

## **Defining Employment Discrimination in Malaysian Legal Context**

**Harlida Abdul Wahab<sup>1\*</sup> and Nik Ahmad Kamal Nik Mahmud<sup>2</sup>**

<sup>1</sup>*School of Law, College of Law, Government & International Studies, Universiti Utara Malaysia, 06010 Sintok, Kedah, Malaysia*

<sup>2</sup>*Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia, 50728 Kuala Lumpur, Malaysia*

### **ABSTRACT**

Discrimination deprives people of equal rights. It creates barriers to employment and resulted in people's right to full participation in the workplace jeopardised. Consequently, people are denied jobs, confined to certain occupations, offered with lower pay, refused promotion and increment, and so on. The grounds for discrimination are commonly owing to their 'physical appearance' such as sex, race, the colour of skin, faith or religion regardless of the capabilities and abilities to performing the job. Therefore, promoting equality by eliminating various forms of discrimination is essential. This paper is looking at employment discrimination from the legal perspective. Generally, the meaning and elaboration of employment discrimination together with its types and grounds are presented by considering other jurisdictions, particularly the United Kingdom, that has her anti-discrimination law namely Equality Act 2010. Owing to the absence of anti-discrimination law in Malaysia, the authors founded the discussion on this Act of the UK while the analysis of employment discrimination in Malaysia is presented by analysing the related court cases. The paper showed that employment discrimination did occur in Malaysia. This paper is expected to give some limelight and reflection on the issues concerned principally in defining employment discrimination within the Malaysian legal context.

*Keywords:* Discrimination, employment, equality, legal, legislation, Malaysia

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*E-mail addresses:*

harlida@uum.edu.my (Harlida Abdul Wahab)

nahmad@iium.edu.my (Nik Ahmad Kamal Nik Mahmud)

\* Corresponding author

### **INTRODUCTION**

Right against discrimination is pertinent for humanity, economic and social reasons as work is manifestly essential and vital means of livelihood. Work as a principal source of income has its significance in people's lives without which, people would lose a

sense of personal worth (Collins, 2003). In Malaysia, protection to the workers is assured with an acknowledgement to the right to livelihood as a fundamental right (Jaafar et al., 2017; Mohamed, 2007). Across different countries and cultures, stigma and discrimination form an important barrier to work reintegration (Brouwers, et al., 2016). Thus, discriminating people is denying them their full participation at the workplace which includes declining them jobs, segregating them to certain categories of occupations, offering lower pay, refusing promotion, and so on. All these are done due to the grounds or characteristics that people may have which can be gender, race, colour or age; matters that generally irrelevant to the capabilities and job performance.

Looking at the definition in Burton's Legal Thesaurus (Burton, 2006), "discriminate" means "differentiation, disequalisation, inequality, injustice, unfairness"; while "employment discrimination" is "bias in the workplace, prejudice in an employment environment". Victorian Equal Opportunity and Human Rights Commission (2018) defined "discrimination" as "treating or proposing to treat someone unfavourably because of a personal characteristic protected by law". While Darby (2005) described discrimination as "the treatment of a person in a less favourable way than another person is, has been or would be treated", Hongchintakul and Kleiner (2001) said, "discrimination is any situation in which a group and individual is treated differently based on something other than individual reason, usually their membership

in a socially distinct group or category". The International Labour Organisation [ILO] (2007) further considers discrimination as "a differential and less favourable treatment of certain individuals" because of any characteristics such as sex, race, and religion, "regardless of their ability to fulfil the requirements of the job". Willey (2012) in explaining discrimination, questioned whether the selection of a worker was dependent on the objective criteria (such as experience, skills, and qualifications) or unlawful criteria (like gender, pregnant women or disabled person). This act of selection (treatment), whether discriminatory or not, depends on the grounds of making the selection. It is inequitable treatment amounted to employment discrimination when the employer makes a selection and decision based on the criterion that is not job-related.

Discrimination works reversely when it deprives people of their equal rights, a human-right-based entitlement. The global community for decades is in unanimity to promote equality by incorporating the principle in most states' constitutions. The Charter of the United Nations of 1945 declares that "*All human beings are born free and equal in dignity and rights*". Article 7 of the Universal Declaration of Human Rights (UDHR) further says: "*All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination*". The ILO also

established the non-discrimination principle since the Declaration of Philadelphia in 1944 and makes it as the agenda of Decent Work. Recently, a shared Sustainable Development Goal 2030 by the UN addresses the global challenges including the promotion of equality as one of the goals.

