational qualifications for a GSTT as a GSTT is by nature temporary, and an emergency stop-gap measure. A GSTT may resign on notice and are employed on month to month by payment of a monthly allowance. Surely the Defendants did intend to employ the Plaintiff as a long term and / or permanent teacher under the guise of a GSTT, as such an action would be utterly unconscionable because a GSTT is paid much lower than a permanent teacher and has very few benefits. The Defendants did not adduce evidence to show the total number of GSTTs in Malaysia and the average length of their employment as GSTTs.

76. The result of this discrimination has nullified the recognition, enjoyment and exercise of the Plaintiff of her rights in being employed in the occupation of her choice.

77. As argued, the nature of a GSTT position is temporary. If the Plaintiff was not pregnant, there is no bar in the Circular which stops the Plaintiff from resigning even after working

for only a month. But because the Plaintiff was pregnant, the Defendants ASSUMED that the Plaintiff will not be productive after a certain period of time and will have to resign, whereas the rest of the candidates were not subjected to this assumption and are free to quit even after one month of service.

78. The other reasons given by the Defendants to support their action are not stated in the Circular itself and thus should not be relied on or considered. In any event, the reasons given are not convincing. Similar arguments were brought forth by the Petitioner in ***Air India v. Nergesh Meerza & others AIR [1981] S.C.C. 1829, Tab 28 PBOA II at pg 1854***, where the Supreme Court said:

> *It was suggested by one of the Corporations that after a women becomes pregnant and bears children there may be a lot of difficulties in her resuming service, the reasons being that her husband may not permit her to work as an AH. These reasons, however, do not appeal to us because such circumstances can also exist even without pregnancy in the case of a married woman and if a married woman leaves the job, the Corporation will have to make arrangements for a substitute. Morover, whether the woman after bearing children would continue in service or would find it difficult to look after children is her personal matter and a problem which affects the AH concerned and the Corporation has nothing to so with the same. These are circumstances which happen in the normal course of business cannot be helped. Suppose an AH dies or becomes incapacitated, it is manifest that the Corporation will have to make alternative arrangements for her substitute. In these circumstances, therefore, we are satisfied that the reasons given for imposing the bar are neither logical nor convincing.*

79. The Plaintiff asserts the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment. In the Plaintiff's case the criteria for selection is clearly not the same, because pregnancy only affects women and not men.

80. Ultimately, the Defendants' actions caused the Plaintiff's rights under Article 8 to be ineffective and illusory. The Defendants had a duty to ensure that no form of discrimination was allowed, and these were not done.

Breach of Article 5 FC

81. The Defendants' actions have also rendered the Plaintiff's right to livelihood ineffective and nugatory, because Plaintiff cannot choose to be pregnant if she wants the GSTT position. The Plaintiff finds support in ***Nergash Meerza***, ***Tab 28 PBOA II at pg 1854***, where the Supreme Court said:

> *Having taken the AH is service and after having utilised her service for four years, to terminate her service by the Management if she becomes pregnant* ***amounts to compelling the poor AH not to have any children and this interfere with and divert the ordinary course of human nature****. It seems to us that the termination of the services of an AH under such circumstances* ***is not only a callous and cruel act but an open insult to Indian womanhood – the most sacrosanct and cherished institution****. We are constrained to observe that such a course of action is extremely detestable and abhorrent to the notions of a civilized society. Apart from being grossly unethical, it smacks of a deep rooted sense of utter selfishness at the cost of all human values.* ***Such a provision, therefore, is not only manifestly unreasonable and arbitrary but contains the quality of unfairness and exhibits naked despotism*** *and is, therefore, clearly violative of....*

Social/Policy reasons for holding that there is a breach of the Plaintiff's right under FC

82. The Plaintiff submits that there are also other social/policy reasons for holding that there is a breach of the Plaintiff's rights.

83. CEDAW lays down the following for State Parties to note:

> *Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware* ***that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibilities between men and women and society as a whole.***
>
> (emphasis ours)

84. The Plaintiff refers to ***Brooks v. Canada Safeway Ltd. Allen et al. v. Canada Safeway Ltd.; Women's Legal Education and Action Fund (LEAF), Intervener, 59 D.L.R (4th) 322, Tab 10 PBOA I at pg 335***, where the Supreme Court held as follows:

