

The image features a dark blue background with a large, faint gear pattern. In the foreground, several colorful, stylized human figures in various colors (red, blue, yellow, purple, orange, green, cyan) are arranged in a circular pattern, appearing to be part of a larger mechanism. A vertical yellow bar is positioned on the left side of the page.

MAYER | BROWN

# Guide to Discrimination Law in Hong Kong

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*The information in this publication is current to February 2024.*

# Introduction

## GENERAL OVERVIEW

Hong Kong employers and employees have become increasingly aware of their rights and obligations under the anti-discrimination legislation since the passing of the Sex Discrimination Ordinance (SDO) and Disability Discrimination Ordinance (DDO) in 1995, the Family Status Discrimination Ordinance (FSDO) in 1997 and the Race Discrimination Ordinance (RDO) in 2008.

In the relatively short period since their coming into force, the anti-discrimination ordinances have seen companies in Hong Kong revise their human resources policies, provide internal grievance mechanisms and recognise the legal rights of their employees to work in an environment free of discrimination and harassment. This has required expenditure of resources on developing policies and practices to ensure compliance with the requirements of the ordinances and to reduce the risk of legal liability.

However, a large proportion of Hong Kong employers still do not have a written anti-discrimination policy. Bearing in mind the potential liability of employers for acts of their employees (see below) as well as the increasing number of claims being brought under the anti-discrimination ordinances this is a situation which we anticipate will rapidly change over the coming years.

This Guide considers the application of the various anti-discrimination ordinances in the employment relationship, the Guide is only meant to provide a general understanding of discrimination law in Hong Kong and is not intended to be formal legal advice. The area of discrimination law is constantly moving forward in new and novel ways. The first step in minimising the risk of breaching the anti-discrimination laws is to be aware of it so that issues can be identified and dealt with in a timely manner.



# An Outline of Discrimination Generally

## THE ELEMENTS OF UNLAWFUL DISCRIMINATION

Not all acts of discrimination are unlawful. For example, there is no protection against discrimination on the basis of age, religious beliefs or sexual orientation. Nor is there any equal pay legislation.

Only discrimination based on one of the protected attributes under the anti-discrimination ordinances will be unlawful. The protected attributes are sex, marital status, pregnancy, breastfeeding, disability, race and family status.

Each of the anti-discrimination ordinances has certain concepts in common. In order to determine whether or not an act constitutes unlawful discrimination it is necessary to ask:

- Has there been “discrimination”?
- Is the act of discrimination for a prohibited reason?
- Even if both of the above elements are met and there is prima facie “unlawful discrimination”, does an exception permitting the discriminatory conduct apply?

## HAS THERE BEEN “DISCRIMINATION”?

There are essentially two types of “discrimination” under the anti-discrimination ordinances. These are known as direct discrimination and indirect discrimination.

### *Direct discrimination*

Direct discrimination occurs if an employer treats a person with a protected attribute (i.e., sex, marital status, pregnancy, breastfeeding, disability, race or family status) “less favourably” than another person without the attribute in comparable circumstances.

The Court adopts a 4-stage test to determine if a treatment or conduct constitutes direct discrimination, namely:

- There is a difference in treatment between a complainant and the compared person,
- The relevant circumstances between the two persons are the same or at least not materially different,
- The treatment given to the complainant is less favourable than that given to the compared person, and
- The difference in treatment is on the basis of one of the protected attributes.

Examples of direct discrimination include:

- Refusing to hire a job applicant because the applicant has diabetes (prohibited under the DDO as disability discrimination), or
- Not promoting an employee because the employee is pregnant (prohibited under the SDO as pregnancy discrimination).

### *Indirect discrimination*

Indirect discrimination is more difficult to identify. Indirect discrimination occurs if an employer applies a requirement or condition equally to all applicants or employees but:

- The proportion of persons with a protected attribute who can comply with the requirement is considerably smaller than the proportion of persons without the attribute,
- The employer cannot show the requirement or condition to be *justifiable* irrespective of the attribute, and
- The person suffers a detriment because that person cannot comply with the requirement.

An example of indirect discrimination in the case of sex discrimination would be where the discriminator treats women and men in the same way by imposing a height requirement (e.g., job applicants must be at least 190cm tall). The requirement disadvantages women (i.e., sex discrimination) as a smaller proportion of women would be able to satisfy the condition than men.

