

Bills Committee on Minimum Wage Bill

Administration's response to Members' concern on indirect discrimination under the Sex Discrimination Ordinance (SDO) and Race Discrimination Ordinance (RDO)

Purpose

At the meeting of the Bills Committee held on 4 December 2009, Members queried whether the exemption for live-in domestic workers (the exemption) contained in clause 6(3) of the Minimum Wage Bill (Bill) would constitute indirect discrimination under the SDO and RDO. The ensuing paragraphs seek to shed light on the above question raised by Members, which for the reasons set out below, is strictly speaking, hypothetical.

SDO and RDO

2. Unlike the Basic Law or the Hong Kong Bill of Rights Ordinance, the SDO and RDO do not have constitutional status under Hong Kong law. As a piece of ordinary legislation, neither the SDO nor RDO can restrict the legislative competence of the legislature. Once the Bill is enacted, a complainant cannot rely on the SDO or the RDO to challenge the constitutionality of the exemption.

Definition of indirect discrimination

3. Indirect discrimination is defined in s. 5(1)(b) of the SDO as follows:

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

...

(b) he applies to her a requirement or condition which he applies or would apply equally to a man but -

- (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it;
- (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied; and
- (iii) which is to her detriment because she cannot

comply with it.”

4. Indirect discrimination is defined in similar terms under s. 4(1)(b) of the RDO. Section 4(1)(b) provides that:

“In any circumstances relevant for the purposes of any provision of this Ordinance, a person (“the discriminator”) discriminates against another person if -

...

(b) the discriminator applies to that other person a requirement or condition which the discriminator applies or would apply equally to persons not of the same racial group as that other person but -

(i) which is such that the proportion of persons of the same racial group as that other person who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it;

(ii) which the discriminator cannot show to be justifiable irrespective of the race of the person to whom it is applied; and

(iii) which is to the detriment of the other person because that person cannot comply with it.”

Elements of indirect discrimination

5. To establish a prima facie case of indirect discrimination under the SDO or the RDO, a complainant has to establish (a) the existence of a requirement or condition which (b) a considerably smaller proportion of his or her sex or racial group can comply with and (c) which the complainant himself or herself cannot comply with and as a result suffers a disadvantage. If the complainant succeeds in proving (a), (b) and (c), the burden would be shifted to the other party, i.e. an employer, a service provider, etc. to establish that the application of the requirement or condition is justifiable.

6. The exemption is provided in clause 6(3) of the Bill. Clause 6, so far as relevant, provides as follows:

“(1) Subject to this section, this Ordinance applies to every employee, his or her employer and the contract of employment under which he or she is engaged.

...

(3) This Ordinance does not apply to a person who is employed as a domestic worker in, or in connection with, a household and who dwells in that household free of charge.”

7. The exemption contained in clause 6(3) of the Bill is not a requirement or condition which a complainant has to comply with in order to enjoy the statutory minimum wage. As the exemption does not constitute a requirement or condition under s. 5(1)(b) of the SDO or s. 4(1)(b) of the RDO, the exemption would not constitute indirect discrimination under the SDO or RDO.

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