

Plaintiff's Summary of Arguments

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 MALAYSIADEFENDAN-DEFENDAN

PLAINTIFF'S SUMMARY OF ARGUMENTS

[summarised from the Plaintiff's Outline Written Submission dated 28.02.2011]

Introduction

1. It is common ground accepted by both parties that the Plaintiff applied to the Education Office, Hulu Langat District (headed by the 3rd Defendant), to be employed as a *Guru Sandaran Tidak Terlatih* (GSTT). As a GSTT, she would have worked as a teacher to cover teacher shortages, and would have been hired in that capacity on a month-to-month basis.
2. On 12.01.2009, the Plaintiff was appointed a GSTT and given a placement memo posting her to a secondary school in the district. On the same day, this posting was withdrawn only after an official discovered that the Plaintiff was pregnant.
3. The Defendants have sought to justify the withdrawal or cancellation of the Plaintiff's employment based on a circular dated 27.02.2007, which provides that a GSTT is not entitled to maternity leave. It is not stated anywhere in the said circular that pregnant women cannot be employed.

Orders Sought

4. The Plaintiff's Originating Summons seeks, *inter alia*, declarations:
 - a. with regard to the legal right, status and character of a pregnant woman, namely the Plaintiff (as of 12.1.2009), that the Plaintiff is qualified and entitled to be appointed a GSTT;
 - b. that the action on 12.01.2009 to withdraw and/or cancel the Plaintiff's appointment as a GSTT is unconstitutional, unlawful and void.

Plaintiff's Submission

5. The Plaintiff's submission is set out in its Outline Written Submissions dated 28.02.2011 (OWS). This Plaintiff's Summary of Arguments highlights the main arguments of the Plaintiff's case.

5.1 *The correct approach to determine whether constitutional rights have been violated (see paras. 26 – 38 & 46 – 63 OWS)*

- a. "The first step in the inquiry is to ascertain whether there is such a constitutionally guaranteed right as asserted by the appellant.": *Lee Kwan Woh v PP* [2009] 5 CLJ 631, 638 [TAB 3].
- b. The Plaintiff claims the right not to be discriminated on the ground only of her gender in being employed under a public authority. This right exists under Article 8(2) of the Federal Constitution [TAB 15].
- c. In interpreting fundamental liberties guaranteed in Part II of the Federal Constitution, the Court is required to adopt a broad and liberal approach, and is not to interpret the Federal Constitution as it would an ordinary statute or in a rigid or pedantic way: *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507, [TAB 5].

- d. The Court is also entitled to, and should, have regard to international conventions and norms binding upon Malaysia in international law when construing domestic statutory provisions: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353, 361 – 362 [TAB 16].
- e. The Federal Court has held that once a State signs a treaty to which states can ratify or accede to, the principles in the treaty will have force of law: *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449, 514 [TAB 22].
- f. In the absence of enacted domestic law occupying the field, the Courts should read international norms consistent with the Fundamental Liberties and in harmony with their spirit into the provisions of Part II of the Federal Constitution to enlarge the meaning and content thereof, so as to promote the object of the constitutional guarantees: *Vishaka v State of Rajasthan* AIR 1997 SC 3011, 3013 – 3014 [TAB 17].

5.2 *Applying Article 8(2) of the Federal Constitution to the facts of this case (see paras. 35 – 41 & 68 – 85 OWS)*

- a. The central argument relied upon by the Plaintiff is based on the prohibition on discrimination on the grounds of “gender” contained in Article 8(2) Federal Constitution. This prohibition was added to Article 8(2) by the Constitution (Amendment) (No. 2) Act 2001 (Act A1130), which came into force on 28.09.2001.
- b. The addition of the term “gender” was to comply with Malaysia’s obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) – see the Minister’s speech in Hansard, for Second and Third Reading on 01.08.2001 at page 69 [TAB 39 Plaintiff’s Bundle of Authorities Vol III]:

(Datuk Seri Utama Dr. Rais bin Yatim): Tuan Yang Di-Pertua, Yang Berhormat bagi Kepong, saya suka menyatakan telah mengambil dua aspek penting. Salah satu daripadanya ialah dari segi bahasa yang satu lagi dari segi peristilahan diskriminasi. Secara am izinkan saya menjawab bahawa pandangan Yang Berhormat berkaitan dengan penggunaan bahasa yang betul dan juga cara olahan sintaksis ataupun susunan bahasa itu perlu mengikut susunan yang diterima dan tidak lagi seperti yang dikritik oleh sesetengah pihak perlu diterima dengan baik dan saya ingat atas pantun burung murai dan sebagainya

itu, dalam pada demikian beliau menanyakan adakah diskriminasi yang disifatkan CEDAW itu merupakan sesuatu yang telah dikemaskinikan.

