

WORKPLACE DIVERSITY: HOW DOES MALAYSIAN LAW PROMOTE PEOPLE WITH DISABILITY?

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Abstract: *Workplace diversity refers to the variety of differences between people in an organization. It refers to the differences that people bring to their job on the basis of gender, race, ethnicity, age and other backgrounds, including disability. Despite one's appearance, look or physical ability, respects and considerations should be given to someone's capability and potential in performing the job. Diversity at workplace has been evidenced to be beneficial to the organization. It may increase innovations, productivity and competitive advantages, gain creativity and give positive reputation. To people with disability (PWD), diversity at the work place is a means of inclusivity. This paper looks at the position of Malaysian laws in promoting diversity in the workplace particularly to support employment of people with disability. Aiming towards realising an inclusive society, PWD's roles, talents and potentials must be valued. It is therefore to note that, even though Malaysia has no explicit laws addressing the matter, there are scattered provisions embedded in different statutes that seemingly promoting diversity at the work place for the disabled. At this point, the paper concludes that Malaysian legislations do play some roles in promoting diversity at the workplace as far as PWD is concerned.*

Keywords: *Diversity, Workplace, People with Disability, Legislation, Employment, Law*

Introduction

Diversity at workplace is not only widespread but expected nowadays. Esty et al. (1995) defined diversity as acknowledging, understanding, accepting, and valuing differences among people with respect to age, class, race, ethnicity, gender, disabilities, etc. It is the fact that individuals are different and valuing difference allows an individual to contribute unique experiences to the workplace. Therefore, workplace diversity refers to the variety of differences between people

in an organisation. Although this sounds simple, diversity encompasses race, gender, ethnic group, age, personality, cognitive style, tenure, organizational function, education, background, and more (Patrick & Kumar, 2012). In short, it refers to the differences between people in the organisations (Rensburg, 2017). People with diverse backgrounds think in different ways thus boost innovations and creativity within the organization. Other than different gender, it is common for an organisation to have variety of workers with different backgrounds, race, ethnicity, religion, and so on. In employment context, diversity is about to respect co-workers and to value people as employees. Accepting the fact that individuals are different makes people more tolerant, understanding and respecting each other. Promoting diversity at the workplace is indeed advancing the principles of industrial peace and social justice, the most essential considerations of the industrial jurisprudence.

In the case of people with disabilities (PWD), the idea of diversity workplace can be a means to enhance their opportunity to be economically and socially included within the society. Diverse workforce enables the employers to tap different talents from employees with different perspectives, backgrounds, abilities and disabilities that they bring to the workplace. It is the fact that PWD has been marginalized and viewed as those require protection or sympathy rather than respect. It has been estimated that, at least 10 percent of the population of a country is disabled. This estimation indicates that about 3 million of the citizen of Malaysia is PWD whereas the Department of Social Welfare Malaysia recorded a total of 506,228 registered PWD in 2014. Surely this number falls behind as many more PWD failed or refused to register for many reasons (Amin & Manap, 2015). As far as employment of PWD is concerned, Ismail and Hamid (2012) found that until May 2012, only 20.7 percent is employed and received Workers with Disability Allowance (Bantuan Elaun Pekerja Cacat (EPC)). Other than unemployment, those employed PWD are still facing difficulties at work, mentally and psychologically (Rosli et al., 2015). This shows that PWD have been disregarded when it comes to employment. Workplace diversity therefore can be a good approach to tap the resources that are productive and able to contribute to the nation.

This paper gives an overview to the role of Malaysian legislations that appear to be promoting diversity at the workplace, particularly for PWD, for their inclusivity within the society. The authors are of the view that there are some legal provisions that supporting this idea of diversity at the workplace. The paper further highlights and discusses those scattered provisions that embedded in different statutes namely the Federal Constitution, Employment Act 1955, Persons with Disabilities Act 2008 and few others. It further concludes that Malaysian legislation do play some roles in promoting diversity at workplace as far as PWD is concerned.