Less obvious perhaps would be the introduction of a new shift system which adversely impacts part-time employees. It has been held in the UK that this is also sex discrimination as, at least in the UK, a considerably higher proportion of women tend to work part-time than men.

### REASON OR REASONS FOR DISCRIMINATION

For the purposes of the anti-discrimination ordinances, if an act is done for two or more reasons and one of the reasons is the protected attribute of the person (whether or not it is the dominant reason for doing the act), the act is treated as having been done solely for the protected attribute.

Therefore, an employer needs to ensure that the protected attribute plays no part in any decision which is unfavourable to the employee.

### IS THE ACT OF DISCRIMINATION FOR A PROHIBITED REASON?

The SDO prohibits discrimination on the grounds of sex, pregnancy, marital status and breastfeeding. The DDO prohibits discrimination on the ground of disability. The FSDO prohibits discrimination on the ground of family status. The RDO prohibits discrimination on the ground of race.

Each of the SDO, DDO, FSDO and RDO prohibits direct and indirect discrimination in a number of areas including employment.

In relation to *job applicants* an employer must not discriminate on the basis of a protected attribute:

- In the arrangements the employer makes for the purpose of determining who should be offered employment (e.g., the venue for job interviews should be accessible by disabled persons),
- In the terms on which the employer offers employment to a successful job applicant (e.g., offering a person employment but on less favourable terms than if they were of a different sex or race, not disabled or did not have a particular family status), or
- By refusing or deliberately omitting to offer employment to an applicant.

In relation to *employees*, an employer must not discriminate on the basis of a protected attribute:

- In the way the employer affords the employee access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford the employee access to them (e.g., having a policy of not permitting pregnant women to attend training courses),
- In the terms of employment the employer affords the employee, or
- By dismissing the employee, or subjecting the employee to any other detriment.

### DOES AN EXCEPTION APPLY?

Each of the SDO, DDO, FSDO and RDO contains defences to discriminatory acts which would otherwise be unlawful. Although similar, each ordinance has slightly different exceptions. Details of the particular exceptions relevant to each ordinance are set out in the subsequent sections of this Guide.

# Victimisation and Harassment

## VICTIMISATION

All four anti-discrimination ordinances also prohibit victimisation. Victimisation is treating a person less favourably on the ground that the person:

- Has made allegations of unlawful discrimination or harassment,
- Has given evidence, or
- Has taken steps to make a complaint under one of the anti-discrimination ordinances.

Employers should take care in how they manage a discrimination complaint received from an employee. For example, an otherwise innocent act of requiring a complainant to “take some time off ” or transferring the complainant to a different area of the organisation while the complaint is being investigated may amount to victimisation as the complainant may be able to demonstrate that such requirement to stay at home or transfer is less favourable treatment and is, therefore, victimisation. This may then give the complainant actionable grounds even if the initial complaint of unlawful discrimination fails.

Whether there is victimisation will turn on the facts of each particular case. In some situations an employer may need to consider its obligation to ensure the health and safety of its employees (if say there is the danger of an employee who has made a complaint suffering personal injury by remaining at the workplace) and it may be necessary to remove the complainant (or some other person) from the workplace.

## HARASSMENT

The SDO, DDO and RDO prohibit sexual, breastfeeding, disability and racial harassment committed by a “workplace participant” against another “workplace participant” at the workplace where they both work or attend. “Workplace participants” include employees, job applicants, contract workers, partners of a firm, commission agents, interns and volunteers who work in the same workplace.

## SEXUAL HARASSMENT UNDER THE SDO

There are two types of behaviour that can amount to sexual harassment.

### *Direct sexual harassment*

The first and more obvious form of sexual harassment arises from the conduct of a workplace participant (the harasser) towards another workplace participant (the victim). This form of sexual harassment occurs where:

- The harasser makes an unwelcome sexual advance or request for sexual favours, or engages in other conduct of a sexual nature towards the victim, and
- The harasser should reasonably have anticipated that the victim would be offended, humiliated or intimidated.

Some examples of what these words mean are:

- Unwelcome sexual advances – e.g., leering and lewd gestures, touching, grabbing or deliberately brushing up against another person,
- Unwelcome requests for sexual favours – e.g., suggestions that sexual co-operation or the toleration of sexual advances may further a person’s career,
- Unwelcome conduct of a sexual nature – e.g., sexually derogatory or stereotypical remarks, persistent questioning about a person’s sex life.

