THEORISING EMPLOYMENT DISCRIMINATION – A COMMON LAW APPROACH

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Abstract:

Purpose*: Unlike the United Kingdom with her Equality Act 2010 that covers different settings and grounds of discrimination, Malaysia does not have an explicit anti-discrimination legislation. On this ground, in the employment context, the researchers established that the employee could institute the right against discrimination through the common law.*

Theoretical Framework*: The argument is founded on the implied contractual term, of trust and confidence, together with the duty of care.*

Methodology*: A doctrinal legal research is the approach by composing a descriptive and analytical analysis of legal rules gathered from primary sources namely court cases and statutes.*

Findings*: Common law duty of implied term of trust and confidence, and duty of care should be positioning and establishing the employer's liability for employment discrimination thus providing legal recourse for victimized/discriminated employees.*

Research Implications*: This work demonstrates that in the absence of a statute regarding employment discrimination, the breach of implied contractual term could be the approach thus indicating the interrelation of common law theory in employment relations.*

Originality*: Should the rights and protection of employees against discrimination be jeopardized in the absence of anti-discrimination legislation in Malaysia, at least, until recently, it is theorised that common law's implied term of trust and confidence, and duty of care are the basis of legal recourse for employees.*

Keywords*: employment discrimination, unfavourable treatment, employment relationship, duty and liability, legal, common law.*

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INTRODUCTION

The notion of equality is the cornerstone of human rights that described as "the starting point of all liberties" (Baderin, 2003). While equality refers to impartiality, discrimination is “a differential treatment or consideration of a person compared to how others in a similar situation would be treated or considered based on an actual or ascribed characteristics that this person holds” (Council of Members, 2016). Employment discrimination, a kind of unfavourable treatment, occurs when factors that are irrelevant to employment and job performance become the matter of concerns limiting one’s freedom to obtain the aspired job; while those in the job are affected when the opportunities to develop skills, potential and talents according to merit are impaired.

The problem is, unlike other jurisdictions with their anti-discrimination legislation, such as Equality Act 2010 in the United Kingdom, Malaysia has no such explicit kind leaving lacunae in law (Wahab & Kamal, 2020), until recently when the amendment to the Employment Act 1955 (EA 1955) took effect. While one may claim Malaysia does not outlaw discrimination for the absence of anti-discrimination statute, Federal Constitution assures equality as a fundamental right to all persons that forbids discrimination on the grounds of religion, race, descent, place of birth or gender. Be that as it may, Article 8 is portrayed under the essence of equality, being the only guidance for a discrimination-free setting.

Also, it would be exaggerating to assert no such antidiscrimination-related provision in labour legislations when some terms are inherently outlawing discrimination. For example, the Industrial Relations Act 1967 (IRA 1967) stipulates employee’s protection against employer’s discriminatory acts in matters regarding participation or non-participation in the trade union. A new amendment to EA 1955 says “the Director General of Labour may inquire into and decide dispute between employee and employer in respect of matter relating to discrimination in employment”. With such a brief and general section as a start-off for employment discrimination provision, the application is yet to be tested and questionable. With such limited provision, this study examined possible legal recourse founded on common law principle of implied term and duty of care through which the employee could institute the rights against discrimination.

As understood, implied term has equal weight with express term, breaching it will subject the party to be liable. As such, the paper justifies and considers the relationship of the parties, through which the duty and liability of employer regarding employment discrimination is founded on common law approach of implied duty of mutual trust and confidence, and the duty of care. The reason being that employment relationship is determined by a contract, whether oral or written, express or implied, though section 10 EA 1955 requires it to be made in writing if exceeds one month. Without a written contract, the relationship is governed by the facts and circumstances of the case.

1. LITERATURE REVIEW

While employment is man’s essential need to make a living, denying employment is depriving someone’s life. According to the recent statistics, 46% of employees in the United States admitted workplace discrimination as a problem, with racial discrimination increased following the pandemic although disability and sex still in the top three (Fenton, 2022). With anti-discrimination laws in place, workers compensation is expected although it is not the only remedy for the victim of discrimination can file a lawsuit for the harassment, discrimination and retaliation (Schooley, 2023). Inherently, the claims can also cost the money and reputation to the business of employer.