In Malaysia, it was reported that gender inequality is persistent in both formal and informal sectors (United Nations Development Programme [UNDP], 2014). In terms of the labour force participation rate, women were recorded 49.3% and men 77% (ILO, 2017); almost similar to the current global report. A result by the Workplace Discrimination Survey revealed that more than 40% of women polled from across Malaysia experienced job discrimination due to pregnancy together with the identified treatments such as making their positions redundant, being denied of the promotion, prolonged the probation, demotion, and termination (Women's Aid Organisation [WAO], 2016). Furthermore, unequal pay is prevalent when women were shown to be earning less than men in all occupational sectors (Department of Statistics Malaysia, 2017). Having mentioned these, the ratification of the Convention on the Elimination of Discrimination Against Women (CEDAW) and the inclusion of the word "gender" (as part of the equality right) in the Federal Constitution are reflecting that women should not be discriminated (Mohamed, 2017). Human Rights Commission of Malaysia [SUHAKAM] (2010) reported that most employers considered women a

disadvantage because of the entitlement for maternity leave as well as a tendency to prefer family to work. Some studies in Malaysia found that women were not just under-represented in technical and professional fields but significantly diminished in the levels of management and decision-making (Hutchings, 1996; Koshal et al., 1998; Lee & Nagaraj, 1995; Sheikh, 2010). Furthermore, the employment structure is intensely segregated by gender and the areas in which women predominate are those which portray low skills, low wages and little opportunities for career advancement (Ahmad, 1999; Nor, 1997; Sheikh, 2010). Othman and Othman (2015) further concluded that work discrimination among women employees occurred more in the upper-level management position as compared to lower-level jobs. Hence, discrimination in employment is believed to be relatively common in Malaysia but occurs discreetly. Accordingly, Ng (2016) proposed to strengthening legal and policy frameworks as well as engendering institutional arrangements.

It is, therefore, the aim of this paper to analyse employment discrimination from the Malaysian legal context. While Malaysia has no explicit legal provisions and anti-discrimination legislation that outlaw and defines discrimination particularly in the employment setting, this article presented the discussion by making references to the provisions of the Equality Act 2010 of the United Kingdom (UK). The idea is to propose a direction to the discrimination law in Malaysia. Founded on the UK

jurisdiction, the cases of employment discrimination in Malaysia are analysed by considering the constitutional provision so as to give reflection to the Malaysian legal context and at the same time to make a recommendation.

## METHODS

This study used a legal research method through a qualitative approach. The legal authorities, particularly the legal provisions and reported cases relating to employment discrimination in the UK were descriptively considered. Based on this finding of the UK, the legislative provisions and reported cases related to employment discrimination in Malaysia were critically analysed. The findings are subsequently presented in the result and discussion part. It is to note that the pattern of employment discrimination varies. It may affect the prospective employees, current employees or past employees; also, it may involve any stages of employment practices including employee selection, hiring, training, job assignment, and so on (Connolly, 2004; McColgan, 2005). For the purpose of this study, the scope of employment discrimination was confined within the employment relationship, thus involving the employer and the employee who were under the contract of service. Therefore, employment discrimination as defined in the context of this study concerns only with the treatment of the employer towards the employee within the working environment.

## RESULTS AND DISCUSSIONS

### Employment Discrimination

Discrimination in the workplace is a common occurrence that arises at all levels, from the advertisement, recruitment, interviews, employment contracts, throughout performing the job including promotion, training, transfer, and termination. This indicates that employment discrimination may occur to a person or an employee. Part 5 of the Equality Act 2010 of the UK (hereinafter referred to as EA 2010) focuses on employment. In specific, section 39 mentions:

“(1) An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.”

In response to this provision, as against an individual, an employer must not discriminate in the arrangement for deciding whom to be offered employment, as to the terms of employment, or by not offering employment; as against an employee, there shall be no discrimination to the terms of the employment, the opportunities for promotion, transfer, training, receiving any benefit, facility or service, the dismissal, or to cause any employee to be the subject of any detriment (Emir, 2018).