### *Work environment sexual harassment*

The second form of sexual harassment occurs where one or more workplace participants engage in conduct of a sexual nature which creates a sexually hostile or intimidating work environment.

Examples of this include:

- Sexual or obscene jokes around the workplace,
- Displaying sexist or other sexually offensive pictures or posters.

A series of incidents may constitute sexual harassment. However, one incident may also be sufficient to constitute sexual harassment.

A workplace participant may be the victim of a hostile work environment where he or she is harassed in a pattern of incidents that individually may not be themselves offensive, but when considered together amount to sexual harassment.

Sexual harassment cases always attract publicity and therefore can result in large settlements. They tend to arise from male dominated “macho” working environments where lewd behaviour and comments may typically be commonplace.

### BREASTFEEDING HARASSMENT UNDER THE SDO

Breastfeeding harassment occurs where a workplace participant (the harasser):

- Engages in unwelcome conduct to another workplace participant who is a breastfeeding woman, which a reasonable person, having regard to all circumstances, would anticipate that the breastfeeding woman would be offended, humiliated or intimidated;
- Alone or with others, engages in conduct that creates a hostile or intimidating environment for other workplace participants who are breastfeeding.

Making derogatory and/or intimidating statement to a breastfeeding woman or in her presence could amount to unlawful breastfeeding harassment.

### DISABILITY HARASSMENT UNDER THE DDO

Disability harassment occurs where a workplace participant (the harasser) engages in unwelcome conduct (whether verbal or in writing) on account of the another workplace participant’s (the victim) disability where a reasonable person would have anticipated that the victim would be offended, humiliated or intimidated by that conduct.

Examples of conduct which may amount to disability harassment include:

- Derogatory remarks or insults on the ground of disability – e.g., name calling which persons with a particular disability may find offensive or impolite,
- Display of slogans or other objects offensive to persons with disabilities,
- Unnecessarily picking on individuals on the ground of their disabilities.

### RACIAL HARASSMENT UNDER THE RDO

Racial harassment occurs where a workplace participant (the harasser):

- Engages in unwelcome conduct on the grounds of the race of the victim where a reasonable person would have anticipated that such person would be offended, humiliated or intimidated, or
- Engages in conduct that renders hostile or intimidating the environment in which the victim works or carries out related activities.

Calling employees derogatory names or using a disparaging or offensive tone when communicating with people based on their racial groups is likely to amount to harassment. Also, inappropriate racial jokes or pictures making fun of a particular ethnic group in the workplace may amount to unlawful harassment.

# Disability Discrimination

## GENERALLY

It is prima facie unlawful for an employer to discriminate against a job applicant or employee on the ground of that person's "disability".

A frequent area of concern is the pre-employment medical examination. It may not be lawful for an employer to reject a job applicant simply because the medical report has identified that the person has certain medical problems, even where such medical problems impact directly upon the applicant's ability to perform the work. This is considered further in "Pre-employment medical examination" below.

## DEFINITION OF "DISABILITY"

"Disability" is defined broadly in the DDO to include:

- Total or partial loss of bodily or mental functions or loss of a part of the body,
- The presence in the body of organisms causing (or capable of causing) disease or illness,
- A disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction,
- A disorder or illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.

The definition of "disability" covers a disability that presently exists, previously existed but no longer exists, may exist in the future or is imputed to a person. So, an employer would be open to challenge if he treats less favourably an individual who used to have, say, a chronic back problem even if this problem no longer exists. Similarly, an employer would be acting unlawfully if he disadvantages an individual on the basis that he understands that the individual has a low stress threshold, even if this is subsequently found to be untrue.

The definition of "disability" will include most if not all of the reasons for which sickness leave is taken (the most common source of problems), including the common cold or stress.

## DISABILITY OF AN ASSOCIATE

The DDO also prohibits discrimination on the grounds of the disability of an associate of a person (complainant). An *associate* is defined to include:

- A spouse of the person,
- Another person who is living with the person on a genuine domestic basis,
- A relative of the person,
- A carer of the person,
- Another person who is in a business, sporting or recreational relationship with the person.

Therefore where a number of applicants for positions in the Hong Kong Fire Services Department were rejected on the grounds that they had close relatives who had suffered mental illnesses, this was held to be unlawful discrimination under the DDO.

## EXCEPTIONS UNDER THE DDO

There are two statutory defences available for actions which would otherwise be unlawful discrimination.