In Malaysia, workplace discrimination is discreetly common and it involves race issue, gender, language spoken, religion and age (Atikah, 2018). Ministry of Human Resources Malaysia (2015) tended to receive complaints about sex and racial discrimination, sexual harassment, unfair wages, victimisation, and lack of facilities to perform prayers. From judicial review standpoint, court cases such as Beatrice Fernandez v Sistem Penerbangan Malaysia & Anor. [2005] 2 CLJ 713, Noorfadilla binti Ahmad Saikin v Chayed bin Basirun and Ors [2012] 1 CLJ 769, and Airasia Berhad v Rafizah Shima binti Mohamed Aris [2014] MLJU 606, that involved gender discrimination failed to provide clear guidance to legal recourse for employment discrimination specifically when the case of Noorfadilla was overturned by Rafizah Shima.

In the international platform, combating discrimination is supported through the principle of decent work (ILO, 2022). Discrimination displays from the minute of advertisement, recruitment, interviews, including when hiring and during termination, usually for the reasons of gender or race. It also covers terms and conditions in employment, promotion, performance, training opportunities, transfer, and termination (Connolly, 2022; Collins, Ewing & McColgan, 2019). While there is insightful study on race, gender, age, and religion that can framework the research that offer understanding to workplace discrimination, Malaysia current position is different when fails to address workplace discrimination issue leaving some individuals vulnerable to exploitation, unfavourable and unfair treatments without meaningful recourse under the law (Cheah & Lim, 2018). On this respect therefore, it is critical to establish an alternative to the claim of discrimination within Malaysia legal framework. The proposed recourse would be the outcome for the protection of employee's rights against workplace discrimination.

2. METHODOLOGY

Employing a doctrinal legal research method, the primary sources namely statutes and reported cases are the main legal authorities scrutinized in addition to secondary sources involving article journals and official reports. These authoritative texts are exploited through descriptive and analytical analysis aiming at resolving legal problems (Langbroek et al., 2017) as well as establishing the legal recourse for resolving claims and issues pertaining to employment discrimination. In specific, the current study analysed relevant provisions of Malaysia labour laws namely Employment Act 1955 (EA 1955) and Industrial Relations Act 1967 (IRA 1967) together with selected court cases. Moreover, the common law theory of implied term and duty of care is the starting point on the basis that employment relationship binds the parties for the rights and duties towards each other. It is based on this that the related legal provisions and relevant cases were critically analysed. The outcomes are subsequently presented in the results and discussion part.

3. RESULTS AND DISCUSSION

An employer is a person or an organization who hires another, that is an employee, to serve him under the contract of employment. Under the IRA 1967, an employer may include either person or a body of persons, corporate or unincorporated, inclusive of the government and statutory authority. The same explanation is given to EA 1955 particularly when the word "person" under the Interpretation Acts 1948 and 1967 includes "a body of persons, corporate or unincorporated". Even in practice, the employer as a business entity will authorise the management to act on its behalf, while the management will act as the employer and at the same time, as the employees (Hassan, 2008). Moreover, the word employee shall refer to a person who works for the employer under the employment contract. This relationship binds the parties for the rights and duties towards each other.

3.1 Establishing employment discrimination - the common law approach

Emphasising the freedom of contract, the common law views discrimination as tolerable so long as no pre-existing contract or property right is infringed (Adams, Barnard, Deakin & Butlin, 2021). Accordingly, employment discrimination on any grounds is considered a legitimate exercise of the employer's right to freedom of contract. In Allen v Flood [1898] A.C. 1, Lord Davey remarked that

"an employer… may refuse to employ [an individual] from the most mistaken, capricious, malicious or morally reprehensible motives that can be conceived, but the workman has no right of action against him". As time passes, the common law courts moved away from the traditional principle to a more fair and just treatment toward employees to meet the realities and changing needs of society. Since then, the industrial law underlines the principle of social justice where the master-servant relationship keeps improved when it concerns the question of bargaining power. This includes a radical departure where employer had to have reasons and to act reasonably in deciding to dismiss (Davies, 2009). As Mohamed (2005: 23) commented, "without legislative intervention in the form of statutory protection, or by employee's unions through collective bargaining for acceptable terms and conditions of employment, an employee had no alternative but to succumb to the employer's pressure". Regarding the establishment of employee's rights against discrimination thus causing employer to be liable for any discriminatory treatment, further discussion are as follows, under the sub-headings implied term of trust and confidence and duty of care.

