Pregnancy Discrimination in the Workplace: The Trend of Decided Cases and Proposed Suggestions for Malaysia

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ABSTRACT

In recent years, we have observed vehement advocacy for the upholding of women's rights in Malaysia. Milestones have been achieved in pursuit of protecting and empowering women and their rights in this nation, including the ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1995. However, discrimination still prevails in the workforce, especially against pregnant employees who are often made to face the risk of being unfairly demoted or even dismissed. Therefore, this work seeks to study the decided cases concerning pregnancy discrimination in order to determine the extent of the legality of such conduct by employers and why such practices are common. By employing analytical and qualitative research methods, it is found that the problem may be attributed to lacunae in existing laws which do not penalise such decisions. In relation to this, the author seeks to propose reforms in the current legal frameworks. To achieve this, reference has been made to several jurisdictions in regards to their legal position in combatting pregnancy discrimination at the workplace. It is hoped that this work would act as a catalyst in creating awareness in regards to this issue, stimulating more studies to be done in this sphere of human rights and indirectly encouraging the amelioration of the women's rights situation in Malaysia.

Keywords: Pregnancy discrimination; Unfair dismissal; Women rights.

Introduction

Pregnancy discrimination is a crucial challenge which is a concoction of other gender-based inequalities like hiring and wages; it commonly takes the forms inclusive of but not limited to dismissals.[1] The Convention on All Forms of Discrimination against Women (hereinafter "CEDAW"), whilst not expressly using the term 'pregnancy discrimination', laid down provisions to counter such discrimination in the view of the right to work as well as the right to reproduction.[2] Article 11(2) CEDAW implicitly imposes a positive duty upon the State Parties for the prevention of discrimination against women on the basis of marriage or maternity and to safeguard their right to work. Part of the

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[1] Reginald Byron and Vincent Roscigno, 'Relational Power, Legitimation, and Pregnancy Discrimination' (2014) 28(3) Gend Soc 435.

[2] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 art 11.

responsibility covers the introduction of maternity leave without having to compromise former employment, social allowances or seniority and prohibition of dismissals.[3] These areas are integral in countering pregnancy discrimination in the arena of employment, as will be demonstrated through the critical analysis of cases, *supra*.

Pregnancy discrimination is not novel nor a problem exclusive to certain countries. Rather, it is a persisting and widespread dilemma. Perhaps, the UK case of *Webb v EMO Air Cargo*[4] can serve as a good illustration of how pregnancy discrimination happens and how pregnancy is perceived as a barricade towards employment. The factual matrix of the case was regarding the applicant who was accepted by a company to stand in the position of a clerk for another employee who was pregnant. Two weeks upon starting work, she realised that she herself was pregnant. At this point, it is pertinent to understand that her contract was not a fixed-term contract.[5] She was then dismissed for the fact. Hence, an action was brought against the employer on the grounds of being unlawfully discriminated on the basis of her sex, in contravention with the UK's Sex Discrimination Act 1975. Her action was dismissed by the Industrial Court, which had arrived to that decision by applying a test which had caused the court to compare a pregnant woman with a sick man with a particular medical condition. Clearly, the outcome of the case can be interpreted as a failed attempt to apply substantial equality to the question where women's rights were put forth.

Fortunately, after a series of appeals,[6] an ultimatum was attained in Webb's plight. The European Court of Justice held that Community Law seeks to defend women from dismissals during pregnancy who are subjected to very exceptional circumstances. It was held that dismissal of a woman who had been hired for an indefinite period of time is not justifiable by the fact that she would be temporarily unable to work due to her pregnancy. The court added that there was no necessity to draw comparisons between a pregnant woman who is unable to work with a similarly incapable man due to a medical condition, for pregnancy is not an illness. Any more unfavourable treatment to a pregnant woman due to the effects of pregnancy equates to direct sex discrimination.[7] The decision was then reaffirmed in the House of Lords.[8] In the United Kingdom, the case was celebrated as a victory in the fight for women's rights.[9] Malaysia, in contrast, still has a long way to go in championing for women's rights along these lines.