### *Inherent requirements of the position*

It is a defence to certain complaints of disability discrimination (and therefore will not be unlawful discrimination) if an employer can show that the person's disability:

- Prevents the person from carrying out the *inherent requirements of the position*, or
- The person would, in order to carry out those inherent requirements, require services or facilities that are not required by persons without a disability and the provision of which would cause *unjustifiable hardship* on the employer.

This defence cannot be applied to all claims of unlawful disability discrimination. In particular it does not apply to a claim that an employer:

- Has granted less favourable employment terms to an individual, or
- Has failed to provide an individual with equal opportunities for promotion, transfer or training.

In assessing whether a person is able to perform the inherent requirements of the job, an employer must take into account all relevant factors. These would include the person's training, qualifications and experience relevant to the employment. If the person is already employed then the employer should also consider the employee's past performance.

Just because a disabled person may not be able to carry out a job in the manner in which it is currently carried out will not necessarily mean that that person cannot carry out the inherent requirements of the job. It may be that changing the tools or procedures relevant to the position would enable the disabled person to perform the job. So, a blind person can perform the document-heavy role of a solicitor, but may require somebody to read documents to him and, perhaps, translate them to braille.

Employers need to consider all angles before being sure they are protected by this exception.

### *Genuine occupational qualifications*

The "genuine occupational qualification" defence can be used as a defence to a claim that an employer has unlawfully discriminated against a disabled person:

- Who is a job applicant, in respect of the arrangements an employer makes for the purpose of determining who should be offered employment or by refusing or deliberately omitting to offer employment to that person, or
- Who is an employee, in respect of not providing such person with equal opportunities for training, promotion or transfer.

The defence is that it is a "genuine occupational qualification" for the job (or the job relevant to the promotion or transfer) that the applicant or employee be a person without a disability.

However, the genuine occupational qualifications defence does not apply to other areas of discriminatory conduct towards an employee or job applicant with a disability (i.e., in the terms on which an employer offers employment or in dismissing an employee or subjecting the employee to any other detriment).

Being a person without a disability is a "genuine occupational qualification" where:

- The essential nature of the job requires a person without a disability for reasons of physiology or reasons of authenticity in dramatic performances (i.e., an actor), or
- The nature or location of the employment establishment requires the holder of the job to live in premises provided by the employer, which premises are lived in or normally lived in, by persons without a disability, and which are not equipped with accommodation and facilities for persons with a disability and it would impose an unjustifiable hardship on the employer to so equip them.

In each case, it is the employer who must prove that it is a genuine occupational qualification that the job requires a person without a disability.

### *Affirmative action*

The DDO permits an employer to take positive action targeting disabled persons which is intended to provide them with equal opportunities in employment.

### **PRE-EMPLOYMENT MEDICAL EXAMINATION**

One of the most likely areas where an employer may fall foul of the DDO is requiring job applicants to submit to pre-employment medical examinations. Such an examination may disclose a number of attributes which could fall within the broad definition of disability (e.g., poor uncorrected eyesight or a history of prior illness). Should the employer then decide not to employ the applicant, it is likely that the applicant will be able to present a prima facie case of unlawful discrimination. In order to defend such a claim, the employer would need to prove either:

- That the disabilities disclosed in the medical report played no part whatsoever in the decision not to employ the individual, or
- The “inherent requirements” defence.

In order to be able to rely on the “inherent requirements” defence, an employer must be able to prove that the reason for not offering the applicant the job was because the applicant could not perform the inherent requirements of the position or that the provision of services or facilities to enable the applicant to perform the inherent requirements would cause the employer unjustifiable hardship. To be in a position to provide such proof, the employer must ask the medical practitioner the right questions. This will mean communicating to the medical practitioner precise details of the inherent requirements of the position and asking the medical practitioner to assess the applicant on his/her ability to perform those requirements. The more detailed the description of the inherent requirements and the analysis by the medical practitioner the better the prospects an employer will have of succeeding in its defence.

# Sex Discrimination

## GENERALLY

The SDO prohibits discrimination on the basis of:

- Sex – because a person is male or female,
- Marital status – whether a person is single, married, married but separated, divorced or widowed,
- Pregnancy,
- Breastfeeding – a woman will be treated as breastfeeding if she is engaged in the act of breastfeeding a child or expressing breast milk, or is a person who feeds a child with her breast milk.