3.2 Implied term of trust and confidence

The parties to the contract will have no difficulty to understand express terms as they are set out unequivocally in the agreement, unlike the implied terms. Implied term as a structural legal principle is of much greater significance (Brodie, 2008) that provides standard incidents of the contract based on efficiency and a fair balance of obligations (Collins, 2016). According to Hassan (2008), terms are implied into employment contract because they are reasonable and necessary in contemporary world. Terms implied in the contract of employment are considered as if they have been brought to the parties' attention (Mohamad, 2004) thus having similar weight and effect to the express term as far as rights, duties and liabilities are concerned. On juridical development, courts have inferred many terms into employment contract with the most significant is implied duty of trust and confidence.

The common law courts have implied that the employers may not, without reasonable and proper cause, conduct themselves in a manner likely to destroy or seriously damage the relationship of confidence and trust between the parties. Brown-Wilkinson J. at 670 in Woods v WM Car Services (Peterborough) Ltd. [1981] ICR 666 says:

"There is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damages the relationship of confidence and trust between employer and employee… To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract; the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect judged reasonably and sensibly, is such that the employee cannot be expected to put up with it…"

This implied term of trust and confidence was subsequently recognised by the House of Lords "as a sound development" where in Malik v Bank of Credit and Commerce International S.A. [1997] 3 All ER 1, Lord Nicholls of Birkenhead at 9 asserted, "the term is now implied in every contract of employment". Since then, the implied obligation of mutual trust and confidence has been largely applied in the courts' ruling on disputes particularly dismissal case. Malaysia echoed the same when implied term of mutual trust and confidence has been featured in many judicial decisions. For example, the Court of Appeal in Quah Swee Khoon v Sime Darby [2001] 1 CLJ 9, at 21 found that:

Whether one would describe the conduct complained of as amounting to constructive dismissal or the breach of the implied term governing mutual trust and confidence is a matter of semantics. Nothing turns upon it. At the end of the day, the question simply is whether the appellant was driven out of employment or left it voluntarily.

Given the above dictum, the court in Lee Kok Thai v Minconsult Sdn. Bhd. [2004] 3 ILR 68, at 74 stated that, "the breach of the implied term of mutual trust and confidence which is a fundamental term of the contract of employment is constructive dismissal. The burden of proof

was on the claimant in a case of constructive dismissal to prove that the company had dismissed him by destroying the relationship of mutual trust and confidence." Hence, the implied term of mutual trust and confidence has been considered by courts in determining whether, on the employer's part, there was "a breach of a significant term of the contract going to the root of the contract of employment". Since the test of constructive dismissal is a contractual one as decided in Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] CLJ 45, the court must look into the express and implied terms of the employment contract.

In the context of employment discrimination, the common law implied term of mutual trust and confidence should be the most significant ground to substantiate the claim in the absence of explicit statutory provision. Given that the constructive dismissal would be the consequence of discriminatory practices of the employer, the implied term should be the essential ground. Hence, the implied terms of mutual trust and confidence have a great impact on the employment contract considering the duty of the employer to preserve a good relationship, and not to destroy or seriously damage it, otherwise, breach of the implied terms takes effect.

3.3 Duty of care

Duty of care is among the common law duties of employer. The employer should be protecting and responsible for the employee's health, safety and well-being. In human resource management, it implies that "organisations have developed disaster management frameworks, or engaged in crisis management planning, for events that could lead their employees into harm's way" (Claus & McNulty, 2015). Simply put, employer must avoid doing things that could hurt the employee, or the courts will give a way of bringing claims against the employer who has harmed him. The duty to provide a safe and conducive working environment for employees also encompasses that employees are not subject to loss of dignity, self-respect and self-esteem because it is an individual's right to respect personal dignity where every employee holds the right to be treated based on individual characteristics, merits and achievements (Adams, Barnard, Deakin & Butlin, 2021). A conducive and pleasant environment of a workplace shall include inculcating harmonious relationship at work and avoidance of any discriminatory practices, favouritism, victimisation, harassment, or other unfavourable treatment which might be perpetrated by superiors, peers or subordinates (Mohamed, 2004).