Literature Review

Diversity simply means difference. It also means ‘variety’ especially the inclusion of different types of people in a group or organisation (Merriam Webster.com, 2012). According to Harjot (2017), diversity in the workforce refers to differences between the workers in an organisation where the key characteristics of diversity include race, religion, language, culture, gender, age and physical abilities or disabilities. In the context of employment, diversity ensures organisations to recruit and retain the best person from the widest possible talent base regardless of gender, age, race, religion or disability (“Benefits”, 2012). Hence, diversity is commonly referred to individual differences that exist among people in an organisation. It covers different

human characteristics such as race, gender, age, creed, religion, etc., the aspects that individual has completely no control thus becoming the sources of prejudice and discrimination.

Diversity in the workplace has been generally viewed as advantageous to the organisation as it may increase productivity and competitive advantages, gain creativity and give positive reputation (Green et al., 2015), stimulate organizational competitiveness and growth (Fassinger, 2008), lead to improvement in employee relations (Chavez & Weisinger, 2008), as well as bring in new solutions to difficult problems (Ethnoconnect, 2017). Organizations with diverse employees are better suited to serve diverse external customers in an increasingly global market (Patrick & Kumar, 2012). This would consequentially bring about a great ownership thus providing a strategic advantage for the organisations (Washington, 2008). Moreover, diversity in the workplace can reduce lawsuits and increase marketing opportunities, recruitment, creativity, and business image (Esty et al., 1995). According to Loysk (1996), managing diversity is about more than equal employment opportunity and affirmative action, although Bhattacharya (2016) believed that organisation that wishes to implement a policy that encourages diversity, it ought to be considered an affirmative action. Placing diversity at the work place is indeed a mean of inclusion, as Toldra and Santos (2013) concluded that social participation through employment leads to social recognition and the feeling of citizenship. Therefore, managing diversity should not just acknowledging differences in people but involve recognizing the value of differences, combating discrimination, and promoting inclusiveness (Green, et. al., 2015). It is a basic human right for those with disabilities to be inclusive and to participate fully in the society. Being the “untapped resources” that are productive and able to contribute to the growth of the nation (Khoo, Tiun & Lee, 2013), employment for PWD is not only a means to provide income but also an opportunity for social participation and inclusiveness (UN Enable, 2007). Aspiring towards an inclusive society, PWD’s roles, talents and potentials must therefore be valued.

It has been evidenced globally that PWD involved in poverty life (Wohl, 2014) or have always been associated with poverty (Palmer, 2011) due to unemployment or working in vulnerable forms of employment. According to UN statistics, 82 per cent of disabled people in developing countries live below the poverty line (O’Reilly, 2007). In reality, as similar to other people, PWD also craves for work to fulfil their necessities and needs (Voo & Bahari, 2014). Article 23(1) of the Universal Declaration of Human Rights mentioned that, “Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment”. This means that right to work is part of the human rights as acknowledged. For PWD, they should be given right to work and right to choose for the employment that is suitable with their disabilities. Moreover Article 27(1) of the Convention on the Rights of Persons with Disabilities (CRPD) proclaims the right to work and during employment of PWD. Other than these international instruments, the court has also acknowledged employment right of PWD. This can be seen from the judgments, for example, in *Lee v. Showmen's Guild of Great Britain* [1952] 2 QB 329 when Lord Denning affirmed that right to work is equally important as right to property; as every day the court of law would interfere with the dealings of right to property therefore the court should also have the right to interfere and protect the right to work. In Malaysia, the Industrial Court have considered the right to work as part of the human rights. For instance, in the case of *Ong Ghee Leong & Ors v. Lim Kim Hai Electric (M) Sdn. Bhd.* [2013] 3 ILJ 445, the court had given consideration to the principle established in *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1996] 1 MLJ 481 and *R. Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 when the Honourable Chairman conceded that the right to work and right to

livelihood of a person is part of the human rights. This has indicated that the court will at all time protect the right to work of a person inclusive of PWD.

Recognizing this right to work of PWD is coordinated with the concept of diversity that encompassing acceptance, respect and acknowledgement that individuals are different. As diversity concept includes the elements of understanding and recognizing others' uniqueness and a matter of valuing people's disparities and dissimilarities, considering PWD as workforce should then create harmonization and commonality that in some way promotes organizational growth.

Legislations that Promote Workplace Diversity for People with Disabilities

Promoting workplace diversity through legislations for PWD has its place in Malaysia. The authors believe that some legal provisions in selected legislations do offer and function for the purpose of promoting diversity for PWD at the workplace. The related provisions can be found in several identified legislations as highlighted below.

