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25 May 2011

Mr. Raymond LAM
Clerk to Subcommittee on Revised Code of Practice on
Employment under the Disability Discrimination Ordinance
Legislative Council
Legislative Council Building
8 Jackson Road, Central
Hong Kong

Dear Mr. LAM,

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

Further to our letter of 13 May 2011, the Equal Opportunities Commission (EOC) proposes to make the following final touch-ups to the Code for Members' information. Marked-up copy of the relevant pages is enclosed with this letter as Annex1 for easy reference.

1. In view of the Human Rights Monitor's comment, to delete "S 14(4)" from the margins of paragraphs 2.8 and 10.7;
2. In view of the Human Rights Monitor's comment, to replace "情感創傷" by "感情損害" in paragraphs 4.21 and 8.10 of the Chinese version only; and
3. To amend the case citation of the case illustration under paragraph 5.13 from "FCA 640" to "FCAFC 425".

The EOC is grateful for the Hong Kong Human Rights Monitor's comments and has considered them with due care. We have taken those suggestions onboard where relevant and appropriate, whilst on the other hand, most of the other issues raised have been properly deliberated at the Subcommittee stage and suitably revised.

Yours sincerely,

(Michael CHAN)
for Chairperson
Equal Opportunities Commission

Encl.
c.c. Mr. Stephen SUI, Commissioner for Rehabilitation, Labour and Welfare Bureau (Fax No.: 2543 0486)

he/she has worked more time[2] in Hong Kong than outside Hong Kong in the whole period[3] of his/her employment.

2.7 Protection does extend to employees in the following two situations unless they do their work wholly outside Hong Kong:

2.7.1 Persons who work on a ship registered in Hong Kong; or — S 14 (2)(a)

2.7.2 Persons who work on an aircraft registered in Hong Kong and operated by an employer whose principal place of business is in Hong Kong or is ordinarily resident in Hong Kong. — S 14 (2)(b)

Flight Attendant C spends his working time mostly flying outside Hong Kong territory on aircrafts which are registered in Hong Kong and operated by an employer who has his principal place of business in Hong Kong. C would be protected by the DDO should he be dismissed on the ground of having a disability.

"In the course of employment"

2.8 Events occurred outside work hours and away from work premises could still come within the employment relationship provisions if it is closely work-related. For example, unlawful discrimination and harassment could also take place during business trips overseas or company outings. On the other hand, an incident of a private nature arises outside work hours and away from work premises between work colleagues or a supervisor and staff, may not necessarily come within the employment relationship provisions. Whether an incident happens in the course of employment depends on — ~~S 14 (4)~~

[2] See *Carver v Saudi Arabian Airlines* [1999] ICR 991
[3] See *Saggar v Ministry of Defence* [2005] IRLR 618

risk were to occur was unlikely to pose a real threat to anyone. In other words, the applicants were able to carry out the inherent requirement of the employment in question and therefore there was discrimination by the government in refusing them employment.

5.13 Inherent requirements of a particular job may in appropriate circumstances involve considerations as to the physical environment in which the particular work is to be performed and as to health and safety considerations in relation to the employee, fellow employees and others. The identification of those requirements is a matter of objective fact to be determined in all circumstances of a particular case.[24]

Cosma v Qantas Airways Ltd. **[2002]** ~~**FCA 640**~~ **FCAFC 425**

Mr. Cosma was employed by the airline company as a porter in the ramp services and he injured himself in the course of his work. After a long period of sick leave, Mr. Cosma was assigned some clerical and other light duties for a period of time as part of a rehabilitation programme. Unfortunately, the arrangement had not enabled Mr. Cosma in resuming his original duties as a porter and his employment was subsequently terminated. The Court found that Mr. Cosma was unable, by reason of his disability, to carry out the inherent requirements of his job as being a porter and thus the dismissal was not unlawful.

5.14 The law "does not impose an obligation on an employer to alter the nature of the particular employment or its inherent requirements so as to accommodate the employee with a disability."[25]

[24] See *Commonwealth v HR&EO Commission* (1998) 152 ALR 182 at 217

[25] See *M v Secretary for Justice* DCEO 8/2004 supra at 265 (ii)

This would have the effect of encouraging the employer in taking the lead to establish a culture free of discrimination in the workplace. Moreover, bearing in mind that employers benefit from the work rendered by their employees, it is reasonable that an employer should be liable if someone's right has been violated by their employee in the course of employment.

"In the course of employment"

10.7 The meaning of "in the course of employment" dictates whether an act of discrimination would become unlawful within the scope of employment. Once an unlawful discriminatory act is found to have been committed in the course of employment, not only would the individual discriminator become personally liable, but his /her employer could also be held vicariously liable. "In the course of employment" should be given an ordinary, everyday meaning so that it would cover conducts ordinary people would regard as being done in the course of employment.

~~S 14(4)~~

See also paragraph 2.8 in Chapter 2

Jones v Tower Boots Co. Ltd. **[1997] 2 ALL ER 406**

A 16-year-old boy of mixed race was subjected by fellow employees to grave acts of racial harassment, including verbal and physical abuse. The employer argued that the acts were outside the scope of the employees' employment. The employer submitted that because the acts complained of were so outrageously wrong and they had not authorized any such acts.

