

For information

Bills Committee on Race Discrimination Bill

The difference between the “reasonable practicability” test and the “unjustifiable hardship” defence

At the meeting held on 31 May 2007, members asked the Administration to explain the difference between the “reasonable practicability test” under clause 4(2)(b) of the Race Discrimination Bill (RDB) and the defence of “unjustifiable hardship” under the Disability Discrimination Ordinance (DDO).

“Reasonably practicable”

2. Under clause 4(2)(b) of the RDB, a requirement or condition which has a disparate adverse impact on members of a racial group is justifiable “if it is not reasonably practicable for the person who allegedly discriminates against another person not to apply the requirement or condition”. Details of the origin of the reasonable practicability test and its operation were discussed in LC paper No. CB(2)1823/06-07(01) entitled *Indirect discrimination and assessment of justifiability*.

3. Clause 4 of RDB defines racial discrimination for the purpose of the Bill. **Clause 4(2)(b) relates to a key defining feature of indirect racial discrimination, that is, the justifiability of a requirement or condition. Strictly speaking, clause 4(2) is not an exemption.** Where a requirement or condition imposed by a person is justifiable on all relevant facts of the case under either the proportionality test (clause 4(2)(a)) or the reasonable practicability test (clause 4(2)(b)), there would not be any proscribed indirect discrimination under the Bill, insofar as the requirement or condition is concerned. Where the requirement or condition is not justifiable on all relevant facts of the case by reference to the above two tests, the respondent may, where appropriate, invoke an exemption under Part 6 of the Bill¹ or other exemptions contained in specific provisions of the Bill².

¹ For example, special measures under clause 49 or statutory requirement under clause 56.

² For example, employment intended to provide training in skills to be exercised outside Hong Kong under clause 12.

“Unjustifiable hardship”

4. There is a broad exemption of “unjustifiable hardship” under the DDO. This exemption is unique to the DDO and is not found in the Sex Discrimination Ordinance and the Family Status Discrimination Ordinance³. **The exemption applies to many areas of prohibited disability discrimination covered by the DDO but not to all parts of the process**⁴. For example, in the field of employment, the defence can arise when determining whom to employ and whom to dismiss. The unjustifiable hardship defence however has no application to the terms of employment offered to new recruits or existing employees. An employer also cannot rely on the defence in the way he or she affords his or her employees access to opportunities for promotion, transfer or training, or to any other benefits, services or facilities. Similarly, in the area of education, the defence applies in assessing the admission of a person with a disability as a student to an educational establishment. Once the person is admitted, the defence no longer has any application.

5. The reasonable practicability test, on the other hand, applies to all requirements or conditions having a disparate adverse impact on members of a particular racial group. Its application is not restricted to part of the employment process or a particular function of an educational establishment.

6. Another key difference between the reasonable practicability test of the Bill and the unjustifiable hardship defence of the DDO is that **the DDO defence applies to both direct and indirect discrimination**. Thus in *K & Others v Secretary for Justice*⁵, after finding that the relevant disciplinary force had discriminated the complainants **directly** on ground of the disability of an associate, the trial judge continued to assess whether the defence of inherent requirement and the defence of unjustifiable hardship would have any application to the case⁶.

7. From a legal perspective, the reasonable practicability test in the Race Discrimination Bill and the unjustifiable hardship defence in the

³ The unjustifiable hardship exemption is modelled on the unjustifiable hardship defence under the Australian Disability Discrimination Act 1992. Section 4 of the DDO is modelled on s. 11 of the Australian Act. In Australian law, the unjustifiable hardship defence also has no place in the other anti-discrimination legislation such as the Racial Discrimination Act 1975 and the Sex Discrimination Act 1984.

⁴ The defence applies to employment (s. 12, 13, 15, 20), education (s. 24), access to premise (s. 25), provision of goods and services (s. 26), disposal of premises (s. 28), consent for assignment (s. 29), clubs (s. 34).

⁵ [2000] 3 HKLRD 777.

⁶ Ibid, at 789-793.