Federal Constitution

Equality as the fundamental right is embedded in Article 8(1) which reads: "All persons are equal before the law and entitled to the equal protection of the law." As such, equality is a guaranteed right to all persons of the Federation, citizens or non-citizens (Mohamad Suffian Hashim, 1976). Clause (2) mentions on the equality against discrimination as follows: "Except as expressly authorised by the Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment." From this Article, every person holds right to equality; it is expected to include employment as well whereby everybody is equal and must be treated equally. Therefore, equality as the fundamental right promotes the concept of diversity with certain limitations.

While equality is evidently admitted as a fundamental right, employment also has its constitutional right (Wahab, 2008; Karean, 2007; Ram, 2007; Bhatt, 2004 & 2006) and is essentially recognized through judicial reviews when the superior court of Malaysia had construed Article 5 on the right to life to include the right to livelihood. This is evidently clear, as mentioned, when the right to life of every person under Article 5 has been extended to the right to livelihood by virtue of the judgments in the cases such as *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 CLJ 771; *Hong Leong Equipment Sdn. Bhd. v Liew Fook Chuan* [1996] 1 CLJ 665 and *R. Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147. Consequently, in the context of employment, both Articles 5 and 8 are inter-related and have their significant implications. This was highlighted by Abdul Malik Ahmad JCA in *Ahmad Tajuddin Ishak v Suruhanjaya Pelabuhan Pulau Pinang* [1997] 1 MLJ 241, at page 251, that the combined effect of both is to strike down any arbitrary or harsh and unfair action which adversely affects the quality of life. Taking this into consideration, equality as supposedly being practiced in employment may subsequently promote diversity at the workplace. The state of being equal is then translated through the acceptance of the idea of workforce diversity so that the difference is seen as equal as others.

Indeed, PWD are entitled to equal opportunity, protection and assistance in all circumstances and subject to such limitations and protection of rights as provided by the Federal Constitution. Having mentioned this, the concept of diversity that considering and giving opportunity at work for the disabled should then be encouraged especially when the court of law has established and affirmed right to livelihood or simply right to work as part of the fundamental rights of everyone.

Persons with Disabilities Act 2008

Persons with Disabilities Act 2008 (PWDA 2008) is a special legislation enacted to give recognition to the persons with disabilities (PWD) or disabled. Aiming to provide protection for the wellbeing of the PWD among its objectives, the Act generally acknowledges the potential contributions of PWD to the overall interests and diversity of the community and society. On the issue of diversity in employment, PWDA 2008 assures the right to access to employment on equal basis with persons without disabilities, thus promoting the diversity concept. This is stated under section 29(1) that says, “*persons with disabilities shall have the right to access to employment on equal basis with persons without disabilities.*”

Sub-section (2) further requires the employer to “*protect the rights of persons with disabilities, on equal basis with persons without disabilities, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, protection from harassment and the redress of grievances*”. This provision assures protection of the PWD in terms of just and favourable conditions of work including fair treatment and non-discrimination environment. In addition, other aspects such as equal opportunities, equal remuneration, safety and health, protection from harassment and redress of grievances are clearly mentioned. Moreover, the employers are expected to properly evaluate the PWD abilities, provide suitable places of employment and conduct proper employment management in performing their social obligation. In the context of diversity, regards should not necessarily be given to someone’s appearance or physical ability but their capability and potentials in doing the jobs. On this account, just conditions of work, equal opportunity and remuneration etc. are expected for PWD once being hired.

Additionally, having repeatedly used the words “*on equal basis with persons without disabilities*” shows the intention of the legislation to place PWD in parity with persons without disabilities. It is the expectation of the law that PWD must be treated equally and be assured rights in employment as others without disabilities thus acknowledging the concept of equality. Sub-section (3) of section 29 says that, “*the employer shall in performing their social obligation endeavor to promote stable employment for persons with disabilities by properly evaluating their abilities, providing suitable places of employment and conducting proper employment management.*” Here, the employers’ commitment towards providing suitable facilities for PWD including transportation to work (Ta & Leng, 2013) should be considered as fulfilling their social obligation under this provision. The needs to provide disabled-friendly work environment is very important in ensuring opportunities for PWD to get jobs (Amin & Manap, 2015; Jayasooria, 1997). Fulfilling this social obligation is therefore part of supporting the diversity concept.

