Pregnancy and Discrimination: Effect of the case Beatrice a/p At Fernandez v Sistem Penerbangan Malaysia and Others

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Abstract

Article 8 (1) of the Federal Constitution guarantees equality before the law while Article 8 (2) of the Federal Constitution was amended in 2001 to prohibit gender discrimination. Finding that the interpretation of courts based on the Article 8 of the Federal Constitution fails to give proper and sufficient protection against gender discrimination, this paper presents the weaknesses and lacuna faces pertaining to Malaysian gender equality law particularly from the perspective of employment in the private sector, pregnancy and gender discrimination.

In the case of Beatrice a/p At Fernandez v Sistem Penerbangan Malaysia and Anor (‘Beatrice Fernandez case’) the interpretation made by the courts is known as ‘vertical effect’ in which constitutional law is applicable if the rights of individual had been contravened by a public authority. If the contravention is made by another private entity, the remedies may be claimed under private law as the constitutional remedy is not available.

Beatrice Fernandez case set a precedent and raised legal concerns due to the adoption of narrow application and literal approach regarding constitutional prohibition against gender discrimination. This paper refers to Beatrice Fernandez case as the main case law study. In order to conclude the paper, few suggestions have been addressed to assist the legislative to review or re-visit the existing provision of law as well as guiding the judges to adopt a broad and liberal approach in interpreting gender equality provision in the Federal Constitution.

Keywords— Employment, Federal Constitution, Gender Discrimination, Pregnancy

1. INTRODUCTION

Convention on the Elimination of All Forms of Discrimination (hereinafter referred as CEDAW) is the first international human rights treaty which recognises the right of equality for women [1].

Discrimination may occurs in private and / or public sectors and can be classified as direct and indirect discrimination. Direct discrimination refers to a situation when someone is badly or unjustly treated as compared to others even though they are within the similar circumstances while indirect discrimination refers to the situation where everyone appear to be treated equally based on the same rules or requirements but it seems to be difficult to be complied by certain members of the group [2].

On the other hand, pregnancy is part of women identity that has reproductive capacity and since it is a social function, women should never be discriminated due to
the pregnancy particularly in employment. Discriminatory practices are obviously seen in the facets of hiring, job assignment, promotion, termination, compensation and harassment. In the gender discrimination perspective, treating someone distinctly must include less favourable treatment which is not justified under such circumstances.

In Malaysian context, despite the ratification made to CEDAW and amendment to Federal Constitution in 2001 which added the word ‘gender’ into Article 8(2) of the Federal Constitution to prohibit discrimination, the courts current interpretation in upholding women’s right to equality and prohibit gender discrimination is narrow and seen as insufficient to provide full gender equality. As such, this paper presents the weaknesses and lacuna faces pertaining to Malaysian gender equality law particularly from the perspective of employment in the private sector, pregnancy and gender discrimination.

2. LITERATURE REVIEW

Article 8 (1) of the Federal Constitution states that “all persons are equal before the law and entitled to the equal protection of the law” while Article 8 (2) of the Federal Constitution was amended to prohibit gender discrimination.

Due to the recent Federal Court ruling in the Beatrice a/p At Fernandez v Sistem Penerbangan Malaysia and Others (hereinafter referred as Beatrice Fernandez case) it was stated that by the usage of words ‘employment under a public authority’, the extent of Article 8 (2) of the Federal Constitution in providing gender equality was limited to only cover public sector employment [3].

Finding that the Article 8 of the Federal Constitution fails to provide sufficient protection to prohibit gender discrimination, it was highlighted that there’s a need to have gender equality legislation promulgated specifically at eliminating and protecting women from gender discrimination [4].

In Africa, the strategies for the attainment of gender equality within the African context had been outlined whereas the constraints and challenges had been evaluated while building viable and sustainable gender structures [5].

In Australia, the strength and weaknesses of the legislation and policy as well as numerous key lessons to be learned from Australia’s experience has been addressed [6].

