

立法會

Legislative Council

立法會LS61/10-11號文件

《殘疾歧視條例》僱傭實務守則修訂本 小組委員會文件

本文件旨在闡述平等機會委員會(下稱"平機會")對《殘疾歧視條例》僱傭實務守則(2011)(立法會CB(2)1710/10-11(01)號文件)(下稱"《守則》")¹ 第3.4.2段所載列的"將來的殘疾"的定義的最新立場。

背景

2. 《守則》第3.4.2段述明，"將來的殘疾"指現在雖未出現，但在將來可能演變成的殘疾，並在註腳7引述"*K及其他人 訴律政司司長* [2000] 3 HKC 796"的案例(下稱"該宗案例")作參考，繼而列舉以下例子：某僱員是乙型肝炎帶菌者，其僱主認為她將來會變成患上肝癌，故此把她解僱(下稱"該例子")。《守則》表明，該名僱主或需要為殘疾歧視負上法律責任。

3. 在小組委員會於2011年5月11日舉行的會議上，平機會在回覆本部就該段所載列的"將來的殘疾"的定義所提出的疑問時確認，所述涵義屬正確。然而，本部解釋，按照該宗案例所作的裁決，"將來的殘疾"是建基於一個過往的殘疾，而所提述的風險是指該過往的殘疾可能復發的風險，而非罹患任何殘疾的風險(該宗案例的相關節錄本載於附件)²。因此，該段所述的"將來的殘疾"的定義未能指出，"將來的殘疾"是建基於一個過往的殘疾。

¹ 謹請注意，平機會建議將《殘疾歧視條例》僱傭實務守則修訂本改稱為"《殘疾歧視條例》僱傭實務守則(2011)"。

² 請參閱該宗案例的第805E至806G頁(只備英文本)。謹請注意，其中一個團體亦曾於較早時提出相若意見。

平機會的最新立場

4. 平機會於2011年5月12日告知立法會秘書處，將會建議修訂《守則》第3.4.2段及該例子，以反映就該宗案例所裁定的"將來的殘疾"的涵義。

連附件

立法會秘書處
助理法律顧問
簡允儀

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(iii) of the definition, in the form of his genetic risk of acquiring the disorder in the future. A

The definitions in s 2(1) (emphasis added) are set out below. Paragraph (g) includes schizophrenia:

‘disability’ (殘疾), in relation to a person, means —

- (a) total or partial loss of the person’s bodily or mental functions; B
 - (b) total or partial loss of a part of the person’s body;
 - (c) the presence in the body of organisms causing disease or illness;
 - (d) the presence in the body of organisms capable of causing disease or illness;
 - (e) the malfunction, malformation or disfigurement of a part of the person’s body; C
 - (f) a disorder or malfunction that results in the persons learning differently from a person without the disorder or malfunction;
 - (g) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; D
- and includes a disability that —
- (i) presently exists;
 - (ii) previously exists but no longer exists;
 - (iii) may exist in the future; or
 - (iv) is imputed to a person E

The above definition of ‘disability’ is almost a duplication of the Australian model, the difference being only in the enumeration of the last four paragraphs which appear as (h)-(k) in the definition in s 4(1) of the (Cth) Disability Discrimination Act 1992. Each of these four paragraphs is descriptive of the disabilities in (a)-(g) of the Hong Kong model, while arguably an improvement, does not change the meaning. F

The following decisions of the Australian Human Rights and Equal Opportunities Commission support both the plaintiffs’ and the defendant’s arguments, but without a close examination of the statutory language.

In *Ralph v Pemar Pty Ltd* (1999) HREOCA 16 the claimant’s associate had a Hepatitis C virus and therefore had a disability under (c) or (d) of the definition. The claimant was at risk of becoming infected because of the association but there was no evidence that he had become infected. He alleged discrimination both on the ground of the disability of his associate and on the ground of a disability imputed to him. The Commissioner upheld the complaint on both grounds. H

In *Beattie v Maroochy Shire Council* (1996) HREOCA 40 the claimant’s children were refused entry to a child care center on the ground that they had a disability which may ‘exist in the future’ in the form of any of the infectious diseases they had not been vaccinated against. The Commissioner held that ‘the fact that the children may at some undefined future time contract such an illness gives rise to the somewhat artificial I

A conclusion that at the relevant time each was subject to a disability as defined by the Act’.

There are, however, fundamental objections to each construction.

‘A disability imputed to a person’

B The objection is that the plaintiffs’ interpretation is not supported by the ordinary meaning of ‘impute’. The primary meaning, according to the New Shorter Oxford Dictionary is:

C to regard (esp. a fault or crime) as being done or caused or possessed by; attribute or ascribe to the discredit (less commonly, the credit) of.

Neither FSD nor CED claimed or assumed that the plaintiffs had a mental disorder. They only attributed to them an increased lifetime risk of acquiring a disorder. That attribution of genetic risk did not mean that the plaintiffs were regarded as having the disability itself at the time of the discrimination. The disability, therefore, was not ‘imputed’ to them. D

‘A disability that may exist in the future’

E The objection to importing future risk of acquiring a disability into the words ‘may exist in the future’ is that such a risk is shared by everyone. Aside from congenital disorders, which are present from birth, any person might one day, as a result of illness or other misfortune, acquire any of the disabilities set out in (a) to (g) of the definition. These include the disorder of schizophrenia. On the evidence in this case, the lifetime risk for the general population of developing schizophrenia has actually been quantified at 1%. F

G ‘Disability’ is a relative term. An interpretation of para (iii) as a disability in itself consisting of a risk, which the whole world shares, of acquiring any of the specified disabilities is an inherent contradiction. This objection is not overcome by interpreting (iii) as words of a special type, or degree, of risk. If that meaning were intended it would have been spelt out.