It is to be noted that by virtue of the enactment of PWDA 2008, the establishment of National Council for Person with Disabilities (Council) shall be seen as medium that function, among others, to formulate appropriate policies and measures in order to promote employment

for PWDs in the private sector (Section 29(4), promote opportunities for training in the labour market, self-employment, entrepreneurship, development of cooperative, starting one's own business and work from home (Section 29(5). This shows that there are initiatives to enhance and support lives of PWD so as to ensure their inclusivity within the community and society. Being an untapped resource with different abilities and talents etc., employment should not only be understood as a means of income for PWD but also an avenue that enabling them to fully and effectively participate in society. It is therefore anticipated that the enactment of PWDA 2008 would be the catalyst to enhance and support PWD to be joining workforce thus creating diversity environment at the workplace.

Employment Act 1955

The Employment Act 1955 (EA 1955) should be applied across the board to all employees regardless of race, religion, gender, citizenship, abled or disabled persons, etc. subject to the meaning of the word "employee". According to the EA 1955, employee generally is the one who enters into a contract of employment with an employer for wages (although the law indicates the wages to be earning RM2,000 and below; or for manual labors, regardless of the wages). Without special interpretation given to the word "employees with disabilities" or "disabled workers" indicating all employees should be treated equally and without distinction which in some ways, would be unfair to the conditions of PWD. Having said this, Jaafar, Wahab and Yaacob (2017) suggesting this group of workers who are having certain impairment to be supported in terms of their accommodation and suitable infrastructure at work to enable them to perform as other normal workers.

Section 7 requires the employer to provide terms and conditions which are not less favorable to employees. Therefore, both employees with disabilities or without disabilities should expect the equal terms and conditions of employment. Hence, the employer shall provide terms and conditions which are not only fair and not less favorable but probably more favorable to the employees. Fair may not necessarily equal but according to the needs of the disabled workers. Therefore, when the employer is hiring someone with certain disabilities, the talent and ability should be taken into consideration rather than the appearance alone. The idea of diversity has been underpinned through this provision when regardless of status, their terms of employment shall be equally applicable. Furthermore, from the diversity context, employer and employees should hold mutual respect each other.

Industrial Relations Act 1967

The Industrial Relations Act 1967 (IRA 1967) is another labor statute. It provides for the regulations of the relations between employers and workmen and their trade unions. Its functions are not only to promote and maintain industrial harmony but also to prevent and settle any disputes arising from the relationship of employers and employees including the matter of trade union.

In the context of promoting diversity at the workplace, the relevant provision could be section 20(1) that is familiar for as a redress in dismissal without just cause or excuse cases or simply unfair dismissal. Here, the application of section 20 can be realized if there was a case of unjust dismissal perhaps due to disabilities. Founded on the phrase "without just cause or excuse", the clause can be applied as a recourse for any unfair dismissal cases which, in the authors' opinion, should include claims against unfair or unfavorable treatment that impede the

diversity. Looking at the objective of the IRA 1967 to promote industrial harmony, section 20 as a remedial provision must further advance this objective as “a piece of beneficent social legislation”, as suggested by the Honourable JCA, Gopal Sri Ram in *Hong Leong Equipment Sdn. Bhd. v Liew Fook Chuan* [1996] 1 CLJ 665. Both provision and courts’ interpretation emphasized the right against unfair treatment and thus highlight the relevance of diversity under the Malaysian labour context. Although the application could be in a more extreme case that involving dismissal, this section is seen as a mechanism to restrain employers from exercising unfair treatment towards workers with disabilities thus promoting diversity at workplace.