The House of Lords in Wilson & Clyde Coal Co. Ltd. v English [1938] A.C. 574 established that the employer owes a duty to provide competent and safe fellow employees, adequate materials and a safe system of working to an employee. Moreover, the duty to provide a safe place of work should have been read as any possible and reasonable steps, skill and care taken to ensure the workplace to be the most conducive place of work. In Naismith v London Film Productions Ltd [1939] 1 All ER 794, Goddard L.J. at 798 uttered it was "not merely to warn against unusual dangers known to them… but also to make the place of employment…as safe as the exercise of reasonable skill and care would permit". Any act of discriminating, harassing, bullying or victimising the employee will be counted as against the safe working conditions. Therefore, the employer is bound to take reasonable care for the safety of the employee, failure of which would render the employer, not only liable for breach of the duty to take reasonable care but also a breach of the implied terms of trust and confidence. Additionally, the employer's duty is not to simply take care of the employees, but to ensure that it is taken by all those persons engaged by him (Walton et al., 2018). Under the issue of discrimination, safety at the workplace should include protection against any unpleasant and menacing environment. If the employer has reasons to believe that the conduct of any employee would cause harm to other co-employees, he must take reasonable steps to avoid any harm that might be inflicted (Walton et al., 2018). Accordingly, it is a duty of an employer to provide competent staff, not just for the effectiveness of work but to ensure good habitual conduct amongst employees. In De Souza v Automobile Association [1986] I.C.R. 514, the Court of Appeal agreed that the employer could be liable for racial or sexual harassment (one of the types of employment discrimination), the effect that created unpleasant and intimidating working environment to the victim. Having mentioned this, the employer is under the duty to take all

reasonably practicable steps to prevent a hostile environment. This may be satisfied by adopting an equal opportunity policy or a code of practice and ensuring these are communicated effectively to all staff.

In Malaysia, it is submitted that the employer's duty to provide safe, pleasant and conducive surroundings of the workplace is relevant when the discriminatory treatment would create hostile and unpleasant working environment. Failure of the employer to abide by this obligation would invite liability for a breach of duty of care. Under the law of tort, this duty would give rise to a contractual obligation to the employer to act reasonably in matters concerning safety as far as implied term of trust and confidence is concerned. Should there be any policy or best practices applied, although not legally binding, they could still be used as a defence on the employer's part.

3.4 Legal Recourse

As recently argued, in the absence of explicit anti-discrimination law, the victimised/discriminated employee should then be able to claim his rights under the common law breach of an implied duty of trust and confidence, and breach of duty of care on the employer's part. Simultaneously, under the labour legislation specifically the IRA 1967, the implicit phrase of "discrimination" or "discriminatory treatment" can be construed through section 20(1) that says:

"Where a workman, …considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director-General to be reinstated in his former employment…"

[Emphasis added]

3.5 Without just cause or excuse

Termination must be initiated with good reason, lawful and sufficient cause. The phrase "without just cause or excuse" should embrace anything and possibly imperative to suggest "discrimination" and equivalent. The justification is that the dismissal without just cause or excuse may include dismissal which is unfair, having the elements of victimisation, capricious or mala fide action, that are incorporated under unfair labour practices which include discrimination. Although section 20 provides no cause of action in terms of the right of employees against dismissal (Anantaraman, 1999), it is submitted that the provision is the recourse for the employee to claim against any discriminatory act or unfavourable treatment based on the phrase without just cause or excuse, particularly where claims of unfair dismissal is concerned. In the case of Perak Match Factory Ltd. v Match Industry Workers' Union [1965-67] Mal. LLR 179:

It is well settled that the dismissal or the termination of the services of an employee is a managerial function and therefore no court or tribunal will interfere unless there has been a colourable exercise of that function as a cloak for victimisation, unfair labour practice, or other mala fide action… It has also been accepted that where the termination of services has been capricious, arbitrary or unnecessarily harsh, that may be cogent evidence of victimisation and unfair labour practice.

Section 20(1) considers dismissal to include termination simpliciter. So far as the employee feels the termination is done without just cause or excuse, claims can be brought for adjudication. The Federal Court in Goon Kwee Phoy v J & L Coats (M) Bhd. [1981] 2 MLJ 129, at 136 declares:

We do not see any material difference between the termination of the contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same. Where representations are referred to the Industrial Court for inquiring, the court has to determine whether the termination or dismissal is with or without just cause and excuse.