DDO work at different levels, the former relates to the definition of indirect discrimination and the latter operates as an exemption to otherwise unlawful discrimination. It should be noted that the unjustifiable hardship defence under the DDO does not apply to define indirect discrimination. Indirect disability discrimination is defined in s. 6(b) of the DDO in the following manner:

“A person discriminates against another person in any circumstances relevant for the purposes of any provision of this Ordinance if-

- (a) ...
- (b) he applies to that other person a requirement or condition which he applies or would apply equally to a person without a disability but-
 - (i) which is such that the proportion of persons with a disability who can comply with it is considerably smaller than the proportion of persons without a disability who can comply with it;
 - (ii) which he cannot show to be justifiable irrespective of the disability or absence of the disability of the person to whom it is applied; and
 - (iii) which is to that person's detriment because he cannot comply with it”.

8. The term “justifiable” under s. 6(b)(ii) is not defined under the DDO. Nor does the DDO provide a test of justification. In considering whether a requirement or condition having disparate adverse impact on a person with a disability is justifiable, the District Court applied a three-step proportionality test developed by the English court. In *Siu Kai Yuen v Maria College*⁷, Chan J said:

“58. I agree with the Plaintiff’s Legal Representative that it is common sense that people who are seriously ill cannot attend work. The requirement to attend work can clearly be an element of indirect discrimination.

59. As to whether the requirement related to attendance is justifiable, the *Board of Governors of St. Matthias Church of England School v Crizzle*

⁷ [2005] 2 HKLRD 775.

[1993] IRLR 472, set out the factors that the Court should consider as follows:

- “(1) Whether the objective was legitimate?
- (2) Whether the means used to achieve the objective are reasonable?
- (3) Whether the conditions are justified when balanced on the principles of proportionality between the discriminatory effect upon the applicant’s racial group and the reasonable needs of those applying the condition?” ”

9. The objective of the attendance requirement is to ensure that there should be little disruption to the teaching program and there should be continuity in the teaching process. Chan J considered the objective to be legitimate. The learned judge however held that even were the objective legitimate, the means used to achieve the objective, namely the attendance requirement, appeared to him to be unreasonable as it would cause those “who have to take leave as a result of disability, to lose their employment.”⁸ In relation to the third step, Chan J opined that the reasonable needs of the pupils could easily be satisfied by the employment of a substitute teacher and there was no evidence that there would be great disruption to the students were the complainant to resume duty at the end of his sick leave period⁹.

10. The learned judge concluded that the school had not shown that the attendance requirement to be justifiable. For the present purpose, **it should be noted that the unjustifiable hardship defence did not feature at all in Chan J’s assessment of the attendance requirement.** Nor did the learned judge make any reference to s. 4 of the DDO which provides guideline on the relevant factors to be considered in determining what constitutes unjustifiable hardship¹⁰. In fact, “legitimate objective” is not one of the factors listed in s. 4 of the DDO. Apparently, our court

⁸ Ibid, para. 60.

⁹ See note 6 above, para. 61.

¹⁰ Section 4 of the DDO provides that:

“For the purposes of this Ordinance, in determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including –

- (a) the reasonableness of any accommodation to be made available to a person with a disability;
- (b) the nature of the benefit or the detriment likely to accrue or be suffered by any persons concerned;
- (c) the effect of the disability of a person concerned; and
- (d) the financial circumstances of and the estimated amount of expenditure (including recurrent expenditure) required to be made by the person claiming unjustifiable hardship.”

does not consider the unjustifiable hardship defence as a test of justification under s. 6(b)(ii) of the DDO.

Concluding remarks

11. In the light of the above discussion, the difference between the reasonable practicability test of the Bill and the unjustifiable hardship defence of the DDO can be summarized as follows:

- (1) The reasonable practicability test serves as a defining feature of indirect discrimination. A requirement or condition that satisfies the test is justifiable and is not unlawful indirect discrimination prohibited by the Bill.
- (2) The unjustifiable hardship defence under the DDO does not relate to the definition of indirect discrimination under the DDO. It is a broad exemption which applies to both direct and indirect discrimination. However, its application is limited to specific provisions of the DDO.
- (3) Under the DDO, the unjustifiable hardship defence is not a substitute for the three-step proportionality test. They operate at different levels. The three-step proportionality test assists to define indirect discrimination. The unjustifiable hardship defence, on the other hand, provides an exemption to otherwise unlawful indirect discrimination.

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