#### **Direct and Indirect Discrimination.**

Discrimination is classified as direct or indirect. Direct, overt or blatant discrimination “occurs when one person treats another less favourably, on the grounds of gender, marital status or race, than she/he treats or would treat a person of another gender, marital status or race” (Painter et al., 2004). Moran (2013) perceived disparate treatment (as commonly used in the United States) to exist when an employer treated an individual differently because that individual was a member of a particular race, religion, gender or ethnic group. Hence, direct discrimination “denotes unequal treatment based on the grounds of the victim’s sex or marital status or racial grounds” (Deakin & Morris, 2012). A reference to the EA 2010 can be made through section 13 that defines direct discrimination as follows:

“(1) A person (A) discriminates against another (B) if, because of a *protected characteristic*, A treats B *less favourably* than A treats or would treat others.”

[Emphasis added]

Emir (2018) clarified that “a person discriminates against another if, because of protected characteristics, he treated that other less favourably than he treated or would treat others”. B here can be a prospective or actual employee who is directly discriminated against by another person if he has been treated less favourably than they treat others due to certain protected characteristics. Based on the interpretation of the EA 2010, the essential elements are: (a) “less favourably”, and (b) “protected characteristic”. Taylor and Emir (2015) referred this as a two-stage test: (i) to look whether the discriminatory treatment was less favourable treatment than had been given to someone else; and (ii) to consider whether it was because of the protected characteristic.

Other than direct discrimination, some acts operate subtly, called indirect discrimination. It occurs when a company’s policies, procedures or rules which apply to everyone affect people with certain protected characteristics and they are put at a disadvantage when compared with those who do not share it. The acts or practices are fair in form but unequal in impact (Painter et al., 2004). Tomei (2008) referred to it as “to norms, procedures, and practices that appear to be neutral but whose application disproportionately affects members of certain groups”. For example, an advertisement that fixes the height will ignore a certain group of people, either men or women. On its surface, the requirement appears to be workable to all groups but looking at the effect, it is discriminating or

victimising certain people. Section 19 of the EA 2010 says:

“(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if—

(a) A applies or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.”

In *Price v Civil Service Commissioners* (1978), the age limit of 28 that imposed for clerical posts in the civil service was found to be indirect discrimination. According to the court, the requirement failed to consider the common work patterns of women when compared to men at that particular time. Hence, indirect discrimination is basically meant to avoid employers from requesting conditions that are not necessary for the job but would have the effect of excluding the proportionately high number of people from

one particular group (Upex & Shruballs, 1995).

An important distinction between direct and indirect discrimination is that the former has no defence of justification while the latter can be justified to achieve a legitimate end (Emir, 2018). As far as the employer’s practices are concerned, justifying factors are possible as long as an objective balance was strike between the discriminatory effects of the provision and the reasonable needs of the business: *Network Railway Infrastructure Ltd. v Gammie* (2009).

*Less Favourably.* Grant (2002) indicated less favourable treatment as different and disadvantageous. For instance, a male worker with less skill is offered with promotion as compared to his female colleague. In this context, an actual or a prospective female worker was treated less favourably due to the protected characteristics, such as sex – the point that judiciously has nothing to do with the job performance.

Less favourable treatment is not a mere different treatment. The element of “less favourable” calls for the act of “comparing”. Here, to compare the one who was treated less favourably with the other who was not. Adopting this understanding, the treatment should be a person of one sex to be compared with the other of the opposite sex, a married person with a person of the same sex who is unmarried, and so on. In other words, the treatment of the claimant must be compared with that of an actual or hypothetical person who does not share the same protected characteristics as the

claimant. If the claimant is blind and applying for a computer operator, he is to be compared with a person who is not blind who applying for the same job as a computer operator (Emir, 2018). The case of *R v Birmingham City Council ex parte EOC* (1989) elaborated “less favourable”. Here, the Council was claimed to provide lesser grammar school places for girls compared to boys and refused that less favourable treatment had been caused to the girls. The House of Lords had then formulated a test for establishing direct discrimination namely (Painter et al., 2004): “(i) was there an act of discrimination? If the answer is yes, (ii) but for the complainant’s gender (or race), would he/she have been treated differently, i.e. less favourably?” Here, the question was whether the treatment is less favourable and on the protected characteristics. This has also been agreed in *Zafar v Glasgow City Council* (1998) where the question of whether an employer had acted reasonably or not was irrelevant in establishing whether there had been less favourable treatment.

