

# Headscarf (*Hijab*) At Work And Dismissal: Whether Discrimination Against Muslim Women?

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# INTRODUCTION

- Islam placed high regards to individual honour and dignity.
- Guarding chastity and appropriately dressing for the Muslims is guided by their religious beliefs.
- The modest dressing for woman has being prescribed in the Quran.
- At workplaces, women should be allowed to be dress following the religious attires, unless employers have dress code requirements that are suited for the nature of their work or for operational and safety reasons.

# HEADSCARF AT WORKPLACE

- The wearing of headscarf at the workplace has long been an issue in many Non-Muslim countries
  - In Samira Achbita's case, a Belgian woman who work as a receptionist in a Belgian security firm, and
  - In Asma B, a French woman who work as a software designer in a French company,
- were dismissed from employment because of their refusal to remove the headscarf at work.
- Their action went against the work regulations which generally prohibited any 'political, philosophical or religious' symbols.
  - The European Court of Justice held inter alia, that religious symbols - including headscarves - may be prohibited in the workplace and that this does not constitute direct discrimination

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- **In Malaysia, some international hotels have been chided by the authority for denying their Muslim female staff who work at the frontline including the cleaners, the right to observe their religious obligations.**



# MALAYSIAN FEDERAL CONSTITUTION

- Article 3 of the Constitution deals with Islam as the religion of the federation.
- The status of Islam in the context of this article is related only to rituals and ceremonies.
- 'Life' in article 5(1) has been liberally interpreted as not merely confined to physical existence alone but includes the quality of life such as the protection of one's honour and dignity.
- Further, article 11(1) provides that 'Every person has the right to profess and practise his religion'.

## ***Fatimah Sihi & Ors v Meor Atiqulrahman Ishak's***

- This is a case involving expulsion from school for not adhering to school directive of not to wear *turban*, an Islamic dressed.
- The Federal Court in affirming the expulsion as not being a violation of article 11(1) held inter alia, that *turban* was not a practice or not an integral part of a religion i.e. the wearing of *turban*, was not a religious obligation.

# ***Hjh Halimatussaadiah v Public Service Commission***

- The appellant was dismissed after she persisted in wearing the *niqab* at the workplace in contravention of a government circular.
- The court held inter alia, that while art. 11 protects the practice of one's religious belief, art 11(5) clearly forbids any act which may lead to public disorder, affect public health or public morality. The service circular was issued for the purpose of preserving public order.
- The court relied on the opinion of the *Mufti* that Islam does not make it obligatory for a Muslim woman to wear a *niqab*.

# Observation

- *Hjh Halimatussaadiah* case is only in relation to *niqab* and does not include *hijab*, which has nothing to do with 'public disorder, affect public health or public morality' in article 11(5).
- *In Fatimah Sihi's*, the *turban* for a male was not a practice or not an integral part of a religion.
- As woman's dressing in the presence of strange men and non-*mahram* relatives is emphasised in Islam, therefore, *hijab* at the workplace should be encouraged and not given a blanket prohibition, more so in Malaysia.



# SUPERIOR ORDER AND INSUBORDINATION

- Workers are required to obey the employer's lawful and reasonable orders or instructions.
- Where the superior order touches an employee's dress code which is based on religious belief such as headscarf, can the worker refuse to obey the instruction of the employer.
- Refusing or refraining an employee from wearing a certain apparel at the workplace must be based valid business justification.
- There would obviously be an invalid excuse to say that the headscarf is a hindrance to work to these workers.

# WORKPLACE DISCRIMINATION

- It would be obvious workplace discrimination to refuse employment of a person by reasons of his race, religion or religious attires.
- Workplace discrimination is undoubted a bitter experience that demoralizes workers and this inevitably affects their work performance.
- Workplace discrimination is prohibited by international instruments:
  - United Nations Universal Declaration of Human Rights and the United Nations Convention on the Elimination of All Forms of Discrimination against Women, and
  - various International Labour Organisation (ILO) conventions

# WORKPLACE DISCRIMINATION LAW

- Many countries have enacted workplace discrimination law which prohibits inter alia, discrimination in employment because of a person's religion, political opinion, national extraction, nationality, social origin, medical record, criminal record or trade union activity.
1. Australian Human Rights Commission Act 1986
  2. United Kingdom, the Equality Act 2010
  3. New Zealand Human Rights Act 1993



# FEDERAL CONSTITUTION: ARTICLE 8(1)

- In Malaysia, the above article generally prohibits discrimination against a person or class of persons unless there is a rational basis for such discrimination.
- The word 'gender' was inserted into article 8(2) in order to comply with Malaysia's obligation under the CEDAW, to reflect the view that women were not discriminated.
- Article 8(2) begins with the exclusion clause of "Except as expressly authorised by this Constitution", which demonstrates that certain kinds of discrimination may be allowed under the express provisions of the Constitution.
- In *Beatrice AT Fernandez v Sistem Penerbangan Malaysia & Anor*, the Federal Court held inter alia, that article 8 only addresses the contravention of an individual's rights by a public authority. But when the rights of a private individual are infringed by another private individual, the above constitutional provision will take no recognisance of it.



# EMPLOYMENT ACT 1955

- This is an important piece of legislation which prescribes the minimum protection rights to workers in West Malaysia .
- This Act does not address on workplace discrimination let alone discrimination on grounds religious attires.
- Although there are no awards of the Industrial Court in relation to termination of employment due to the employee's religious attire (except the case of *Fatimah Sihi and Hjh Halimatussaadiah* by civil court), nevertheless it must be noted the that court have insisted, inter alia, that employees must be protected from victimisation, harassment and discrimination.
- An employee who had been subjected to unreasonable detrimental treatment at the workplace may seek his or her recourse for dismissal without just cause or excuse pursuant to the above section.

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- In fact, any dismissal tainted with unfair motives, having the element of discrimination, victimisation, capricious or *mala fide* actions that are incorporated under unfair labour practices would come within the scope of section 20(1) of the Industrial Relations Act 1967 (which basically deals with dismissal without just cause or excuse).

# CONCLUSION

- Any company directive or rule indiscriminately barring Muslim women from wearing *hijab*, except for operational and safety reasons, should not be entertained.
- Women should be allowed to practice their religion freely without having to choose between having a job or to practice their religion.
- *Hjh Halimatussaadiah* is primarily concerned with the prohibition of *niqab* at the workplace which is based on the government's circular and her dismissal was justified mainly due to preserving public order and safety.
- The prohibition however does not extend to *hijab* that only covers the hair and as such, Muslim women should be allowed to wear it at the work.
- Any termination from employment which is tainted with unfair motives, having the element of discrimination, victimisation, capricious or *mala fide* actions that are incorporated under unfair labour practices would come within the scope of the Industrial Relations Act 1967, section 20



# WAY FORWARD

- There is a need for the country to enact a comprehensive anti-discrimination legislation to protect inter alia, workers against discrimination and this include on grounds of religious attires.
- The proposed law should be based on the concept of gender discrimination as defined under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the International Labour Organisation (ILO)
- This is aside from the fact that all human beings are born free and equal in dignity and rights as provided in the United Nations Universal Declaration of Human Rights 1948.