The Legal Position for Women's Rights in Malaysia

CEDAW was introduced in the year 1979 by the United Nations but it was only 16 years later, in 1995, that Malaysia decided to sign and ratify the instrument.[10] It took another

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[3] Ibid art. 11(2)(a) and (b).
[4] [1990] ICR 442.
[5] A fixed term contract is a contract in which a company or an enterprise hires an employee for a specific period of time.
[6] See *Webb v EMO Air Cargo (UK) Ltd* [1992] 2 All ER 43, [1993] 1 WLR 49.
[7] *Webb v EMO Air Cargo (UK) Ltd ECJ* [1994] EUECJ C-32/93.
[8] *Webb v EMO Air Cargo (UK) Ltd (No. 2)* [1995] 4 All ER 577.
[9] Erika Rackley and Rosemary Auchmuty, *Women's Legal Landmarks: Celebrating the History of Women and Law in the UK and Ireland* (Bloomsbury Publishing 2018).
[10] Human Rights Commission of Malaysia, *SUHAKAM's Report on the Status of Women's Rights in Malaysia* (Human Rights Commission of Malaysia 2010) <http://www.suhakam.org.my/wp-content/uploads/2013/11/SUHAKAM-Report-on-The-Status-of-Women-s-Rights-in-Malaysia-2010.pdf> accessed 20 March 2019.

six years to witness a substantial development of the law in regards to the ratification of CEDAW. Arguably, one of the earliest and most significant changes is the constitutional amendment for article 8(2) Federal Constitution (hereinafter "FC") in the year 2001. It was an attempt to prohibit gender discrimination through the inclusion of the term 'gender' as a ground of non-discrimination. It is suggested that the constitutional amendment, which was prompted by the ratification of CEDAW, had enshrined the constitutional safeguards against the discrimination which has been long suffered by Malaysian women. However, this did not mark an end to the problem. Amendments were necessary to ensure that other laws and legislation are aligned with the FC and CEDAW.[11]

In the sphere of pregnancy discrimination in the workplace, there is an absence of legislation specifically dealing with the matter. Nevertheless, reference may still be made to some legislation which slightly pinpoints to the matter of pregnancy during employment or may be indirectly deduced to have some sort of applicability towards pregnancy discrimination. Firstly, the Employment Act 1955 (hereinafter "EA 1955"), ever since its inception, has conferred maternity rights.[12] However, it is pertinent to note that it revolves dominantly around the entitlement to maternity leave and pay as well as the period which qualifies for the said pay. One provision which may act as a potent sanction against pregnancy discrimination is section 37(4) EA 1955, which states what amounts to an offence for employers to terminate the services of an employee while she is on maternity leave.

Since rights during pregnancy are expressly bestowed in the EA 1955, this triggers a question as to whether pregnancy discrimination can be construed to be against those rights. For example, since women employees' rights are acknowledged, would it then be unlawful for employers to require an employee's resignation or subject her to termination exclusively based on the reason that the employee has fallen pregnant?[13] Unfortunately, in *Beatrice A/P AT Fernandez v Sistem Penerbangan Malaysia & Ors*, the court had answered this in the negative. It was laid down that:

> Section 37(1) of the Employment Act 1955 makes it mandatory for employers to pay maternity allowance to female employees on maternity leave. This section clearly protects the rights of working women in Malaysia. However, it does not prohibit provisions requiring female employees in specialised occupations such as flight cabin crew to resign if they become pregnant…[14]

Therefore, the doors of the existing EA 1955 to accommodate the prohibition of certain pregnancy discrimination practices were shut through the decision of the above case. Although in the same case, the judge was swift to dismiss the application of the Industrial Relations Act 1967 (hereinafter "IRA 1967") to the facts of the case, it may still be argued that IRA 1967 is a viable avenue to counter pregnancy discrimination in employment. For

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[11] Ibid.
[12] Employment Act 1955, pt IX.
[13] Maizatul Azila Binti Chee Din, Hawa Binti Rahmat and Rohaidah Binti Mashudi, 'Pregnancy and Discrimination: Effect of the Case Beatrice a/p At Fernandez v Sistem Penerbangan Malaysia and Others' (2011) 19(2) IJCIM 29.
[14] *Beatrice A/P AT Fernandez v Sistem Penerbangan Malaysia & Ors* [2005] 3 MLJ 681, 692.

instance, section 14(3) IRA 1967 stipulates the effect of any condition or term of employment in a collective agreement which is less favourable or contravenes other written laws applicable to the workmen. As a consequence, the said term or condition shall be rendered void and of no effect, and shall be substituted with written law.