***Protected Characteristic.*** Section 4 of the EA 2010 has listed down the protected characteristics, namely, age, disability, gender reassignment, marriage, and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. Chapter 1 of the EA 2010 further elaborates on each of these protected characteristics. With regards to the age, section 5 says:

“(1) In relation to the protected characteristic of age—

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;

(b) a reference to persons who share a protected characteristic is a reference to persons of the same age group.”

To explain this, in *James v Eastleigh Borough Council* (1990), both Mr. and Mrs. James, aged 61, went for a swim in the Council’s baths. Mrs. James was allowed in free but Mr. James had to pay where he claimed for direct sex discrimination. The rationale for such treatment was explained due to the state pension age of women at 60 and men at 65 and yet, the court found it as caused less favourable treatment to men thus violated the spirit of anti-discrimination law. The European Court of Justice found otherwise in a more recent case of *Achbita v G4S Secure Solutions* (Court of Justice of the European Union, 2017). It was mentioned that, since the employer had a general rule against religious and political displays, a Muslim woman who was prohibited from wearing a headscarf was not treated differently than other workers. In other words, a Muslim woman who was fired owing to her wearing an Islamic headscarf at her job did not suffer from direct discrimination.

### **Employment Discrimination in the Malaysian Legal Context**

Cases of employment discrimination involving language spoken, race issue,

gender, religion, and age are common in Malaysia (Lokman & Atikah, 2018). Lee and Khalid (2016) who investigated racial discrimination in hiring fresh degree graduates in Malaysia through a field study found that race mattered much more than résumé quality. A study by Richardson et al. (2013) suggested that age discrimination occurred via direct bias against older workers. Moreover, the Malaysian Association of Hotels supported the policy of keeping out the frontline staff from wearing headscarves and claimed it an international practice (Ng, 2017). The issue was also prompted in a study of the Centre for Governance and Political Studies (2019) that found racial discrimination as apparent in private sector recruitment. A report of the Ministry of Human Resources (2014) indicated complaints of employment discrimination that include sex and racial discrimination, sexual harassment, lack of facilities to perform prayers, Muslim men were disallowed to take Friday prayer, employers who hired candidates with Chinese language proficiency, as well as job advertisements with a certain range of age or sex.

**Less Favourable Treatment.** The element of ‘less favourable’ that requires the act of ‘comparing’ (the one discriminated against and the one who did not) is essential to establish a discriminatory treatment. As compared to the phrases of ‘less favourable’ as applicable in the UK, the word ‘unfavourable’ is mostly found in the cases of dismissal and discrimination in Malaysia

when the employees claimed the unfair treatment employers towards them. It is remarkable to consider a comment by Emir (2018) who suggested that, ‘less favourable’ treatment should be distinguished from ‘unfavourable’ treatment because the former requires a comparator while the latter does not.

In *Beatrice Fernandez v Sistem Penerbangan Malaysia & Anor* (2005) (hereinafter referred to as *Beatrice Fernandez*), the clauses of the collective agreement offered different treatment to different sets of people of men and women employees (stewards and stewardesses) which accordingly invite the issue of discrimination; in this context, sex/gender discrimination. The court in this case instead of considering the different treatment between gender, found the constitutional law, specifically Article 8, as a branch of public law that has no connection with the private matters as in this case of employment. The High Court in *Supercomal Wira and Cable Sdn. Bhd. v Anjana Devi A/P Satiavelu and Others* (2003) found that “there was clear discrimination by the appellants against the respondents when action was only taken against the five respondents” (although 95% employees had breached the order and had taken lunch outside the lunch hour) but ruled such act as breaching the principles of natural justice. To respond to the EA 2010, the court here had considered the less favourable treatment of respondents when ‘compared’ them with the other 95% employees who had breached the order. This is indicating a similar approach was applied

although the court considered the issue of discrimination together with the principle of natural justice.