Employee’s Social Security Act 1967

The aim of Employee’s Social Security Act 1967 (ESSA 1967) is to provide protection against economic and social distress towards employees and their families when the insured persons (employees) sustain injury or death. A body that governs the Act and administers the social security schemes is named Social Security Organization (SOCSCO). Through the Act and Regulations, SOCSCO functions to provide free medical treatment, facility for physical or vocational rehabilitation, and financial assistance to employees if they have lost their abilities due to accidents or diseases that have reduced their abilities to work or rendered them incapacitated. In the case of death, the dependents are provided financially through pensions (SOCSCO, 2017). The Act basically provides insurance coverage for all employees under the contract of service or apprenticeship earning monthly of RM4,000 (and below) regardless of their employment status, being it permanent, temporary or casual in nature (section 2(5) of ESSA). The rate of contribution is further capped at monthly wage ceiling of RM4,000.00. The principle means once an employee has made a contribution, he remains liable to make contribution even if his or her earning exceeds that sum subsequently. For an employee who earns more than RM4,000 is given an option to be covered with the agreement of the employer under the principle of once-in-always-in. The Act however does not cover foreign workers and public-sector employees.

How does SOCSCO or ESSA 1967 relate to promoting workplace diversity? SOCSCO at the same time stresses out for the organizations to promote measures or corporate with existing institutions for the improvement of the health, occupational safety and welfare of insured person. This may include the rehabilitation and re-employment of person who have been disabled or injured (Section 40 of ESSA). Free-of-charge facilities for physical or vocational rehabilitation shall be provided to insured person who is suffering and claiming to suffer from invalidity or permanent disablement. The renewable facilities are also provided which may include prosthetic, orthotic or other appropriate appliances as may be determined by the organization (Section 57). Via these provisions, section 53 of ESSA 1967 further ensures the employment security of the employee victims (insured persons). Section 53 provides that any notice of dismissal or discharge or reduction given to an employee during the period he is in receipt of disablement shall be invalid or inoperative. All these provisions of ESSA 1967 support the injured or disabled workers thus relevant to the subject matter of workplace diversity. On top of that, the benefits provided ensure that the workers will not lose their job although they might have gone through a critical period of illness.

Income Tax Act 1967

This Act provides significant support to PWD including workers who have become disabled by promoting favorable tax treatment. By providing tax relief as the incentives, the Act is at the

same time promoting diversity at the workplace for the PWD. This tax treatment includes personal tax relief, tax benefits and tax deduction. Personal tax relief are basically made available to: (a) a disabled individual (additional personal relief of RM6,000.00); (b) a disabled husband/wife (annual deduction of RM3,500.00); (c) a disabled child (tax relief of RM5,000.00 and an additional relief if the child is involved in tertiary education); and (d) purchasing basic supporting equipment/ assistive device to be used by a disabled person, husband, wife, child or parent with a maximum value of RM 5,000.00. Tax benefits would be advantageous for the employers who are employing disabled persons when the employers are entitled for (a) double deduction of remuneration paid to the disabled worker; (b) double deduction for expenses spent for training of non-employee disabled persons; and also (c) expenditure on any equipment to assist worker with a disability, including the alteration or renovation of workplace. It can be seen here that this tax would benefits the employers in three ways i.e. double tax deduction for one disabled employee, double tax deduction for the training provided for the disabled employee as well as deduction for any expenditures spent for the equipment or tools for the purpose of assisting the disabled employee. While the incentives are advantageous to the employers, they correspondingly help and supports PWD so as to be given equal opportunity at work.

This legal provision of the Income Tax Act 1967 should be read consistently with section 29(3) of the PWDA 2008 whereby the employer, in performing their social obligation for PWD, shall be providing suitable places of employment and conducting proper employment management. While providing suitable accommodations and equipment to the disabled employees or making certain adjustment to the office to ensure its suitability with the type of disablement, employers are supporting diversity concept to the PWD and at the same time gain benefits for themselves. In other words, the Income Tax Act 1967 does not only support PWD through the tax deductions but also giving incentives to the employers who happened to employ the disabled.

Conclusion

Diversity at the workplace is almost inevitable in this globalization era. By having differences among people in respect to age, race, gender, disabilities, etc. would allow individuals to show respect and value differences thus may contribute unique experiences to the workplace. Workforce diversity by considering inclusivity of PWD at the workplace is essentially opening an opportunity for these untapped resources to show their talents and abilities that at the same time contributing to the nation. From the discussion above, Malaysian legislations through their scattered provisions, are keen in supporting the idea of diversity at workplace for PWD. Furthermore, as far as PWD is concerned, the most applicable provisions probably the PWDA 2008 that specifically governs their employment rights. This fact concludes that the laws in Malaysia do play some roles in promoting diversity for PWD at the workplace.

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