In interpreting the section, theoretically it seems to suggest that it is relatively easy to challenge a term or condition in the collective agreement by virtue of the words 'less favourable'. The term or condition need not even be proven to contradict *any* written law applicable to the workmen. It is hence arguable that since contents which are discriminatory in nature are not consistent with the constitutional right of equality promised under article 8(2) Federal Constitution (hereinafter "FC"), such terms and conditions would be ineffective and void. Notwithstanding that section14(3) IRA 1967 governs private employment, it gives regards to other written laws, possibly including article 8(2) FC.[15] However, in real life, this argument is yet to be tested in the courts (again after the *Beatrice Fernandez* case) and it would mean that such deductions are merely academic discussions which do not possess the force of established nor binding legal principles.

Alternatively, section 20(1) IRA 1967 may be invoked for the dismissal of a workman without just cause or excuse, with the remedy of reinstatement being provided for the aggrieved party who can successfully prove that they have been dismissed without just cause or excuse. It is a provision which is remedial in nature.[16] It provides a remedy which is available for any workmen who have suffered dismissals or terminations from employment.[17] However, given that the remedy of reinstatement is a discretionary remedy, the application of the section may somehow be said to be restricted, where compensation may be awarded instead.[18] There are a number of Industrial Court cases which have found in favour of the employees relying upon this section where they have been discriminated against because or in relation to their pregnancies.

Analysis of Decided Cases on Pregnancy Discrimination

a. Pregnancy Discrimination - Manifestation of Unjust Dismissal?

The Industrial Court, in many instances, is not hesitant to hold that certain practices of pregnancy discrimination fall within the ambit of unjust dismissal. The case of *Aznalisa Yaacob v Malayan Banking Berhad*[19] demonstrates one of those instances. The claimant, a probationer at the respondent's company, was dismissed on the basis of her alleged "poor performance" claimed by the employer when she was seven months into her pregnancy. The court took into consideration the various circumstances surrounding the case including the fact that the employer had not issued any warning or offered any counselling in regard of her purported incompetence, to hold that the employer had not satisfied the burden to prove that the dismissal was made with just cause or excuse. The

[15] (n 10).

[16] *Non-Metallic Mineral Products Manufacturing Employees Union v. South East Asia Fire Bricks Sdn Bhd* [1976] 2 MLJ 67.

[17] Ashgar Ali Ali Mohamed, *Dismissal from Employment and the Remedies* (Malayan Law Journal Sdn Bhd, 2007).

[18] Jashpal Kaur Bhatt, 'A Review of the Industrial Court's Approach to Unjust Dismissal Claims in Malaysia, in Respect of Pregnancy and Maternity Issues at the Workplace' (2016) 10 ILR ix.

[19] [2015] 2 LNS 0987.

court could only come to the conclusion in affirmation of the claimant's argument that she was dismissed not due to her poor performance but rather for the fact that she was pregnant. In this case, the courts had imposed a duty upon the employer to prove that the dismissal was accompanied with just cause and excuse, so that employers would not be able to use vague and general excuses to mask practices of pregnancy discrimination.

Pregnancy discrimination may also take the form of ill-treatment by the employers' prejudice to pregnant employees who are suffering from pregnancy-related complications. Such health conditions render them to have no choice but to take medical leaves. In *K Kavitha Krishnan v Aetins Sdn Bhd*,[20] the Industrial Court had criticized the actions of refusal of medical certificates due to her pregnancy-related complications, deduction of annual leave and salary, and subsequent dismissal by the employer against the claimant. The court sagaciously described the actions as:

> … had not shown any compassion to a female employee who had faced complications in pregnancies. Instead, it had resorted to unacceptable means to try and get rid of her and to deprive her of her maternity benefits. Its actions had clearly been a blatant disregard of fair labour practices and had amounted to acts of victimisation against a female employee.[21]

The court, in this case, had aptly summarized actions which are obviously driven by pregnancy discrimination as the victimisation of an employee and denounced them as a non-adherence to fair labour practices. Other than dismissals during pregnancy, the Industrial Court has also decided that demotions during or after the period of maternity leave equate to constructive dismissals.

Meanwhile, in *Manalom Sdn Bhd v Nageswary T Rengasamy*,[22] the claimant had to experience a change in the nature and functions of her work after being transferred to another department during the period that she was on medical leave owing to her suffering from pregnancy-related complications. The Industrial Court took notice that the transfer was motivated as a display of dissatisfaction by the Managing Director because the claimant had to take about a 16-day long medical leave. Thus, it was not considered to be a *bona fide* act. Although it acknowledged the existence of an employer's prerogative and contractual right to re-designate the job functions of an employee, the Industrial Court, in this case, stated that it must be prudent in upholding the rights of the employer.