Hence, the Industrial Court will intervene whenever the employer or management, in exercising its traditional rights, acts harshly or unfairly towards the employee, which may become cogent evidence of victimisation and unfair labour practice. In Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors [1996] 3 MLJ 489, the issue was regarding discrimination of employees for being involved in the union activities. The Court of Appeal in the judgment opined it had

implicated victimisation and unfair labour practice. Malhotra (1985: 900) suggested unfair practices as a comprehensive term that includes victimization where it is "committed by an employer when he does or omits to do something which act, or omission is an invasion of the legitimate rights or interests of the workmen".

On this note, it is suggested that any discriminatory act or unfavourable treatment by the employer must be described as unfair labour practice which could then invite the court's interference particularly when the dismissal was the outcome. Succinctly, victimisation, any capricious and mala fide actions including unfavourable treatment and discrimination shall be featured as unfair labour practice thus fall under similar understanding and become part of the phrase "without just cause or excuse". In other words, the claim of discrimination may arise when the dismissal which is alleged to be "without just cause or excuse" is adjudicated to determine whether the dismissal is fairly or unfairly executed. Accordingly, it is submitted that section 20(1) of the IRA is of the essence in construing the meaning of "discrimination".

Other than this, the key section altogether focuses on the rights of the employee to the security of tenure which covers the rights against unfair dismissal. As per Gopal Sri Ram JCA in Hong Leong Equipment Sdn. Bhd. v Liew Fook Chuan [1997] 1 CLJ 665 at 704-705:

"Parliament intended to elevate the status of a workman, from the weak and subordinate position assigned to him by the common law to a much stronger position. The legislature has willed that the relationship of employer and workman as resting on a mere consensual basis that is capable of termination by the employer at will with the meagre consequence of paying the hapless workman a paltry sum as damages should be altered in favour of the workman. It has accordingly provided for the security of tenure and equated the right to be engaged in gainful employment to a proprietary right which may not be forfeited save and except for just cause and excuse."

In the context of the promoting equality of treatment in employment, the security of tenure denotes a guarantee that dismissal will not occur on discriminatory grounds and it must be justified by sound reasons. The dismissal that was tainted with the motive of discrimination shall be considered unlawful. Therefore, any discriminatory acts or unfair treatment that led to such dismissal shall be concluded under the heading of section 20(1). The Industrial Court Chairman once declared in Tanjung Manis Development Sdn. Bhd. v Florida Tayie Ak Ngaw [1998] 2 ILR 831, at 835, that: "the right to security of tenure under s 20 IRA 1967…founded upon the right to earn a living has been judicially recognised to be encapsulated within the right to life, a fundamental right enshrined in the Federal Constitution".

Although the implied duty of mutual trust and confidence is a common law principle, by virtue of its association with unfair and constructive dismissal, any breach of the implied terms on the employer's part would possibly give rise to a statutory claim by the employee. Indeed, the phrase "without just cause or excuse" is wide enough to include the implied obligation of mutual trust and confidence. Hence, the employees' right to claim is extended beyond the contractual document.

3.6 dismissed

Section 20(1) applies to an employee who is "dismissed" from the employment "without just cause or excuse". Unless the employee is being or has been, in the first place, dismissed, the section has no implication. In Southern Bank Bhd. v Ng Keng Liat [2002] 2 CLJ 514, the court remarked that dismissal should be the prerequisite before a workman can make representations under s 20(1). Since s 20(1) makes no mention of non-dismissal circumstances, an employee who might experience discrimination or unfavourable treatment in the course of employment is left out from the recourse of s 20(1) unless being dismissed. Having said this, discrimination claims may only be asserted when the employee has been firstly dismissed by the employer; and this is an overstatement because s 20 is also applicable to an employee who has dismissed himself by walking away from the office due to the employer's action. In this situation, the action that was initiated by the employee would still fall within the definition of dismissal, particularly when it is the employee who 'was forced' to leave the job, one that is called constructive dismissal. In this context, an employee who might be

treated unfairly, unreasonably or discriminatorily by the employer may consider himself as being dismissed and therefore may seek redress under the same heading. Should discriminatory act has been prompted, the employee may consider him/herself as being dismissed by leaving the job to counter the employer's action that had breached the fundamental term that goes to the root of the contract.