> ***It cannot be disputed that everyone in society benefits from procreation****. The Safeway Plan, however, places one of the major costs of procreation entirely upon one group in society; pregnant women. Thus, in distinguishing pregnancy from all other health related reasons for nor working, the plan imposes unfair disadvantages on pregnant women. In the second part of this judgment I state that this disadvantage can be viewed as a disadvantage suffered by women generally. That argument further emphasizes how a refusal to find that Safeway plan discriminatory would undermine one of the purposes of anti-discrimination legislation. It would do so by sanctioning one of the most significant ways in which women have been disadvantaged in our society.* ***It would sanction imposing a disproportionate amount of the costs of pregnancy upon women. Removal of such unfair impositions upon women and other groups in society is a key purpose of anti-discrimination legislation****. Finding that the Safeway plan is discriminatory furthers this purpose.*

(emphasis ours)

See also ***Nergash Meerza, Tab 28 PBOA II at pg 1854.***

85. The Plaintiff submits that not only there is a legal duty on the Defendants not to discriminate against the Plaintiff, they also have a social responsibility to uphold. This is apparent in CEDAW and the authorities quoted above. The society of Malaysia benefits from procreation, and by withdrawing the offer because the Plaintiff is pregnant is sanctioning a discriminatory policy of disproportioning a huge amount of the costs of pregnancy upon women. This cannot be right. In short, the Defendants' action of withdrawing the offer is in breach of the Plaintiff's fundamental rights guaranteed under the FC and also in breach of our social policy.

VII. The Defendants have breached the legitimate expectations of the Plaintiff that the Government of Malaysia will respect and uphold the CEDAW principles and law

86. The Plaintiff's rights are enshrined under FC read with CEDAW. It follows that Plaintiff has a legitimate expectation that her rights will be upheld and protected pursuant to the Government's commitments to CEDAW.

87. In ***Minister for Immigration and Ethnic Affairs v. Teoh, (1995) 128 ALR 353, Tab 16 PBOA I at pg 376***, where the significance of Australia's ratification of the United Nations Convention on the Rights of the Child was discussed, it was held that:

> *The significance of the Convention, in my view, is that it gives expression to a fundamental human right which is taken for granted by Australian society, in the sense that it is valued and respected here as in other civilized countries.* ***And if there were any doubt whether that were so, ratification would tend to confirm the significance of the right within our society.*** *Given that the Convention gives*

expression to an important rights valued by the Australian community, ***it is reasonable to speak of an expectation that the Convention would be given effect.*** *However, that may not be so in the case of a treaty or convention that is not in harmony with community values and expectations.*

(emphasis ours)

88. The act of the Malaysian Government in ratifying CEDAW shows that the Government confirms the significance of CEDAW's principles and the rights of women in our society. Malaysians have a legitimate expectation created by the Government by her act of ratifying CEDAW that the Government will respect and uphold the CEDAW principles and law. The Defendants have breached the Plaintiff's legitimate expectation that the Government would uphold gender non-discrimination pursuant to CEDAW.

VIII. Clause 4.2.2 of the Circular is unconstitutional as it goes against Article 5 and 8 of the FC and also CEDAW

89. Clause 4.2.2 of the Circular says that a GSTT is not entitled to maternity leave.

90. Since it has been submitted that the action of the Defendants in withdrawing the offer is in breach of the Plaintiff's fundamental rights, it flows naturally that this impugned clause (which forms the basis of the Defendants' action) is unconstitutional.

91. The Plaintiff finds support in the case of ***Nergash Meerza***, ***Tab 28 PBOA II at pg 1854***. After considering other Indian authorities, the Court held that the relevant part of the Regulation which disallows pregnant employees to continue working is a clear case of official arbitrariness. That particular provision was deemed unconstitutional and struck down. The Court held as follows:

The impugned provisions appear to us to be a clear case of official arbitrariness. As the impugned part of the regulation is severable from the rest of the regulation, it is not necessary for us to strike down the entire Regulation.

...

99. For the reasons given above, we strike down the last portion of regulation 46(i)(c) and hold that the provision "or on first pregnancy whichever occurs earlier" is unconstitutional, void and is violative of Article 14 of the Constitution...

D. ORDERS SOUGHT

The Plaintiff humbly prays for the orders as stipulated in Originating Summons dated 7.5.2010.

In respect of prayer 6, the Plaintiff further prays that a hearing date for the assessment of damages before the Registrar be fixed pursuant to Order 37 Rules of the High Court 1980.

Much obliged.

Dated this 28th day of February 2011

Choi & Co

.....

Counsel for the Plaintiff

Edmund Bon Tai Soon (Honey Tan Lay Ean and Syahredzan Johan with him)

This Plaintiff's Outline Written Submission is filed by Messrs. Chooi & Company, solicitors for the Plaintiff abovenamed with an address for service at Level 23, Menara Dion, 27, Jalan Sultan Ismail, 50450, Kuala Lumpur.

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