H It is not obvious, all the same, what other meaning ‘may exist in the future’ should have. If they are simply words of future tense they appear to be unnecessary, since a future event will one day be present. Para (i), which provides for present disabilities, also appears to be unnecessary. This suggests that (i) and (iii) are intended to explain (ii) and should be read together. On this view, (iii) refers to a future disability predicated by a past disability and the risk it refers to is the possibility of recurrence of the past disability, not the risk of acquiring any disability. I find support for this view in the Introduction to the Standard Rules on the *Equalisation of Opportunities for Persons with Disabilities* promulgated by the United Nations General Assembly (Resolution 48/96, Annex, of 20 December I

1993) upon which all disability discrimination legislation is based. Paragraph 17 of the Introduction provides (emphasis added):

The term 'disability' summarizes a great number of different functional limitations occurring in any population in any country of the world. People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be *permanent or transitory* in nature.

'Transitory' does not imply recurrence but it takes the definition a step in that direction. The concepts of transitory and recurring disabilities are especially apposite to mental disorders. These disorders are not identified by biological or neurological signs but by the appearance of symptoms. If the symptoms appear for a time, then disappear before re-appearing, a past disorder will have become present again. In relation to mental disorders, then, there is reason to incorporate in the definition references to time past and future.

Another possible reason for the reference to future time in (iii) is that it is intended to include degenerative conditions, such as multiple sclerosis, which have not progressed to the point of malfunction but, predictably, will do so. Such progressive disorders are included in the more detailed framework of the definition of disability in the corresponding UK legislation (Disability Discrimination Act 1995). They do not appear to come within (e) of the Hong Kong/Australian model without the assistance of (iii) ((j) in the Australian Act).

In these ways, references in Hong Kong/Australian legislation to present, past and future in paras (i), (ii) and (iii)/(h), (i) and (j) may relate to disabilities (e) and (g). How they could relate to the other disabilities is still not clear. Despite this difficulty, the interpretation I have arrived at is much to be preferred to the other possible interpretations because they are either otiose (future tense only), or oxymoronic (risk of acquiring any disability). In my view para (iii) of the definition does not mean that a genetic risk, or any kind of risk, of acquiring any disability is a disability in itself. Insofar as the paragraph imports risk, it refers only to the risk of recurrence of a past disability.

Discrimination on the ground of the disability of an associate

The parents' disabilities not having been imputed to the plaintiffs, and the plaintiffs' genetic liability (if any) to develop a mental illness in the future not amounting to a disability in itself, it will follow that the discrimination in each case was not on the ground of a disability of the plaintiff under s 6(a). The discrimination was only on the ground of the disability of an associate of the plaintiff under s 6(c).

A *The case of Y*

There is a dispute of fact as to whether Y's father suffered from the disorder of schizophrenia or a delusional disorder. Both disorders are within (g) of the 'disability' definition but the latter disorder does not carry an established genetic liability. The issue of which disorder the father of Y suffered from will be relevant to the issue of whether the discrimination was lawful or not and I will return to it later. In the meantime it is enough to note that FSD discriminated against Y on the ground of his father's disability.

Y's father, however, died several years before Y applied to FSD for employment. Because Y's associate was no longer living at the time of discrimination it is necessary to read 'associate' as 'associate or former associate' to establish a discrimination under s 6(c). In *Ryan v Dennis* (1998) HREOCA 36 Commissioner Innes held that an interpretation to this effect was necessary to achieve the objects of the Disability Discrimination Act. It is not an issue in this case. In his closing submission Mr Fleming for the defendant accepted that if the plaintiff had no disability and the discrimination was on the ground of the disability of the associate, 'it makes no difference to the legal argument'. The defence in DCEO 4/99 (para 4) admits that Y 'is a person with an associate with a disability' within the meaning of the Ordinance. I take this to amount to an admission that the above interpretation is correct.

THE LEGALITY OF THE DISCRIMINATION

The statutory provisions

Section 11(1)(c) makes it unlawful to discriminate against a person with a disability by refusing to offer that person employment. Section 12 provides for exceptions. Where, as in these cases, the discrimination is on the ground of a disability of an associate under s 6(c), both s 11 and s 12 must be read subject to s 2(7) which provides:

2(7) For the purposes of section 6(c), references in this Ordinance to —

- (a) a person with a disability (or words to the like effect) shall be construed to mean a person (and whether or not he has a disability) with an associate with a disability;
- (b) a person without a disability (or words to the like effect) shall be construed to mean a person without an associate with a disability.

Section 11, adapted in terms of s 2(7), provides (words in italics replacing those in parenthesis):

11. Discrimination against applicants and employees

- (1) It is unlawful for a person ('the employer'), in relation to employment by him at an establishment in Hong Kong, to discriminate against