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**PROTECTION AGAINST PRE-EMPLOYMENT DISCRIMINATION IN MALAYSIA:  
A LEGAL ANALYSIS**

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**ABSTRACT**

The principles of equal rights and non-discrimination as well as the right to equality before the law and equal protection of the law are fundamental human rights principles enshrined under Article 55 of United Nations Charter and Article 7 of the Universal Declaration of Human Rights (UDHR). The UDHR, international human rights standards and state practice consistently view employment and the right to work to include pre-employment. Therefore, rights during pre-employment would also fall within the scope of right to work regime. It is important to stress that the employer must not make employment decisions based on personal characteristics such as gender, race, nationality, ethnic origin, religion or belief, disability, age or any unrelated issues to inherent job requirements. Employer must base the employment relationship on the principle of equal opportunity and fair treatment and will not discriminate with respect to all aspects of the employment relationship, including recruitment and hiring, compensation (including wages and benefits), working conditions and terms of employment, access to training, promotion, termination of employment or retirement, and discipline. This paper will analyse the international laws, laws of other jurisdictions and Malaysian laws on protection against pre-employment discrimination. Recommendations would be accorded to ensure that Malaysia guarantees equal rights among jobseekers.

**Keywords:** *Pre-employment, non-discrimination, equal rights, human rights*

**Introduction**

Jobseekers, particularly among persons with disabilities (PWD) and women require legal protection as they continue to face discrimination. Discrimination against citizens based on race, religion, ethnicity and gender is constitutionally prohibited. During the recent Commission of Human Rights' Stakeholder Consultation on 17<sup>th</sup> September 2019, it was learned that pregnant women have suffered from discrimination not only during employment but even while seeking employment. Centre for Governance and Political Studies (CENT-GPS), a Kuala Lumpur-based behavioural and social science research firm also highlighted during the Stakeholder Consultation of their 2019 survey finding that Indian and Malay candidates are more likely to face discrimination when seeking employment in the private sector (Centre for Governance and Political Studies).

There is currently no written law that specifically prohibits pre-employment discrimination in Malaysia. Proposed introduction of protections for jobseekers against discrimination were withdrawn because the Malaysian Employment Act 1955 (the Act) is restricted to employees with their employers. Even though the Preamble of the Act expressly states that it is an Act relating to employment, yet, restricting to only relationship between employee and employer and not extended to equal recruitment opportunity

rights making it narrow and limited. The Universal Declaration of Human Rights (UDHR) 1948, international human rights standards and state practise consistently view employment and the right to work to include pre-employment. This paper will analyse the international laws, laws of other jurisdictions and Malaysian laws on protection against pre-employment discrimination. Recommendations would be accorded to ensure that Malaysia guarantee equal rights among jobseekers.

### **Equal Before the Law: Fundamental Human Rights Principle**

The principles of equal rights and non-discrimination as well as the right to equality before the law and equal protection of the law are fundamental human rights principles enshrined under Article 55 of United Nations Charter and Article 7 of the UDHR. Article 55 of the United Nations Charter emphasized that, “with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a) higher standards of living, full employment, and conditions of economic and social progress and development;
- b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”.

Article 7 of the Universal Declaration of Human Rights 1948 clearly mentioned that “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”. More specifically, ‘discrimination against women’ is defined under Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to which Malaysia has been a party since 1995, as:

“...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 basic definition of the term ‘discrimination’ under Article 1 of CEDAW is similar to discrimination as defined under other international human rights treaties such as Article 1 of the International Convention on the Elimination of Racial Discrimination (ICERD) and Article 2 (1) and Article 3 of the International Covenant on Civil and Political Rights (ICCPR) (UN Doc. HRI/GEN/1/Rev. 1, 26). Article 1 (1) of the ICERD stated that “the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”. Article (2) 1 of the ICCPR stressed that ‘each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. Gender equality is confirmed by Article 3 as the States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Under these definitions, there are three elements of discrimination (Vala, 2005), which are;

- a) the existence of a behaviour that constitutes a difference in treatment

- b) a ground upon which the difference in treatment is based
- c) the objective result of this difference in treatment

Discrimination may be direct or indirect. Direct discrimination happens when someone is treated unfairly, due to a variety of reason and suffers a disadvantage because of such unfair treatment. Meanwhile, indirect discrimination occurs when there is an unreasonable rule or policy that is the same for everyone but has an unfair effect on people who share a particular attribute (Australian Human Rights Commission). Rights during pre-employment would also fall within the scope of right to work regime. Article 23 (1) of the UDHR enshrines everyone's right not only to work, but also to free choice of employment and to protection against unemployment. Article 23 (1) of the UDHR Similarly, the scope of protections under ILO Convention No. 111 on Discrimination (Employment and Occupation) 1958 also includes protections against discrimination in access to employment (ILO Convention No. 111, Art. 1 (3)). Malaysia is one of only 12 countries in the world not a party to this Convention. However, the 175 State Parties to this Convention evidence widespread state recognition for its standards.