## EXCEPTIONS UNDER THE SDO

### *Genuine occupational qualifications*

Genuine occupational qualification is a limited exemption to sex discrimination (but not pregnancy, breastfeeding or marital status discrimination) in the field of employment. It can be used for:

- Job applicants, in respect of arrangements for job offer or refusing a job, or
- Employees, in respect of failing to provide equality of opportunities for training, promotion or transfer, where being a man or a woman is a genuine occupational qualification.

Under the SDO, genuine occupational qualifications include:

- Where the essential nature of the job requires a person of a given sex for reasons of physiology or reasons of authenticity in dramatic performances,
- Where the job needs to be held by a person of a given sex to preserve decency or privacy (e.g., washroom assistant),
- Where the job is likely to involve people doing the work or living in a private home and objection may reasonably be taken to a person of a given sex because of the degree of physical or social contact with that person in the private home, or
- Where the holder of the job provides individuals with personal services promoting their welfare or education, or similar personal services, and such services can be best provided by a person of a given sex.

Once again the onus is on the employer to show that the genuine occupational qualification exception applies. As such, as for all potentially litigious matters, evidence is the key to any defence (preferably written evidence).

### *Affirmative action*

Another defence to a claim for unlawful discrimination is where the employer takes affirmative action. The SDO allows for positive action whereby an act targeting persons of a particular sex, marital status, who are pregnant or who are breastfeeding is reasonably intended to ensure that these persons have equal opportunities in employments.

### *Double benefits for married persons*

The SDO provides that it is not unlawful for a person to refuse or omit to provide a benefit or allowance relating to housing, education, air-conditioning, passage or baggage to a married person if the married person's spouse receives or has received the same or a similar benefit or allowance either from the same employer or some other employer.

# Family Status Discrimination

## GENERALLY

The FSDO prohibits discrimination against a person on the basis of a person's particular family status.

"Family status" means the status of having responsibility for the care of an immediate family member (which in turn is defined to mean a person who is related by blood, marriage, adoption or affinity).

The category of persons related by "affinity" is very broad. It would include persons that, although not related by blood and not strictly speaking "in-laws", are persons who are less directly related by marriage. For example, if Eva was married to Roy, Eva would be related to the parents and siblings of Roy by affinity (and vice versa).

One example where an employee may allege discrimination on the basis of family status is if an employer refuses to accommodate reasonable working arrangements for an employee to take time off (say postpone the taking of lunch to be taken at a later time) to collect a child from school. Another example may be if an employer refuses to grant a requested transfer or to promote an employee (even if he is the best candidate) because of a belief that that employee who has to care for a sick family member (or even a number of children) will not be able to devote sufficient or consistent time to work. This may also be a breach of the DDO (being unfavourable treatment due to the disability of an associate).

## EXCEPTIONS UNDER THE FSDO

The FSDO does *not* contain the exceptions of "genuine occupational qualification" and "inherent requirements" set out in the DDO and SDO.

The FSDO does, however, permit an employer to restrict employment of any person if:

- That person is an immediate family member of an employee of the same employer, or
- That person is an immediate family member of an employee of another employer,

and the first employer can demonstrate, after making reasonable enquiries, that there is a significant likelihood of collusion between that person and the employee which would result in damage to the business of the first employer.

However, even if an employer can prove that this exception applies, care still needs to be taken as the same facts may also give rise to a claim under the SDO (which does not contain an equivalent exception).

In addition, an employer may provide a person with a particular family status with particular benefits to meet that person's "special needs". Unfortunately this term "special needs" is not defined and is, therefore, unclear.

Finally an employer can take affirmative action in favour of persons with a particular family status where such action is intended to ensure that such persons have equal opportunities in employment.

# Race Discrimination

## GENERALLY

The RDO prohibits discrimination against a person on the basis of a person's "race".

The term "race" means "race, colour, descent or national or ethnic origin of the person". This is broad and has a cross over with those religions which also comprise an "ethnic group" (e.g. Jews, Sikhs and Hindus). "Race" also includes a race or racial group that is imputed to a person. Excluded from "race" for the purposes of the RDO are the following:

- Whether the person is an indigenous inhabitant of the New Territories,
- Whether or not a person is a Hong Kong permanent resident,
- Whether or not a person has the right of abode or the right to land in Hong Kong,
- Whether or not a person is subject to any restriction or condition of stay imposed under the Immigration Ordinance (Cap.115),
- Whether or not a person has been given the permission to land or remain in Hong Kong under the Immigration Ordinance (Cap.115),
- The length of residence in Hong Kong of a person,
- The nationality, citizenship or resident status of a person under the law of any country or place concerning nationality, citizenship, resident status or naturalisation of or in that country or place.