Following Western Excavating (ECC) Ltd. v Sharp [1978] ICR 221 by the English Court of Appeal, Malaysia industrial law has established the doctrine of constructive dismissal through the Supreme Court ruling in Wong Chee Hong v Cathay Organization (M) Sdn Bhd [1988] 1 MLJ 92 when it is opined that constructive dismissal could be housed under section 20(1) by interpreting the word 'dismissed' as referred from the common law principle. Here, the court will apply the contract test i.e., the behaviour which constituted a breach of a fundamental term of the contract which would allow the employee to repudiate the contract (Rowland, 2001). The use of a contractual test is basically where the repudiatory breach can be either an expressed or implied terms of the employment contract.

In Yoahan Marketing (M) Sdn. Bhd. v Teong Kok Kong [2001] 3 ILR 1, the Industrial Court held that the company had breached a fundamental "term of the contract, albeit implied, that the employer will not, without reasonable and proper cause, conduct himself in a manner calculated likely to destroy or seriously damage the relationship of confidence and trust between employer and employee". Since dismissal under section 20(1) may also cover constructive dismissal, the issue of employment discrimination may apply the same because some cases of constructive dismissal are associated with unlawful discrimination or unfavourable treatment on the part of the employer. The cases of Burton v British Railway Board [1982] E.C.R. 555, Marshall v Southampton and SW Hampshire Area Health Authority [1986] ECR 723, Derby Specialist Fabrications Ltd. v Burton [2001] ICR 833, Weathersfield Ltd. v Sargent [1999] I.C.R. 425 are all the authorities which denote that discrimination can be the grounds for dismissal that includes constructive dismissal.

It is therefore submitted constructive dismissal, having connection with unlawful discrimination, should also be under the purview of section 20 of the IRA 1967. The primary reason is rooted in the development of the law governing constructive dismissal that was adapted from the common law principle in Western Excavating. Eventually, one may conclude that although there are no explicit provisions or laws that deal with discrimination in employment save for s 5(1) of the IRA on the ground of trade unionism, employees are offered with recourse, implicitly, for redressing their rights under s 20 should they consider themselves as being dismissed "without just cause or excuse"; in this case, "discriminatorily".

In line with the aim of the IRA 1967 to render and uphold social justice, the problem of discrimination in the field of employment must not be disregarded but forms as a type of trade dispute that is claimable under the Malaysian labour law. As the social function of the law is to provide legal means by which conflicts between parties can be resolved (Yaqin, 2002), the industrial court as a medium for social justice may perhaps inhibit any prerogatives that are unwarranted, unfair and excessive. Therefore, in the absence of laws prohibiting discrimination in employment as well as pre-employment, the Industrial Court has to exercise its judicial discretion if the sole issue of discrimination arises (Vadaketh, 2003). On this principle, even if there is no clear provision under the labour law to outlaw discrimination, it is the role of the Industrial Court to consider the sole issue should the case be brought for settlement.

4. Conclusion

As a concluding remark, in the absence of or limited legal provision in protection of employees from discrimination, the common law approach should be workable because the act of discrimination or unfavourable treatment by the employer could be taken as breaching the implied term of trust and confidence, and the duty of care. Hence, the employer must take reasonable care and provide safe and conducive working environment to protect employees from the element of victimisation, harassment, discrimination and other negative conducts which might be

perpetrated by superiors, failure of which might effect liability for breaching those duties. As a legal recourse, discrimination claims can be construed and justifiable through the application of IRA 1967 where its facade is primarily associated with unfair dismissal. The phrase "without just cause or excuse" is suggested as essential in construing the idea of "discrimination" thus offer a recourse for the employee to claim against discriminatory treatment should it involved dismissal as long as the dismissal was tainted with unfair motives, having the element of victimisation, capricious or mala fide actions that are incorporated under the unfair labour practices. The approach of court in relying on the breach of implied term of trust and confidence has been showcased in many reported cases as being discussed. Eventually, section 20 should be a remedial provision housed in the IRA 1967 as "a piece of beneficent social legislation" (Hong Leong Equipment) available for employees who consider themselves being dismissed unfairly for the reason of discrimination.

Overall, theorizing employment discrimination through common law approach could be challenging with limited employment discrimination cases adjudicated in court. If any, the judicial review and opinion was superficial and did not directly deal with employment discrimination, instead associated with unfair labour practice. In addition, with the current amendment to EA 1955 that incorporates matter regarding discrimination, the study recommends for future research to deal with the approach and recourse following the amendment so as to institutionalise and compare pre and post amendment which is expected to be enlightening.

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