Saya maklum tentang konvensyen tersebut dan Malaysia sebagai salah satu daripada anggota konvensyen CEDAW pada tahun 1995 memang akur kepada keputusan tersebut dan memasukkan perkataan “jantina” dalam Perkara 8(2) ini adalah sedekat-dekat mungkin bagi kita memberi penjelasan dan kesempurnaan kepada tuntutan CEDAW itu.

(emphasis ours)

Further at page 70, the Minister said:

Tentang CEDAW sebentar tadi, biar saya bacakan sedikit petikan daripada The Convention on the Elimination of all forms of Discrimination Against Woman. Atau secara ringkasnya The CEDAW Convention. Dia kata di sini, “Malaysia has become a party in 1995”. Keadaan sedemikian juga Artikel 2 menyatakan bahawa pihak-pihak yang berkenaan mempunyai tanggungjawab supaya menampilkan pandangan serta konsep bahawa wanita tidak didiskriminasikan. Atas tujuan itu kita telah berjaya pada hari ini dan yang Menteri Pembangunan Wanita dan Keluarga telah tiga kali menyebut peruntukan ini supaya kerajaan mengambil perhatian sekiranya pihak pembangkang merasa bahawa dengan keikhlasan Perdana Menteri mewujudkan kementerian ini ada faedahnya. Sekurang-kurangnya perkataan terima kasih dan penghargaan itu harus kita kemukakan kepada beliau. [Tepuk]

(emphasis ours)

- c. The Court is to take a purposive approach when interpreting the Constitution, and Hansard may be referred to as an aid to interpretation: *DYMM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor* [2002] 2 CLJ 57, 74 [TAB 40 Plaintiff's Bundle of Authorities Vol III] and *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265 [TAB 41 Plaintiff's Bundle of Authorities Vol III].
- d. The authority of *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors* [2005] 3 MLJ 681 [TAB 11] is inapplicable as only Article 8(1) was argued, and in any event, the Court's comments on the same were *obiter*.

- e. It is settled that discrimination on the grounds only of any of the grounds enumerated in Article 8(2) is absolutely prohibited and cannot be justified by the principle of reasonable classification which applies under Article 8(1): *PP v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116, 119 [TAB 8]:

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).

- f. The Plaintiff submits that the Court should find that discrimination on the grounds only of gender (i.e. that the Plaintiff was pregnant) amounts to a violation of Article 8(2), for the following reasons.

- (i) First, pregnancy is inextricably linked with the female sex. Only women have the capacity to be pregnant. The Plaintiff relies on the observations and reasoning of the Supreme Court of Canada in *Brooks v Canada Safeway Ltd* (1989) 59 DLR (4th) 321 [TAB 10]:

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...

- (ii) The question to be answered is whether a particular differential treatment (no matter whether the circumstance which justifies that differential treatment will ever be experienced by men such as pregnancy) does not allow women to enjoy a right that a man would, then it is discrimination. The unfair difference is in the treatment and in

the equal enjoyment of rights. Differential treatment in this case was on the basis of biological basis (i.e. pregnancy), leading to a denial of the right to livelihood and employment, and is therefore gender based discrimination (i.e. it happens only to women).

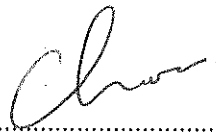
- g. The Plaintiff's case falls squarely within the prohibition of gender discrimination in employment under Article 8(2) of the Federal Constitution. The Defendants were wrong to have withdrawn the Plaintiff's appointment as a GSTT.
 - h. Alternatively, based on *Vishaka's case* and Malaysia's international obligations to comply with the binding provisions of CEDAW, the Plaintiff invites the Court to apply Articles 1, 11 and 16 of CEDAW to hold that pregnancy in this case was a form of gender discrimination which excluded or restricted the Plaintiff's recognition, enjoyment and right to livelihood and employment, and its exercise thereof. This ensures that Malaysia, as a State party to CEDAW, fulfils its legal obligations so that the Plaintiff may enjoy her right not to be discriminated on the grounds of gender in her employment by a public authority: see *General Recommendation No. 28 on the Core Obligations of State Parties under Article 2 of CEDAW, 2010*, [TAB 42 Plaintiff's Bundle of Authorities Vol III] at para 9 which elaborates on the legal obligations to respect, protect and fulfil women's rights.
6. As such, the Plaintiff should have been entitled to be employed as a GSTT even if she was pregnant.

Defendants' Submission

- 7. The Defendants in essence have justified their actions on the basis that since the Plaintiff is pregnant, she will require maternity leave which will cause disruption to her work. This submission is misconceived and further, irrelevant for the following two reasons:
 - 7.1 *Misconceived* because the Defendant's argument is one of "administrative convenience" which can never override a clear constitutional prohibition in Article 8(2) Federal Constitution.

7.2 *Irrelevant* because in any event, the Plaintiff is only employed on a month-to-month basis, and she is free to leave the employment at the completion of every monthly work cycle. No leave is required.

Dated this 14th day of June 2011



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Counsel for the Plaintiff

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

This Plaintiff's Summary of Arguments 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, 50250 Kuala Lumpur.

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