3. CASE LAW ANALYSIS

In Beatrice Fernandez case, Beatrice (the appellant) was an employee to Malaysian Airlines System (the respondent) as a Grade B flight stewardess. The collective agreement dated 3 May 1998 governed her terms and conditions of service. Article 2(3) of the First Schedule to the collective agreement requires all stewardesses (in the same category as Beatrice) to resign upon becoming pregnant. The first respondent shall have the right to terminate her services in the event if she refuses to resign. The appellant refused to resign when she became pregnant and was terminated by the respondent. This led her to file a legal suit at the High Court submitting that the provisions of the collective agreement were discriminatory in nature and therefore contravened Article 8 of the Federal Constitution of Malaysia 1957 rendering the collective agreement void. The High Court and Court of Appeal [7] dismissed her application. The appellant then applied for leave to appeal to the Federal Court [8].

The constitutional amendment prohibiting gender discrimination had been passed by the time Beatrice Fernandez case was heard before the Court of Appeal. In
deciding this case, the court have look into few issues before the court. The first issue raised is whether Article 8 of the Federal Constitution is applicable to terms and conditions of a collective agreement between an employer and a trade union which are discriminatory in nature. The learned counsel for the appellant argued that Article 8 of the Federal Constitution is silent on the parties who should not practice discrimination. So, it was argued that the provision may apply not only to public authority but also private entity.

The Court of Appeal held that, “As a branch of public law, Constitutional law, deals with the contravention of individual rights by a public authority, i.e. the State itself or any of its agencies, as distinguished from another individual. Where both parties affected by the infringement of a right are private individuals, constitutional law would take no cognisance of it by extending its substantive or procedural provision” [9]. This finding has been upheld by the Federal Court.

From the above decision, the authors are of view that the courts clearly tied themselves with the private and public law dichotomy in which, in order for the appellant to invoke Article 8 of the Federal Constitution, the court require the appellant to prove that the discrimination was done by the State i.e. Executive, Legislature or its agencies, as distinguished from another individual. In the event if the contravention was done by another private individual, the remedies are available under the private law. The interpretation made by the courts is known as ‘vertical effect’ in which constitutional law provides remedies if the rights of individual had been contravened by a public authority and not by a private entity.

Article 8 (1) of the Federal Constitution declares that ‘all persons are equal before the law’. So, the next question is whether the collective agreement was considered as a ‘law’ in the context of Article 8. The Court of Appeal and Federal Court are of view that Article 8 is not applicable to the collective agreement simply because the word ‘law’ in the context of Article 8 does not include collective agreement as the latter is a contract which is enforceable as an award when taken cognisance by the Industrial Court. Being an award, which is similar as an order, the collective agreement is not considered as ‘law’ in the context of Article 8 of the Federal Constitution.

The second issue which the courts dealt with is whether Article 2(3) of the collective agreement (which expressly requires resignation upon pregnancy) violated Article 8(2) of the Federal Constitution as it discriminated against her as a woman. Interestingly, the Court of Appeal stated that, “In any event, we do not think that it can be argued that Article 2(3) of the First Schedule of the collective agreement is discriminatory just as it cannot reasonably be argued that the provision of the law giving maternity leave only to women is discriminatory as against men”[10].

The Court held that the collective agreement was a lawful contract between private parties though it requires a stewardess to resign upon becoming pregnant or termination will took place in the event of refusal to resign.

The third issue before the courts to consider is whether Article 2(3) and clause 14 in the First Schedule of the collective agreement dated 3 May 1988 is ultra vires the provisions of the Employment Act 1955 (in particular S.37 and S.40). As for S.37 of the Employment Act 1955, it concerns about entitlement to maternity leave, the length of the period of maternity leave and the entitlement to maternity allowance. The Court of Appeal found no relevance of that provision to the facts of the case and the finding was upheld by the Federal Court.
The authors are of view that, the reason being for the learned counsel in arguing that the Article 2(3) of the collective agreement contravenes S.37 of the Employment Act 1955, is simply because the section clearly recognises women workers rights during pregnancy instead of requiring the worker to tender her resignation or face termination of employment solely on the grounds that she becomes pregnant which is totally in contravention.