## RACE OF AN ASSOCIATE

The RDO also prohibits discrimination on the ground of the race of a person's associate. "Associate" has the same definition under the DDO. Therefore it is unlawful to reject an applicant on the ground of the race of his spouse.

## EXCEPTIONS UNDER THE RDO

### *Genuine occupational qualifications*

Genuine occupational qualifications operate as a (limited) exemption to race discrimination in the field of employment. It can be used for:

- Job applicants, in respect of arrangements for job offer or refusing a job, or
- Employees, in respect of failing to provide equality of opportunities for training, promotion or transfer, where being of a particular racial group is a genuine occupational qualification for the job.

Under the RDO, genuine occupational qualifications apply only in five specified circumstances. These are:

- The job involves participation in a dramatic performance or other entertainment in a capacity for which a person of a particular racial group is required for reason of authenticity,
- The job involves participation as an artist's or photographic model in the production of a work of art, visual images or sequence of visual images for which a person of a particular racial group is required for reason of authenticity,
- The job involves working in a place where food or drink is provided to and consumed by the public in a particular setting for which, in that job, a person of that racial group is required for reasons of authenticity,
- The holder of the job provides persons of a particular racial group with personal services promoting their welfare, and those services can most effectively be provided by a person of that racial group,
- The job involves providing persons of a particular racial group with personal services of such nature or in such circumstances as to require familiarity with the language, culture and customs of and sensitivity to the needs of that racial group, and those services can most effectively be provided by a person of that racial group.

For the RDO, the onus is on the employer to show that the genuine occupational qualification exception applies. As such, as for all potentially litigious matters, evidence is the key to any defence (preferably written evidence).

#### *Affirmative action*

Another defence to a claim for unlawful race discrimination is where the employer takes affirmative action. The RDO allows for positive action to be taken to assist a racial group which has been disadvantaged in the past. Examples of positive action may include encouragement to apply for employment, transfer or promotion, language classes, mentorship schemes, and management skills training or other training courses.

#### *Special skills, knowledge or experience*

An act done by an employer for the benefit of a person recruited or transferred from outside Hong Kong to work in Hong Kong where the work requires special skills, knowledge or experience not readily available in Hong Kong would not amount to unlawful discrimination if the act done was reasonable.

#### *Small employers*

The discrimination restrictions of the RDO do not apply to employers with no more than 5 employees until 10th July 2011. However, the harassment and vilification restrictions do still apply.

# Liability of Employers

## GENERALLY

Employers are legally responsible for the actions of their employees done in the course of their employment, whether or not such actions were done with the employer's knowledge or approval. So, where an employee does an unlawful act under the anti-discrimination legislation, not only will the employee be liable, but also the employer. This is known as "vicarious liability".

The DDO, SDO and RDO contain express provisions imposing vicarious liability on employers for the actions of their "workplace participants" which include employees and interns and volunteers whom they engaged. Whereas the scope of employer's vicarious liability under the FSDO is limited to the actions of the employees.

## TEST FOR VICARIOUS LIABILITY

The test for vicarious liability of an employer is that the unlawful act must be done:

- By an employee (whether or not it is done with the employer's knowledge or approval), and
- In the course of employment.

If these two elements are satisfied, then the unlawful act by the employee will be treated as if it was done by the employer.

The phrase "in the course of his employment" is not defined in the anti-discrimination ordinances and so guidance must be sought from case law. The test (also known as the "close connection test") for determining what conduct constitutes conduct in the course of employment is to ask:

"Whether the employee's wrongdoing was so closely connected with his employment that it would be fair and just to hold his employer vicariously liable."

In determining whether conduct is so closely connected with his employment that it would be fair and just to hold his employer vicariously liable, each case will turn on its own facts. In order for an employer to escape vicarious liability, it would need to show that the conduct of the employee was so disconnected or unrelated to his duties such that it could not possibly be considered to have been done in the course of his employment.

For there to be vicarious liability there is no need to show that the employee acted, or at least intended to act, for the employer's benefit.

