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Comments on the Revised Code of Practice on Employment
under the Disability Discrimination Ordinance

Submission to the Panel on Constitutional Affairs
For the meeting on 17 May 2010

1. Introduction

This paper is submitted to the Panel on Constitutional Affairs for the meeting on 12 June 2009, and provides comments on the Revised Code of Practice on Employment under the Disability Discrimination Ordinance (the revised code).

This paper points to areas and topics both from the Code on Employment under the Sex Discrimination Ordinance (SDO Code) and the UK “Code of Practice – Employment and Occupation” (2004) published by the Disability Rights Commission, which have been left out in the revised code.

2. Rights and responsibilities of the employees

Include harassment

Although the revised code (para. 11.18) does mention the employees’ responsibilities, it could be expanded much more.

Recommendation 1:

With reference to the SDO Code para. 24-25, insert the following:

“Eliminating discrimination

- Employees can be proactive in helping to eliminate discrimination on the ground of disability by becoming familiar with the subject, so that they do not inadvertently discriminate against someone or inadvertently aid their employer to do so.
- Whenever appropriate, employees could also encourage their employers to formulate discrimination policies and to implement preventive measures.
- Employees are encouraged to be supportive of friends or colleagues who intend, in good faith, to lodge a complaint about discrimination, or have lodged such complaint.

Eliminating disability harassment

- Disability harassment is not merely a "management problem" and still less a "disabled person's problem". All employees have responsibilities as well as rights in respect of the work environment that is created. Disability harassment, particularly in its less severe forms, can be part of the usual code of behaviour in a workplace. To change this may require each employee to reconsider his or her own attitudes and conduct as well as those of his or her colleagues.
- Employees can do much to discourage disability harassment by making it clear that they find such behaviour unacceptable and by supporting colleagues who suffered such treatment and are considering making a complaint.
- A major reason why few disability harassment complaints are reported is that the person involved is afraid of co-workers' reactions. They do not want to run the risk of being accused by them of spoiling the work climate. Neither do they want to be told that they provoked the harassment themselves or that they cannot take disability harassment unacceptable, this will provide substantial support to those who are harassed and make it easier for them to come forward to file a complaint.
- Employees, who are themselves recipients of harassment should, where practicable, tell the harasser that the behaviour is clearly unwanted and unacceptable. Once the offender understands clearly that the behaviour is unwelcome, this may be enough to put an end to it. If the behaviour persists, employees should inform management and/or their employee representative through the appropriate channels and request assistance in stopping the harassment, whether through informal or formal channels.
- When telling the harasser that the behaviour is unwanted, if the employee does not want to confront the harasser alone, he or she may want to ask a co-worker or a friend to be present. An alternative to confronting the harasser in person is to write to him or her and keep a copy of the correspondence.
- Where an employee feels uncomfortable or unsafe in confronting the harasser directly, the employee may choose to inform management and/or an employee representative in the first instance and request for steps to be taken to deal with the matter.
- If the harassment continues, however, the employee should, if possible, seek advice on what to do next. The employee at all times has the option of seeking external assistance.
- It is important for an employee subjected to disability harassment to keep a record of the incident(s) so as to be able to recall exactly what has happened.
- Employees are also encouraged to come forward with complaints as soon as possible after the alleged incidents as a lapse in time may, in certain circumstances, weaken a complainant's case."

3. Consistent selection criteria

Include principles of consistent selection criteria

The revised code (para. 6.3) refers to the use of Consistent Selection Criteria (CSC) in relation to employment. It would be useful if the revised code could further expand on the principle and also explain the **benefits** of such criteria. Explaining such benefits could further commit employers to use the criteria.

The revised code should refer to the SDO Code paragraph 10:

Recommendation 2:

Insert at the revised code, paragraph 6.4:

“These Consistent Selection Criteria (CSC) and terms and conditions should be made known to all employees and job applicants upon request. Without this consistency, decisions can be subjective and leave the way open for discrimination to occur.