S.40 of the Employment Act 1955 requires four months notice (regarding pregnancy) to be given by a female employee to her employer who is leaving her employment, failing which entitlement to maternity allowance will be withdrawn. The Federal Court reaffirmed the Court of Appeal decision by stating that, “Unless and until the Employment Act 1955 is amended to expressly prohibit any term and condition of employment that requires flight stewardesses to resign upon becoming pregnant, such clauses are subject to our Contracts Act 1950 and continue to be valid and enforceable” [11].

The authors are of view that the reason being for the learned counsel in arguing that the Article 2(3) of the collective agreement contravenes S.40 of the Employment Act 1955 is simply because the section protects the women worker’s right to be entitled to maternity allowance, in which if she intends to leave her employment on her own will, she is requires to give four months notice to her employer regarding her pregnancy instead of the collective agreement which requires the women worker to resign upon pregnancy or face termination of employment which is against her own will.

The Federal Court however did not address the fourth ground of appeal on whether Article 5 of the Federal Constitution and the Employment Act 1955 guaranteed the applicant the right to work and the right to continue employment during her pregnancy.

The fifth issue is the most important from the perspective of gender discrimination, which is related to the applicability of the CEDAW to the terms and conditions of the collective agreement. Unfortunately, this issue was not examined by the Federal Court.

3. FINDINGS

There are few weaknesses and lacuna that has been identified by the authors:

1) In interpreting whether Article 8 of the Federal Constitution is applicable to the collective agreement, the courts tied themselves to the dichotomy of private and public law. It seems that the right of equality is available only if the contravention of individual rights is due to the public authority.

2) The courts are of view that the collective agreement is not ‘law’ in the context of Article 8 of the Federal Constitution. Be that as it may, S.14 (3) of the Industrial Relations Act 1967 (IRA) requires that the terms and conditions in the collective agreement cannot contradict with any written law and this includes Federal Constitution and if it does, will automatically render the terms and conditions as void. It seems that, even though S.14 (3) of IRA relates to private employment, but it recognise the right of equality under Article 8 of the Federal Constitution.

3) Article 8 of the Federal Constitution is not adequate in providing full gender equality in respect of employment especially in terms of private sector. The interpretation of the courts on Article 8(2) of the Federal Constitution is very narrow and this cause undue hardship for the women to seek full protection from the Federal Constitution.

4) The implementation of Malaysian gender equality law is yet to fully meet the International Labour Organisation standard and be in compliance with the three main principles of CEDAW i.e. non-discrimination, substantive equality, and state obligation.
4. CONCLUSIONS

There are few suggestions that could be useful for better implementation of the law.

1) Since Malaysia applies the ‘dualist’ system, in order to incorporate CEDAW into our laws, legislative measures is required by either expressly enact law based on the convention or impliedly require interpretation made on domestic laws should be in line with the relevant convention.

2) CEDAW principles may also gain its constitutional status in an indirect way if the courts are influenced to adopt CEDAW’s principles in a specific case and simultaneously gives broader interpretation to the concept of equality.

3) Another way of incorporating the international conventions into domestic law is by inserting a specific reference in a preamble of an Act or in a section of an Act indicating that the legislation is intended to give effect to the specific convention.

4) Employment Act 1950 should be amended to prohibit any term and condition of employment which expressly requires employee to tender resignation due to pregnancy.

5) The court must adopt a broad and liberal approach by adopting international law and convention when interpreting a written constitution especially involving a human right to ensure it is capable of adapting to changing situation.

The workman’s fundamental rights are guaranteed in the Constitution. The only thing left is the application of the correct approach and interpretation by the judiciary to accord them with the rights.

REFERENCES


[7] [2004] 4 MLJ 466

[8] [2005] 3 MLJ 681

[9] [2004] 4 MLJ 469

[10] [2005] 3 MLJ 681 at 688