This cautiousness is to be practised when doubts arise as to whether the employer had acted in good faith. After all, it concerned the deprivation of an employee's right to job security. In deciding such matters, the court ought to consider section 30(5) IRA 1967.[23] The court established that the issuance of a transfer order or removal of job functions while the employee is on medical leave shall *prima facie*, be considered as a breach of contract. Clearly, the court, through section 30(5) IRA 1967, invoked its discretionary

[20] [2016] 1 ILR 156.
[21] Ibid 176.
[22] [2008] 1 ILR 341.
[23] Industrial Relations Act 1967, s 30(5): "the Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form."

powers and allowed itself to act equitably in regards to cases in which employees were made to suffer further detriments while being on medical leave.

Claims of constructive dismissals have also been upheld in instances where an employee is demoted after returning from maternity leave. This can be observed in the case of *Vasanthi Suvalingam v Price Solution Sdn Bhd*,[24] where the claimant, upon returning from her maternity leave, discovered that she had been replaced by another employee. She was subsequently transferred to a different department with her responsibilities diminished and at a lower pay. The Court upheld her claim of constructive dismissal, stating that the conduct of the company, in reducing her work and responsibilities, indicated that it was acting in *mala fide*.

The Industrial Court in relation to being a court of social justice has often adopted an approach which is accommodative in deciding cases pertaining to unjust dismissals claims towards women during pregnancy and birth.[25] Therefore, the Industrial Court's attitude, in the majority of cases, can be said to condemn pregnancy discrimination practices, in light of a handful of cases favouring the aggrieved employees. Unfortunately, however, this does not mean that pregnancy discrimination is completely outlawed in our jurisdiction.

b. Pregnancy Discrimination-Still Lawful?

While dismissals, demotions, and change of work scope during or after pregnancy have been held to be unfair, unjust and illegal by the Industrial Court, it is still lawful for employers to discriminate against pregnant employees through the fixing of employment contractual terms and agreement. It is common for airline companies to fix contractual terms which require air stewardesses to resign if they have become pregnant or become pregnant more than the number of times allowed in their employment contracts. It is disheartening that such practices are still lawful in Malaysia due to the absence of laws specifically prohibiting the practice as well the attitude of the courts in employing a narrow interpretation in construing the rights accorded in our constitution.

In the case of *Sheela Devi Visuvanathan v Malaysia Airlines System Berhad*,[26] the complainant worked as an air stewardess who had a third child, contrary to one of the terms in the collective agreement between her and the employer. The said term required her to resign if she became pregnant for the third time, failing which the company would be allowed to terminate her services. As she refused to resign, she was subsequently terminated. The court held that the termination was made in just cause and excuse to the invocation of article 8 FC by the respondents with the separation of public law and private law; the Constitution being a domain of public law, has no application to the private contract between the complainant and respondent which is clearly to be governed by private law.

In the midst of this disappointing outcome, the respondent had described the situation of being pregnant a third time as a 'serious fault'[27] and the court had accepted the statement as evidence to negate condonation, which was one of the issues raised in the

[24] [2012] 3 ILR 361.
[25] *Webb* (n 8).
[26] [2007] 1 ILR 99.
[27] The original words used in the judgment were in Bahasa Malaysia (i.e. *kesalahan yang serius*).

case, on the part of the respondent. The judge even added that the birth of her third child did not extinguish the wrong or fault of getting pregnant in the first place.[28] With all due respect to the presiding judge, it appeared that the court had indirectly condoned with the act which blatantly amounts to pregnancy discrimination by perceiving the situation of being pregnant as a wrong, a fault from which the law can offer no refuge.

The landmark case pertaining to such circumstances is the case of *Beatrice A/P AT Fernandez v Sistem Penerbangan Malaysia & Ors*.[29] The applicant was an air stewardess with the respondent company. They were bound by a collective agreement which, *inter alia*, required her to resign upon becoming pregnant, failing which, the respondent would be allowed to terminate her services. Upon becoming pregnant, the applicant refused to tender her resignation and this led to her subsequent termination. Therefore, this matter was brought before the court, her contention in that the collective agreement was null and void for the reason of being in contravention of article 8 FC. Her main line of argument was that the collective agreement was discriminatory in nature.