In the case of *Integrated Forwarding & Shipping Bhd. v Rozia Abdullah* (2000), a workman claimed against the employer who treated her differently when compared with other employees who obtained retirement benefits. The court deemed it as a wrong exercise of the employer that amounted to discriminatory practice thus constituted unfair labour practice. In a recent case, *Rajasekar K. Suppiah & Ors v. Malaysian Airline System Berhad & Anor* (2019), one of the claims was about the different working hours (that breached the collective agreement), thus asserted this as discrimination. Looking at the nature of work which was unlike, the court viewed that the claimants cannot compare the two categories when alleging discrimination as it is not an apple to apple comparison. The Industrial Court in *National Union of Employee in Companies Manufacturing Rubber Products v. Ansel Companies Operating in Melaka* (2014), at 397, decided that:

The respondents chose to absorb the meal allowance into their basic wages of only 128 workmen who fell in the lower job category. The meal allowance of the other workmen who earned basic wages of more than RM 900 per month just before the implementation of the said order and for those in the higher job categories was maintained. That was obvious discrimination of workmen in the lowest job category and it has disturbed the conscience of the court.

Furthermore, in *Leo Burnett Advertising Sdn. Bhd. v Agnes Ann Rodriquez* (2003), the workman proclaimed the company for refusing her yearly increment, bonus and *angpow* when compared with almost all other employees. The Industrial Court ruled that *angpow*, bonuses and year increment are the company's decisions that relied on the workers' performance. There was no discrimination because the claimant was not the only one who did not receive these. As a matter of fact, "there is no evidence adduced by the claimant to prove that the company had deliberately discriminated against her in favour of others who were equal to her in position, salary, job function and work performance". In *Ahmad Tajuddin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang* (1997), the claim was about breaching Article 8 of the Federal Constitution. When deciding whether there was an unfair treatment among the security assistants, the Court of Appeal had compared every one of them with the auxiliary police constable and found that all of them were on the same salary scale, received the same amount of take-home pay at the end of each month, and were given the same opportunity to apply for the post of auxiliary police sergeants. On this point, there was no breach of Article 8.

Looking at all these judgments, the courts in Malaysia generally and incidentally consider the elements of "less favourable" and "comparison" in determining the claims of discrimination practices at the workplace.

**Protected Characteristic.** While the EA 2010 enumerates the protected characteristics such as sex, race, age, and religion, as far as Malaysia is concerned, the provision that incorporates the grounds of discrimination that can be referred to, is Article 8(2) of the Federal Constitution. It says: "...there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender...". On this account, Malaysian law is somewhat pertinent to proscribe discrimination and any attempt to discriminate on any of these grounds is considered as illegal subject to several exceptions. Despite an argument that Article 8 is confined to public matters having no regard to private parties (as ruled in *Beatrice Fernandez*) the following will examine the grounds of discrimination in the Malaysian context.

**Gender/Sex.** Women are the common victims of discrimination although men can also be the subjects. Though the word "gender" shall apply to both women and men, the purpose of the legislator was to dismantle discrimination that affects women more than men. A landmark case on gender discrimination was brought up in *Beatrice Fernandez*. The case was about the issue of the collective agreement which was binding on all stewardesses that comprised the terms that discriminated women. The applicant was a stewardess in the Malaysian Airline System (MAS) and was terminated for being pregnant. The Federal Court held, *inter alia*, that the constitutional law as a branch of public law. When the rights of a

private individual are infringed by another private individual, constitutional law will take no recognisance of it. In this case, rather than proving whether discrimination had taken place or not, the court examined the extent of Article 8(2) of the Constitution and concluded that "regardless of how we view and review Article 8 of the Federal Constitution, we could only come to the same conclusion as the courts below that the collective agreement does not contravene our Federal Constitution" (*Beatrice Fernandez*, at 725).

One way of proving discrimination is to demonstrate that the employer's rule involves different treatment for one of the protected groups as Collins (2003) said, "the rule does not directly refer to sex as a criterion, but since only women can become pregnant, the rule necessarily involves different treatment for men and women". It is the employer's role to justify and rationalise his action for having such rules or terms. Looking at *Beatrice Fernandez*, the employer's role was dispensed with when the honourable court testified "those special conditions" are "peculiar to such specialised occupation". Be that as it may, so far as *Beatrice Fernandez* is concerned, Article 8 is insignificant to protect gender discrimination. The position, however, is hoped to be reversible with the effect of the amendment to the word "gender" in Article 8. With such dismayed decision, the case of *Noorfadilla binti Ahmad Saikin v Chayed bin Basirun and Ors* (2012) a few years later had proven otherwise when the right against discrimination has its light in Malaysia. It

was held by the High Court that a refusal to employ a woman due to pregnancy alone was a form of gender discrimination, thus unconstitutional and against Article 8 of the Federal Constitution. Despite this celebrated decision, the Court of Appeal in a more recent case of *AirAsia Berhad v Rafizah Shima binti Mohamed Aris* (2014), held that a provision in a training agreement which did not restrain marriage and/or prohibit pregnancy if the respondent completed her training in the manner stipulated in the agreement did not discriminate and against the rights of women.