Under the DDO, SDO and RDO, an employer may also be held vicariously liable for the unlawful act:

- By an intern in the course of the internship, and
- By a volunteer in the course of performing volunteering work.

## THE ONLY DEFENCE TO VICARIOUS LIABILITY FOR AN EMPLOYER

The only defence available to an employer for vicarious liability is if it can establish that "it took such steps as were reasonably practicable" to prevent the employee, intern and volunteer from committing the unlawful act. The burden of proof will be on the employer to establish the defence and the question of whether an employer has taken such steps is one of fact.

In *Ray Chen v. Taramus Rus IBM (HK) Ltd*, a former male employee alleged that he had been sexually harassed by a female project manager and dismissed by the employer after he complained about the harassment. The female project manager admitted that she and the plaintiff had had a personal relationship but claimed that it was consensual and that she had no influence over his career (as she was in a lower "band" than the plaintiff in the management hierarchy). The Court dismissed the claim, but in so doing it stated that the employer would not have been vicariously liable for the acts of the female project

manager (even if she had been found liable) because the employer had taken reasonable steps to prevent the sexual harassment in breach of the SDO. Specifically the employer had:

- Issued a copy of business conduct guidelines to each individual joining the company (such guidelines specified that the employer had a zero tolerance policy with regard to sexual harassment), and
- Required each employee to sign a certificate certifying that he or she had read and understood those guidelines.

The Court noted that by providing the necessary guidelines on sexual harassment and requiring employees to sign a certificate to declare that they had read and understood the contents, the employer had taken such steps as were reasonable to prevent the employer from committing sexual harassment. Furthermore, the Court relied on the fact that the claimant had previously been spoken to by a superior after he had sent an inappropriate and embarrassing email to the female project manager as indication that the employer's management was prepared to implement the guidelines (i.e., the guidelines were more than simply a paper policy, but were enforced in practice).

### STEPS AN EMPLOYER COULD TAKE TO AVOID VICARIOUS LIABILITY

What steps an employer should take to reduce the likelihood of being held vicariously liable for unlawful discriminatory acts of an employee, intern or volunteer will ultimately depend on the circumstances of that employer. However, steps which employers should consider taking would include the following:

#### *A transparent anti-discrimination policy*

- Have a written (zero tolerance) anti-discrimination policy. The policy should cover matters mentioned in the Codes of Practice on Employment under the SDO, DDO, FSDO and RDO.
- Implement the anti-discrimination policy. Request employees, interns and volunteers to sign a declaration (as proof) that they have understood the policy. Provide continual training (e.g., annual for all staff).
- Enforce the anti-discrimination policy in a consistent and transparent manner (i.e., any disciplinary action taken should be, where possible, measured and consistent).
- Conduct specialised training for those employees nominated to be points of contact if there is a concern.

#### *Take care when determining discretionary benefits*

When exercising any managerial right or discretion to award benefits, an employer should ensure that the reasons for its decision are not in any way related to gender, pregnancy, marital status, breastfeeding, disability, race or family status of its employee(s).

Company directors or the relevant managers should document in the minutes the general method by which any decision concerning discretionary benefits or promotions was reached. The minutes should record accurately and succinctly how the decision has been derived, showing that the decision makers have weighed all the relevant factors (and not unlawful discriminatory factors) in coming to such decision.

#### *Appraisals*

Appraisal reports concerning an employee's performance, notes regarding discussions of the result with the employee and warning letters issued by the employer are all liable to be disclosed to an employee (by means of a data access request under the Personal Data (Privacy) Ordinance). It is important therefore that none of these documents give any indication that an unlawful discriminatory factor has been taken into consideration in determining the future of an employee.



## WHAT TO DO IF A COMPLAINT IS MADE

Should an employee make a complaint of unlawful discrimination the employer should:

- Treat the matter seriously, even where it appears trivial.
- Be very careful not to fall into the trap of “victimising” the complainant (e.g., do not force the complainant to spend time at home).
- Follow any internal policy or grievance procedure.
- Document every interview held and evidence gathered.
- If the complaint is thought to be unfounded, gather evidence as to what attitude or treatment the employer would have given to an actual or hypothetical employee in relevant circumstances similar to the complainant. If the same treatment would have been given to the comparator employee (actual or hypothetical), then the Equal Opportunities Commission (EOC) or the Court would be hard pressed to find evidence of unlawful discrimination.
- Contact your lawyers to discuss your defence strategy.