Developing a set of ***consistent selection criteria*** for all aspects of employment is one of the most important steps in eliminating discrimination in the workplace. This can be done by reference to the duties and responsibilities that would need to be carried out in the job. The application of ***consistent selection criteria*** is good management practice as it helps organisations to:

- make faster decisions because the criteria for decisions are clear;
- make better decisions because the criteria directly relate to work performance; and
- form the basis for effective job evaluation.
- Save for a few exceptions, such criteria should not make reference to disability. They should be specifically related to the job, such as:
 - the type of experience the job holder should have, e.g. merchandising experience;
 - the amount of experience required for the job, e.g. five years experience;
 - the educational qualifications, if necessary, e.g. a diploma in merchandising;
 - the specific technical and managerial skills, e.g. use of certain computer software, proficiency in Cantonese and English;
 - the personal qualities required for the job, e.g. willingness to meet people of different backgrounds; and
 - the physical and other skills required for the job, e.g. eye-hand co-ordination for delicate assembly work.

In line with good management practice, it is recommended that employers:

- develop ***consistent selection criteria*** as one of the first steps in establishing a fair recruitment practice; and
- from time to time re-examine the criteria to see whether they still apply or need to be modified.”

4. Advertising vacancies

Chapter 6 of the revised code concerns recruitment. The chapter could be expanded to include a section on advertisement of vacancies.

Recommendation 3:

With reference to the SDO Code para. 11.5.2, insert after paragraph 6.7:

- “Advertising vacancies.

Review all advertising materials and accompanying literature relating to employment to ensure that such materials emphasize that the employer is an equal opportunities employer and that it welcomes all applicants, including people with disabilities. Use job titles, headlines and illustrations with care. “

5. Interviewing

Recommendation 4:

With reference to the SDO code para. 11.9, insert after para 6.29:

“It is a good practice to record, immediately after the interview, the assessment that each interviewer has formed on the applicant's ability to match the *consistent selection criteria*. This will not only ensure a logical assessment of the applicant's strengths and weaknesses but will also serve as a valuable explanation and defence against any unfounded suggestion of bias against disability.”

6. Terms of employment

The revised code should include more details on benefits that employees receive. Firstly examples of what benefits encompasses should be included, and secondly, it is recommended that more details are included regarding pensions and health insurance plans. The United Kingdom “Code of Practice – Employment and Occupation” (2004) published by the Disability Rights Commission, has devoted a whole chapter concerning discrimination in providing occupational pension and group insurance services. As some of the most significant benefits which employers commonly make available relates to pensions and insurances, it is recommended that the revised code expands on this topic. Especially it should mention the role of trustees and managers of pension schemes and their duty not to discriminate. Also it should mention that both the employer and the insurer may be in breach of the Disability Discrimination Ordinance if they discriminate on the ground of disability in providing insurance-related benefits. Here a distinction should be made as to the insurer, where it has to be established whether he has discriminated in the provision of goods, facilities or services.

Recommendation 5:

With reference to the SDO Code para. 12.1. insert after para. 8.3.1:

“Benefits may be in the form of fringe benefits, commissions, bonuses, allowances, pensions, health insurance plans, annual leave, merit and performance pay, or any other benefits available to employees generally”

Recommendation 6:

With reference to the UK “Code of Practice – Employment and Occupation” chapter 10, include a chapter concerning pensions and health insurance plans.

7. Equal pay for work of equal value

When considering the principle of equal pay for work of equal value, the employer may make considerations about whether there are any justifications for individual differences in pay. It is recommended that the revised code includes a section about how the employer can make such considerations.

Recommendation 7:

With reference to the SDO code para. 12.13, in the revised code insert after para. 8.5 the following:

“Considerations for individual differences in pay should:

- actually exist (e.g. the person without any disability has more experience than the person with a disability);
- be genuinely the cause of the difference in pay (i.e. the employer should have a pay system which applies to all persons alike and consistently rewards experience, where appropriate);
- account for the whole of the pay gap (i.e. the extra payment is not an excessive reward for the additional experience); and
- have the effect which the employer sets out to achieve (e.g. there is evidence that, as a result of the specific employee's experience, he/she does the work better than the other colleague, who has/does not have any disability)”

8. Prevent disability harassment

The revised code (chapter 9) explains disability harassment and vilification. However, it could be expanded much more by focusing in policies, education and training.