The court dismissed her claims for a number of reasons. Firstly, the court had followed the public-private law divide to deny the effects of article 8 in this case, citing that the constitutional law does not apply to arrangements between private individuals and that the collective agreement does not qualify as 'law' as envisaged by the Federal Constitution. Next, the court had recognized the principle of substantive equality,[30] which is commendable, but unfortunately failed to apply it to the situation at hand. It was laid down that:

> The equal protection in cl (1) of art 8 thereof extends only to persons in the same class. It recognizes that all persons by nature, attainment, circumstances and the varying needs of different classes of persons often require separate treatment. Regardless of how we try to interpret art 8 of the Federal Constitution, we could only come to the conclusion that there was obviously no contravention.

The words used, i.e. 'varying needs of different classes of persons often require separate treatment' is an uncanny reflection of the principle of substantive equality but the court had limited the concept to the same class of persons, which may seem slightly contradictory. If a different class of persons cannot be brought into the picture, the need to address the principle of substantive equality would not arise in the first place. It had been submitted that the court ought to have placed the issue of discrimination as the focal point, and the court had failed to tackle the issue of gender discrimination by drawing comparisons with other female ground staff rather than male stewards.[31]

In addition, the court delivered that the EA 1955 provided no aid to the applicant as the Act neither explicitly and specifically prohibited nor governed any terms or conditions

[28] *Sheela Devi* (n 26) 107.
[29] [2005] 3 CLJ 681.
[30] Substantive equality requires measures to achieve equality of results, meaning that same treatment is not the underlying requirement as understood in formal equality but instead, focuses on achieving equitable outcomes.
[31] Siti Aliza Alias, 'Beatrice Fernandez v Sistem Penerbangan Malaysia: A Constitutional Crique' in Khairil Azmin Mokhtar (ed), *Constitutional Law and Human Rights in Malaysia: Topical Issues and Perspectives* (Sweet & Maxwell Asia 2013).

requiring pregnant stewardesses to resign upon pregnancy. In effect, being subjected to the Contracts Act 1950 meant that those terms and conditions remain enforceable and valid. With such reasoning given, the applicant's claim was dismissed by the apex court.

The precedent set out by the Federal Court in the *Beatrice Fernandez* case was frowned upon by many. Then, a glimmer of hope for positive change was ignited in the case of *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors*[32], where the High Court delivered a revolutionary judgment in regards to a pregnancy discrimination case. The facts of this case are slightly different from the above-discussed cases pertaining to air stewardesses and the terms of their collective agreements. The facts of this case revolved around the plaintiff who obtained employment after making an application for a post of '*Guru Sandaran Tidak Terlatih*' and subsequently obtained employment. She was then required to attend a briefing pertaining to the terms of her service of employment after receiving a memo for her placement. Upon revealing that she was three months pregnant at the said briefing, her memo was withdrawn. She then demanded for her employment to be restored but received no written reply. In light of this, she commenced an action, naming the officers in charge of employing her, the education department of Selangor's state director, the Ministry of Education and the Government of Malaysia as the respondents.

She contended that her right guaranteed under article 8(2) FC was infringed as the conduct of the respondents was discriminatory on the basis of gender. The judgments of this case were revolutionary for the reason that the court had iterated on Malaysia's obligation as a State Party to CEDAW. This departs from the theory of dualism[33] and the doctrine of transformation[34] which had been long upheld by Malaysian courts. The court, in this case, had referred to provisions of the CEDAW to interpret the FC:

> CEDAW is without doubt a treaty in force and Malaysia's commitment to CEDAW is strengthened when art 8(2) of the Federal Constitution was amended to incorporate the provision of CEDAW which is not part of the reservation, ie to include non-discrimination based on gender. As such, I am of the opinion that there is no impediment for the court to refer to CEDAW in interpreting art 8(2) of the Federal Constitution. Hence, applying articles 1 and 11 of CEDAW, I hold that pregnancy in this case was a form of gender discrimination… Discrimination on the basis of pregnancy is a form of gender discrimination because basic biological fact that only woman has the capacity to become pregnant.[35]

However, it should be noted that this case was decided in this manner because the contract was between a public authority and a private individual. This case would have minimal applicability if an employee had been discriminated on the grounds of pregnancy by a private employer. Although this case had received positive reactions from various organizations and the public, it did not necessarily obtain a nod of approval by the higher courts in a latter case. In the Court of Appeal case of *Air Asia Bhd v Rafizah Shima bt. Mohamed Aris*,[36] which is another case regarding a pregnant stewardess, it was held that

[32] [2012] 1 MLJ 832.
[33] The theory that national and international law fare separate forms operating in different fields.
[34] Conversion is necessary for rule contained in an international treaty into domestic law by way of legislation.
[35] *Noorfadilla* (n 32) 846.
[36] [2014] 5 MLJ 318.