In the context of Malaysia's international obligation, Article 11 of CEDAW entails obligation of State Parties, to take appropriate measures to ensure the right to the same employment opportunities. Article 11 (1) states that 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.

In addition, under Article 27 of the Convention on the Rights of Persons with Disabilities (CRPD), Malaysia is also under obligation to recognise the equal right of PWD to work, including the right to the opportunity to gain work, and to safeguard and promote the realisation of PWD's rights to work, e.g. through legislation to prohibit discrimination on the basis of disability in all matters concerning employment, including conditions of recruitment. In Article 27 (1), it is stated that States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.

States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during employment, by taking appropriate steps, including through legislation, to, inter alia:

- a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;
- b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;
- c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;
- d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;
- e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;
- f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;
- g) Employ persons with disabilities in the public sector;
- h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;
- i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;
- j) Promote the acquisition by persons with disabilities of work experience in the open labour market;
- k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

### **Equal Rights in Pre-Employment of other Jurisdictions**

In another jurisdiction, it is observed that the laws on prohibition of discrimination in pre-employment and employment are mentioned in different category of statutes. In Norway, the Working Environment Act 2006 stressed that the Act includes prohibition of discrimination from vacancy announcement to termination of employment (Working Environment Act 2006).

Germany's law of General Act on Equal Treatment 2006 incorporates four European Union anti-discrimination directives into German law and governs the claims and legal consequences in the case of discrimination, both in the field of work and in the sphere of civil law. The directives are in particular (The Directives on Equal Treatment of the European Union, Federal Anti-Discrimination Agency 2019):

1. Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
2. Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

3. Directive 2002/73/EC of the European Parliament and of the Council amending Council Directive 76/207/EC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.
4. Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

Employers must observe the ban on discrimination when publishing job advertisements and during the application procedure. This Act foresees the protection of people who have been affected by multiple discrimination, thus it is potentially helpful for women with disabilities who can be discriminated twice on the grounds of their disability and on the grounds of their sex.

In Australia, the Disability Discrimination Act (DDA) 1992 covers all areas of discrimination from recruitment process and specific to disabled persons whereas the Anti-Discrimination Act (ADA) 1977 covers racial discrimination against applicants and employees. The DDA makes it unlawful to discriminate against people with disabilities in employment, including the recruitment process, such as advertising, interviewing, and other selection processes and decisions on who will get the job. In addition, the DDA covers recruitment processes organised through labour hire, recruitment and employment agencies. For example, it may be unlawful for an employment agency not to refer a person with a disability for a position if he or she could do the job (Australian Human Rights Commission, 2014). Section 8 of the ADA highlights about discrimination against applicants and employees:

- (1) It is unlawful for an employer to discriminate against a person on the ground of race:
  - (a) in the arrangements the employer makes for the purpose of determining who should be offered employment
  - (b) in determining who should be offered employment
  - (c) in the terms on which the employer offers employment

The Civil Rights Act 1964 of the United States of America establishes Equal Employment Opportunity Commission, which is charged with the enforcement of the federal anti-discrimination employment laws. It covers protection to the employees or applicants from discrimination in many employment activities. Title VII of the Civil Rights Act of 1964 is a federal law that prohibits employers from discriminating against employees, including recruitment, based on sex, race, colour, national origin and religion (AAUW Empower).

The Americans with Disabilities Act (ADA) 1990 includes on discrimination in hiring towards disabled persons. As it relates to employment, Title I of the ADA protects the rights of both employees and job seekers. California passed The California Prudence Kay Poppink Act 2001 on September 30, 2000 which broadened California's disability employment discrimination laws to cover individuals with less severe disabilities by lowering the burden of proof to establish a disability (Button, 2016).

In Ghana, the Republican Constitution of Ghana 1992 only stressed to the effect that all persons shall be equal before the law (Article 12). However, the Labour Act 2003 (Act 651) extent to non-discrimination of any person seeking employment. The Employment Equity Act 1998 prevents medical screening of a prospective employee save where the work has some 'inherent requirements' and the medical screening its needed to ascertain whether the person is fit or not. The relevant provision is as follows:

“Medical testing of an employee is prohibited, unless—

- a) Legislation permits or requires the testing or

b) It is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job (Adomako-Kwakye-Chris et al., 2017).”