It is worthwhile to consider a related provision of the EA 2010, particularly section 18 that relates to the pregnancy and maternity discrimination in the work cases. It says:

“(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it.”

This section is clear enough to the effect that discrimination due to pregnancy and maternity is unlawful.

**Race.** The race is another forbidden ground mentioned in Article 8(2). As far as *bumiputra* (specifically referred to the Malays and natives of Sabah and Sarawak) is concerned, it is subject to the exceptions that have been circumscribed under the Constitution. Though this exception appears

to be discriminating, ‘special privileges’ or called ‘positive discrimination’ is legal and allowed discrimination. It is remarkable that the word ‘race’ itself has no interpretation except Article 160 that says Malay, the majority race, as a person who professes the religion of Islam, habitually speaks the Malay language and conforms to Malay customs. No definition is however offered to other races. Another word that may be interpreted as ‘race’ is perhaps ‘descent’ as the former will more often than not represent the latter. To give ‘descent’ its precise understanding, the interpretation shall not just confine to ‘race’ but lineage or ancestry such as of a royal family or an ordinary person: *Public Prosecutor v Tengku Mahmood Iskandar & Anor* (1973).

**Religion.** Generally, Malaysia is the land of multi-races with many religions. While other races such as Chinese and Indian are practising different religions of Islam, Hinduism, Buddhism, Christianity, and other faiths, the Malays are practising only Islam and associated with the religion of Islam (Article 160). While Islam is the religion of the Federation through Article 3, there is still a balancing clause whereby “other religions may be practised in peace and harmony in any part of the Federation”. Having this understanding, Article 8(2) inclines to recognise religion as one aspect that must be given an impartial consideration. For this reason, citizens of Malaysia shall not be discriminated against on the grounds of religion.

**Nationality/Place of Birth.** Clause (2) of Article 8 gives protection to citizens. Any immigrants and non-citizens have no rights over this provision save for clause (1) that provides equality for all persons. On the subject of citizenship, one has to deal with the term 'nationality' as it "has a juridical basis pointing to citizenship": As *per* Lord Johnston in *Northern Joint Police Board v Power* (1997) (hereinafter referred to as *Northern Joint Police Board*), at 613. In the field of employment, foreign workers may be singled out because of their nationality but by right, they may get similar protection under the laws of the country as long as they have valid work permits. It is common for the industries and private companies nowadays to employ foreign workers for corporate and business strategy as well as justify the shortage of labourer while at the same time sustaining the profit. This phenomenon would create discrimination between local and foreign employees. The legal provisions that are protecting the locals against foreign employees are sections 60L, 60M, and 60N of the Employment Act 1955. Section 60M prohibits the employer from terminating the contract of service of a local employee to employ a foreign employee. While this provision is essential in protecting the right of tenure of local employees, it could not guarantee their job placement because the employer can still prefer foreign employees for cheap labour. The local employee can assuredly make a complaint to the Director-General of Labour that he is being discriminated against concerning a foreign employee, for instance, in respect of the terms and conditions of his employment

(Section 60L). Section 60N further requires the employer, in exercising retrenchment, to first terminate the services of all foreign employees employed in a capacity similar to that of the local employee.

'National origin' can also be the ground for discrimination. While nationality refers to the citizen of a country, national origin offers a more specific indication that "identifiable elements, both historically and geographically, which at least at some point in time reveals the existence of a nation": *Northern Joint Police Board*. In *Ealing LBC v Race Relations Board* (1972), Lord Simon clarified that "Scotland is not a nation but Scotsmen constitute a nation because of those most powerful elements in the creation of national spirit". To respond to this judgment, Malaysian is a nationality while, for example, Kelantanese, may be considered as 'national origin'. In the context of the Federal Constitution, the phrase 'national origin' might be relevant to the 'place of birth'. Therefore, while equality must be upheld regardless of nationality, discrimination may not be executed for the reasons of national origin or place of birth.