CEDAW does not possess the force of law in this jurisdiction because it has not been enacted into legislation. The court had indirectly rejected the findings in *Noorfadilla*'s case by going to great lengths to explain the dualist approach practiced in Malaysia and that according to precedents, it is mandatory for a treaty to be passed as law by the Parliament before they are operative in Malaysia. Ratification alone is insufficient.

The Underlying Challenges

By studying the trend of decisions by the Industrial Court in hearing cases relating to discriminated employees due to their pregnancies, it can be said that the court is ready to strike down conduct that is tantamount to pregnancy discrimination by the employers. However, the current legal position in Malaysia provides no prohibitory measures to counter 'an agreed pregnancy discrimination' in the private sector. In the *Beatrice Fernandez* case, the Federal Court has drawn a clear line of distinction between the public and private sector in the protection bestowed under article 8 FC.[37] This decision has undoubtedly exposed the vulnerability of private employees in becoming victims of pregnancy discrimination.

It is a herculean task to completely transform the dualist approach practised by our jurisdiction to that of a monist. That being said, it should be understood that how we have arrived at this point of discussion is due to the fact that our current legal position and existing laws are not in tune with the aims and objectives of CEDAW. As explained in the above cases, the constitutional amendment to article 8 FC seems to be of little help to employees employed in the private sector. Existing legislations like EA 1955 and IRA 1957, whilst providing for maternity rights and paving ways for possible reliefs in cases of pregnancy discrimination, neither expressly govern nor prohibit discrimination against pregnancies. This exhibits the lacuna in our law. Therefore, the absence of any legislation prohibiting pregnancy discrimination is a critical issue.

Proposed Reforms

In studying decided cases, some have identified the courts' narrow and pedantic approach to construing constitutional rights as a challenge in addressing the issues of pregnancy discrimination.[38] Meanwhile, *Noorfadilla*'s case suggests that modifying our conventional, and disputably outdated, approach in weighing the force of an international instrument may assist in relieving the problem. Unfortunately, that case is just a High Court case which does not bind the higher courts. These calculations boil down to only one viable and long-term solution to the problem.

Provisions against all forms of pregnancy discrimination must be legislated to eradicate the practice and protect the rights of pregnancy. To achieve this, existing statutes like the EA 1955 and IRA 1967 may possibly be amended to include sections expressly prohibiting and criminalizing pregnancy discrimination whilst also clearly statingthe remedies thatare available to employees in event of their rights being infringed. Alternatively, a better solution is to enact a new anti-gender discrimination act which would be applicable towards both private and public spheres. This would ensure a more

[37] *Siti* (n 31).

[38] Kamal H Hassan, 'The Dismissal of a Pregnant Stewardess: Still Lawful in Malaysia' (2012) 21(2) J Gend Stud 125.

holistic approach in countering any gender discrimination in various fields, including but not limited to employment.

A number of jurisdictions have enacted such legislation to hinder such discrimination. As an illustration, Australia has the Sex Discrimination Act 1984 which clearly coins the definition of 'Discrimination on the ground of pregnancy and potential pregnancy,' which includes but is not limited to giving less favourable treatment to a pregnant or potentially pregnant woman and imposing a condition, requirement and practice which results in disadvantages towards the said group of people.[39] The Act is far-sighted and comprehensive as it takes into consideration potential pregnancies as well. The legislative framework also makes it unlawful to discriminate an employee on the basis of sex, marital status, and (potential) pregnancy in work in relation to the arrangements in which the employment is offered, the selection of employee and the terms and conditions pertaining to the offer of employment.[40]

Clearly, Beatrice Fernandez and Rafizah Shima would have been spared from their predicaments if such legislation was in existence in our jurisdiction. Having legislation prohibiting all forms of sexual discrimination, including pregnancy discrimination would give Malaysia a powerful momentum to continue fulfilling its obligations under the CEDAW instead of just stopping at a constitutional amendment.

Conclusion

The ratification of CEDAW and the constitutional amendment which followed are insufficient on their own to protect Malaysian women from discrimination. Given the dualist approach practised in Malaysia, the enforceability of international instruments are significantly diminished within this jurisdiction. Therefore, there is still a long journey to be endeavoured by Malaysia to completely fulfil its obligation as a State Party to CEDAW. Perhaps, the journey may be continued with rapid initiatives to battle pregnancy discrimination suffered by Malaysian employees.

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[39] Sex Discrimination Act 1984, s 7.
[40] Sex Discrimination Act 1984, s 14.