### Analysis of Malaysian Laws

In *Tan Tek Seng v. Suruhanjaya Perkhidmatan* [1996] 1 MLJ 261, the majority Court of Appeal held that the expression ‘life’ in right to life under Article 5 (1) of the Federal Constitution incorporates all facets that are integral to life and quality of life, including the right to seek and be engaged in lawful and gainful employment. Meanwhile, Article 8 (2) of the Federal Constitution prohibits discrimination against citizens on the basis of religion, race, place of birth or gender;

- a) In any law;
- b) In the appointment to any office or employment under a public authority, or
- c) In the administration of any law including relating to the establishing or carrying on of any profession, vocation or employment

However, the Court of Appeal in *AirAsia Bhd v Rafizah Shima* [2014] 5 MLJ 318, following the Court of Appeal judgment in *Beatrice Fernandez v Sistem Penerbangan Malaysia Bhd* [2004] 4 MLJ 44 held that Article 8 (2) Federal Court cannot be invoked to challenge the validity of employment contract between the private parties in this case. The court interpreted that constitutional law deals only with violation of individual rights by State agents, not by another private individual. The Court of Appeal, in overturning the High Court decision in this case, also held that CEDAW principles have no direct application in Malaysia. This is because Malaysia is a dualist State and as there is still no domestic law in force to incorporate the CEDAW principles, even though Malaysia has been a State Party to CEDAW since 1995.

Although discrimination on the basis of disability is not expressly protected under Article 8 (2) of the Federal Constitution, Section 29 (1) and (2) Persons with Disabilities Act 2008 recognises and protects PWDs’ right to equal access to employment and places the duty on employers to protect PWD’s right to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value. However, the absence of accountability, remedial and monitoring provisions under PWD Act has impeded its implementation and enforcement (Human Rights Commission of Malaysia, 2016). The express immunity of the Government, the Minister, the Council and members of the Council from any prosecution or proceeding for any act, neglect or default ‘done in good faith’ in relation to the Act as stated in Section 41 and 42 has further exacerbated its ineffectiveness (Abdullah et al., 2017). Other than PWD Act, there is no other law in force that specifically operationalises the non-discrimination prohibition under Article 8 (2) of the Federal Constitution.

Meanwhile, Article 8 (5) of the Federal Constitution provides to the effect that Article 8 shall not invalidate, among others, any provision regulating personal law and any provision or practice that may restrict any office or employment relating to the affairs or institution of any religion.

Malaysian courts since the *Tan Tek Seng’s* judgment recognise that the right to work which would include the right to seek employment would fall within the meaning of the right to life under Article 5 (1) of the Federal Constitution. In addition, Article 8 (2) also prohibits discrimination including in the administration of any law relating to the establishment or sustainability of any profession, vocation and employment.

Accordingly, the scope of the Employment Act 1955 should be interpreted to include pre-employment and should continue to be amended to include protection for jobseekers against discrimination on the ground of race, religion, ethnicity, gender and pursuant to Section 29 of PWD Act, disable persons. The administration of employment laws such as the Act could be seen to be violation of Article 8 (2) of the Federal Constitution if it fails to protect jobseekers against discrimination and or effectively

discriminates against jobseekers. Similar interpretation should apply to the Sabah Labour Ordinance and Sarawak Labour Ordinance.

For consistency and clarity, Section 2 of Employment Act 1955 the interpretation of ‘employer’ should include any person who in the process to employ any other person as an employee, or any person who has entered into a contract of service to employ any other person as an employee and includes the agent, manager or factor of such first mentioned person. The definition of jobseekers must be included to mean ‘any person seeking opportunities for employment and by being currently available to start working’.

The definition of the term ‘pre-employment’ must be incorporated in the Act as a ‘stage of access of employment from advertisement process to employee vetting stage’ or ‘access to employment of the employee’s own choice on the basis of individual suitability for such employment (ILO, 2019)’. Discrimination in the pre-employment must be defined as ‘the existence of a behaviour either directly or indirectly that constitutes a difference in treatment, on the ground of age, gender, religion, race, disability, language, marital status and pregnancy during the stage of access of employment’.

Following international best practices, a rights-based employment equal opportunity law should include express provisions on:

- a) Action and mechanisms to ensure protection of equal employment opportunities at every stage of employment including pre-employment
- b) Protection mechanisms against workplace discrimination
- c) Grievance and redress mechanisms upon violations
- d) Employer’s duties to ensure protection of equal employment opportunities
- e) Duties of other relevant actors in the promotion and protection of equal employment opportunities
- f) Duties and powers of state actors in regulating unfair treatment and practices at the workplace as well as promoting equity at the workplace

## **Conclusion**

In conclusion, it is understood that non-discrimination and equal rights in pre-employment stage are rights protected by international treaties. The principles of equal rights and non-discrimination as well as the right to equality before the law and equal protection of the law are fundamental human rights principles enshrined under Article 55 of United Nations Charter and Article 7 of the UDHR. The UDHR, international human rights standards and state practise consistently view employment and the right to work to include pre-employment. Therefore, rights during pre-employment would also fall within the scope of right to work regime.

It is important to stress that the employer must not make employment decisions based on personal characteristics such as gender, race, nationality, ethnic origin, religion or belief, disability, age or any unrelated issues to inherent job requirements. Employer must base the employment relationship on the principle of equal opportunity and fair treatment and will not discriminate with respect to all aspects of the employment relationship, including recruitment and hiring, compensation (including wages and benefits), working conditions and terms of employment, access to training, promotion, termination of employment or retirement, and discipline.

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