Additionally, in the authors' opinion, another point that may associate with race is language. In a multi-racial society, different languages are used in Malaysia. More often than not, language mirrors the race. Article 152(1) states that the Malay language shall be the national language. Being considered as special and a language of unity, other languages are practicable without restraint. The deliberate expression of the Malay language as the "national

language” is because “*Bahasa* should be used not only for official purposes but also as an instrument for bringing together the diverse and polyglot races that live here and thus promote national unity”: Suffian LP in *Merdeka University Bhd v Government of Malaysia* (1982), at 249 (*Merdeka University*). Although being guaranteed by the Constitution, as a result of globalisation, other languages such as English or Mandarin essentially become preferential in the private sector employment. This nevertheless shall not be seen as against the Constitution as far as “official purpose” is concerned. Article 152(6) provides “official purpose” to mean “any purpose of the Government, whether Federal or State and includes any purpose of a public authority”. Reading Article 152 together with the National Language Act, the practice is not unconstitutional to the extent that “a person is prohibited from using any language for official purposes” and “no person shall be prohibited or prevented from using (to be specific) Chinese for unofficial purpose” (Suffian LP in *Merdeka University*, at 249).

It is quite common for some private employment to request for Chinese language or Mandarin as a prerequisite to employment. Since language could represent race, it is perceived that only the Chinese would be able to fulfil the requirement. In some way, this may incite racial discrimination, against the principle of equality and be counted as indirect discrimination affecting other groups of people. Considering the defence of the employer, a justification for doing so is commanded.

Having considered the cases and judgments in Malaysia, although the cases might not be entirely pertinent to the context of employment discrimination, it is deemed to understand that the courts are seemingly prepared to hear such claims in the absence of any legal provisions that outlawing discrimination. Even one can see in some cases, the application of ‘comparison’ has been exercised in assessing the element of ‘less favourable’ while determining the discriminatory treatment. Be that as it may, the right interpretations of the word discrimination should be expected when an appropriate approach to the concept, in particular within the employment setting, is anticipated. To look at the issue of employment discrimination from the legal context of Malaysia as at present is unpromising in the absence of a specific provision that prohibits discrimination. Without an explicit explanation to the word makes the claim of employment discrimination ineffective even though less favourable incidences are, to some extent, prevalent in the workplace particularly when it arises in covert and subtle ways. In response to the current fact and in the light of Article 8 of the Federal Constitution as discussed above, it is therefore recommended for Malaysia to legislate a specific provision or law that prohibits employment discrimination or any discrimination practices. It is predictable that by having a specific law, the problem can be addressed more effectively and seriously.

## CONCLUSION

Discrimination in the world of work manifests all levels of employment. Promoting equality and combating discrimination at the workplace are essential parts of upholding decent work, the key element to achieving a fair globalisation and poverty reduction (International Labour Office, 2011). While the world community should be firmly enfolding equality as a thrust of unanimity, any subdivisions and elements of unfairness, prejudice, and discrimination must be resisted. It is for this reason that regulations and legislations are mechanised to respond to the issue. Legislative interference aiming at safeguarding the employees is essential for the effectiveness of the labour standards (Hassan, 2008). In the case of Malaysia, employment discrimination has become among the issues in the labour sector recently. Without an explicit anti-discrimination law or legal provisions outlawing employment discrimination like the EA 2010 of the UK, the Federal Constitution nevertheless, does provide the notion of equality but within a confining interpretation as far as gender discrimination, particularly in the private sector, is concerned. Despite this, in its substantive term, complaints on the issue to the Department of Labour have never been disregarded while claims on the subject matter have been given some ways by the Industrial Court though the attempts were of no avail as at present. Although judicial reviews and cases presented above may not be entirely pertinent to the concept of discrimination, it is signifying that Malaysian courts are ready to hear employment

discrimination claims. The right approach to the concept would be workable if the word discrimination in employment is defined appropriately. At this point, discrimination at work indubitably results in inequality, unfairness, and diversity in the labour market outcomes. From the legal point of view, this should be contrary to the principle of equality because it denies one's rights; in the labour context, it refutes employees' rights.

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