Recommendation 8:

With reference to the SDO Code para. 19-22, insert the following after para. 9.13:

“Eliminating disability harassment in employment

- This part of the Code seeks to encourage the development and implementation of policies and practices, which establish working environments free of disability harassment.
- A common characteristic of disability harassment is that employees subjected to it will often be reluctant to complain to their employers. An absence of complaints about disability harassment does not necessarily mean an absence of disability harassment. It may mean that the recipients of disability harassment think that there is no point in complaining because nothing will be done about it, or because it will be trivialised or the complainant subjected to ridicule, or because they fear reprisals.
- Implementing the preventive and procedural measures outlined here should facilitate a favourable climate at work.
- Both the policy and complaints procedures should be introduced after consultation or negotiation with employees. Strategies to create and maintain a working environment in which the dignity of employees is respected are most likely to be effective where they are jointly agreed.
- Employers should also make clear that employees have a duty and responsibility towards creating such an environment and in ensuring that disability harassment does not occur.

Formulating a policy

- As a first step in showing senior management's concern and its commitment to dealing with the problem of disability harassment, employers should issue a policy statement which expressly states that disability harassment at work is unlawful and will not be permitted and that employees have a right to complain should it occur.
- A policy statement on disability harassment should include:
 - a message that management is committed to eliminating and preventing disability harassment;
 - a clear statement that disability harassment will not be tolerated;
 - the legal definition of disability harassment;
 - a behavioural definition of disability harassment, i.e. some examples of conduct which could amount to disability harassment;
 - the options available for dealing with disability harassment complaints, i.e. informal and formal;
 - information about the organisation's internal complaint procedures, assuring employees that confidentiality will be observed;
 - an assurance that no one will be victimised or penalised for coming forward with a complaint;

- the names and telephone numbers of officers who are responsible for dealing with complaints, providing information and advice, etc.;
- a note about disciplinary action; and
- a note that the complainant may lodge a complaint directly with the EOC or take action in the District Court.

Implementing the policy

Dealing with complaints

A co-ordinator, preferably with special training, should be designated to establish and administer both informal and formal complaints procedures.

Promotion and education

Effective and regular promotion of the policy is important to a successful programme against disability harassment in that:

- it warns that certain offensive conduct is unlawful;
- it sends out a clear message that management will act against such behaviour;
- it ensures that all persons in the organisation know what disability harassment is;
- it ensures that all persons in the organisation know what to do if they encounter disability harassment and know that any complaint will be handled effectively and properly; and
- it assures staff that they are unlikely to be disadvantaged by disability harassment or be victimised by making a complaint.

In order to promote the policy, information may be disseminated through:

- speaking at staff meetings;
- distribution and re-circulation of policy statements;
- posting notices; and
- conducting training and refresher courses

Staff training

The co-ordinator or any other staff member involved in the complaints handling procedures should receive adequate training to enable sensitive treatment of cases in relation to disability harassment, for example:

- ***what is disability harassment:*** definitions and examples; the role of power in harassment situations; the reasons why some individuals harass; recognise harassment situations, e.g. who are the workers at risk;
- ***prevention of disability harassment:*** recognise the role of publicity, how to use publicity and available resources effectively; informal monitoring of the workplace; recognise symptoms of harassment; and alert staff of possible acts of disability harassment; and

- ***dealing with harassment:*** skills on responding to enquiries and maintaining privacy and confidentiality; non-judgmental listening skills; informing enquirers of alternative ways of handling harassment other than by making a formal complaint; knowledge of outside bodies that can be approached for assistance or to whom complaints can be made, e.g. the EOC.

Monitoring the policy

Regardless of whether an informal or formal complaints procedure is in use, it is good practice for employers to monitor and review complaints of disability harassment and how they have been resolved, in order to ensure that the procedures are working effectively.”

9. Sample policy on Disability Equality

Recommendation 9:

The sample policy should include the following:

- An equal opportunities action plan will be drawn up, with disability equality targets and timetables, to show what steps the organisation plans to take to achieve equality of opportunity.
- The effectiveness of the policy and the plan will be monitored regularly. A report on progress will be produced each year, and published via the intranet, the website, the staff newsletter, notice boards, and the annual report.
- Customers and clients will be made aware of the policy, and of their right to fair and equal treatment