# What Happens When a Complaint is Made?

## HOW DOES AN EMPLOYEE MAKE A FORMAL COMPLAINT?

There are two ways that an aggrieved employee may bring a formal external complaint for breach of the anti-discrimination ordinances. He/She may:

- Lodge a complaint with the EOC, or
- Commence personal proceedings in the District Court against the alleged wrongdoer (these are civil proceedings, not criminal).

In practice nearly all actions are commenced by means of a complaint to the EOC.

## COMPLAINT TO THE EOC

If a complaint is lodged with the EOC, the EOC is obliged (other than in particular circumstances) to conduct an investigation into the complaint and to endeavour to settle it by conciliation. Typically when the EOC forwards the complaint to the respondent (i.e., the employer), it will ask the respondent whether it wishes to engage in early conciliation of the matter before proceeding to investigation.

Conciliation is simply where the parties meet on an informal basis with the EOC acting as facilitator to try to resolve the complaint. No decision is made following the meeting.

### *Investigation*

“Investigation” for the purposes of complaints handling is really no more than the EOC trying to obtain sufficient information from both parties in order to ascertain whether there is a case for the employer to answer and whether the matter should proceed to conciliation. The EOC will request the employer to answer a number of detailed questions. The responses to such questions will be made available to the Complainant. Responding to the EOC’s questions can be a time consuming and, if external lawyers are involved, costly exercise.

Although the EOC does not have the power to force parties to provide information during the course of investigation, it may serve a notice in writing on a person to provide information specified in the notice at a certain place, time, period or date. Any person who does not comply, without reasonable excuse, commits an offence and is liable to pay a fine at level four (i.e., up to HK\$25,000).

The EOC maintains confidentiality of all information provided to it, but also informs the parties that the information obtained during investigation may be used as evidence in court proceedings if the matter does not settle.

### *Conciliation*

Conciliation is by its nature a voluntary process and the parties cannot be forced to conciliate. However, they may be compelled to attend a conference if the conciliator thinks it would be advantageous.

The EOC maintains a policy of confidentiality regarding all information provided during the conciliation stage. The anti-discrimination ordinances also provide that anything said or done at any conciliation conference is not admissible as evidence in court.

### *Legal assistance from the EOC*

The EOC is empowered to offer legal assistance to persons who have lodged complaints with the EOC where conciliation has failed. The EOC may, if it thinks fit to do so, and in particular where the case raises a question of principle or it is unreasonable to allow the person to proceed unaided because of the complexity of the case or other reasons, offer assistance, including:

- Give legal advice,
- Arrange for representation by a solicitor or barrister,

- Arrange for representation by any person, or
- Give any other assistance it considers necessary.

The EOC may also provide one of its officers to assist, which allows that officer a right of audience to appear in the matter, conduct any proceeding in the matter, or defend and address any proceeding in the matter.

## COURT PROCEEDINGS

It is not necessary for a complainant to lodge a complaint with the EOC first before commencing proceedings. However, the EOC cannot consider applications for assistance unless the applicants have first been through the complaints procedure and conciliation has not proved successful.

The Court has broad powers to award remedies. Such remedies may include:

- Making an order that the respondent not repeat or continue the discriminatory act or conduct,
- Making an order for employment, re-employment or promotion of the complainant,
- Making an order that the respondent pays damages for loss as well as damages to punish the respondent for his discriminatory act.

Employers should be aware that in the event of a successful prosecution under the anti-discrimination ordinances, there is no limit to the amount of damages a court may award (if proceedings are brought in the District Court). In an employment context, compensatory damages will be assessed largely by reference to loss of earnings and injury to feelings caused by the act of discrimination. In particular, damages for injury to feelings can be substantial. For example, in one case, awards for injury to feelings ranged from HK\$100,000 to HK\$150,000 for each of the three plaintiffs with each plaintiff receiving an average of HK\$800,000 in overall damages.

Damages can be awarded for unlawful indirect discrimination under the SDO, DDO, RDO or FSDO where the wrongdoer did not intend to discriminate (i.e., an employer may have introduced a policy simply not recognising the discriminatory consequences).

Employers should be aware that unless proceedings were brought maliciously or vexatiously or there are special circumstances which warrant an award of costs, each party bears their own costs in any court proceedings brought under the anti-discrimination ordinances. Such costs can be very substantial.

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