The Court however held that it would be wrong to allow racial harassment suffered by the employee in this case to slip through the net of employer responsibility. To do so would seriously undermine the discrimination legislation. In

環球客戶主任 A 受僱於香港某貿易公司，除了需要約每月一次往海外公幹(每次最少一晚最多不超過一星期)外，他在僱用期內主要在香港工作。若他因為其殘疾而被解僱，應受到《殘疾歧視條例》的保障。

另一名受僱於同一間公司的環球客戶主任 B 是內地附屬公司的經理。除了需要每月一次到香港的總公司出席管理層會議外，B 在僱用期內主要在內地工作。B 同樣因為其殘疾而被解僱，但她可能不受《殘疾歧視條例》保障。

2.6 當僱員主要在香港工作，縱使歧視行為發生在香港以外地區，只要他在整段[2]受僱期間，在香港的工作時間多於[3]在香港以外的地方，條例仍然對他適用。

2.7 下列兩種主要在香港以外地方工作的僱員亦受到保障，只要他們不是所有時間都在香港以外地方工作:

2.7.1 在香港註冊的船舶上工作的人士；或 第 14(2)(a)條

2.7.2 在香港註冊並由一名以香港為主要業務地點或屬香港居民的僱主所營運的飛機上工作的人士。 第 14(2)(b)條

機艙服務員 C 經常服務香港境外的航線，但航機均在香港註冊，並且由以香港為其主要業務的航空公司營運。假如他因為其殘疾而被解僱，他將受到《殘疾歧視條例》保障。

「受僱用中」

2.8 在工作時間及工作場所以外的行為，只要與工作有密切關係，仍有可能受僱傭關係條文的規 ~~第 14 (4)條~~

[2] 見 *Saggar v Ministry of Defence* [2005] IRLR 618
[3] 見 *Carver v Saudi Arabian Airlines* [1999] ICR 991

蕭啟源 訴 瑪利亞書院 **[2005] 2 HKLRD 775**

蕭先生於瑪利亞書院任職教師超過 14 年，在他放約兩個半月病假期間，學校將他解僱，校方聲稱是因他缺勤而非殘疾而解僱他。法庭以蕭先生的情況與兩個假設對象就相若情況作出比較，即沒有殘疾而需要放為期相若假期的教師(其中一個是放產假，而另一個是因為要擔任陪審員而需要缺勤)。校方確認會讓放產假及擔任陪審員的教師繼續留任。法庭將蕭先生的情況與以上兩個假設對象的情況比較，裁定若非因蕭先生的殘疾，他便不會被解僱。

這是一個重要的個案，因為它帶出直接歧視和間接歧視的法律概念。有關間接歧視的部份於稍後章節討論。

「較差的待遇」—「不利」的概念

4.21 有關直接歧視的定義，其中一個關鍵的元素是「較差的待遇」，意指引致該殘疾僱員蒙受不利。要確立「不利」情況，不一定需要證明有經濟損失；~~情感創傷~~感情損害、受訓及事業發展機會的問題亦可構成在歧視申索中的「不利」。某項待遇對於某人是否構成不利，需視乎每宗個案的相關情況的客觀評估而定。

4.22 若待遇上的差別令受影響的人客觀上蒙受不利，則僱主任何主觀論據並無關係，且不能成為抗辯理據。[14]

「動機」與「意圖」見 4.17 段

P 是某零售店的銷售主管。她在三年內數度在工作中扭傷足踝。她被調往公司的總務部擔任三名辦公室助理的主管。僱主聲稱調職是為了 P 的長遠利益，因為她似乎很容易發生意外；相對於店內的工作，辦公室的環境可減少她受傷的機會。雖然 P 的新職位基本薪金不變，但她將失去在店內推銷貨品所得到的佣金。此外，P 認為行政工作並非她的專長，且不滿非自願地改變事業前途。個案中，P 似乎因為她曾扭傷足踝而蒙受不利。

[14] *同上；*亦見 *Haines v Leves* (1987) 8 NSWLR 442 at 471

病患者的有聯繫人士)會否令他們不能執行工作的固有要求，會危及公眾。經考慮雙方提供的醫學證據，法庭衡量申索人因遺傳其父或母的殘疾所帶來的風險及相關的歧視行為所帶來的後果，認為有關風險並不嚴重，且風險的後果亦未必會對其他人構成威脅。換言之，申索人應可執行有關工作的固有要求。因此，政府拒絕聘用他們是對他們殘疾歧視。

5.13 在適當情況下，對某工作固有要求的考慮可包括工作的實際環境，及僱員、同僚和其他人的健康及安全。要識別出這些客觀事實的要求，需要考慮個別個案中的所有情況。[24]

Cosma v Qantas Airways Ltd. **[2002]** ~~**FCA 640**~~ **FCAFC 425**

Cosma 先生受僱於航空公司，任職停機坪搬運工人，他工作時受傷。長時間放病假後，他被安排擔任一些文書及其他輕省的工作一段時間，作為康復計劃的一部分。但有關安排未能協助他重新執行搬運工人的原本職務，公司遂解僱他。法庭裁定 Cosma 先生因其殘疾而無法執行他作為搬運工人的工作固有要求，故有關解僱並不違法。

5.14 法例沒有要求僱主改變特定工作的性質或其固有要求，以遷就殘疾僱員。[25]遷就可以給予***服務***或***設施***的方式提供，協助僱員執行工作。

不合情理的困難

5.15 在決定甚麼構成不合情理的困難時，應考慮到特定個案的所有相關情況，包括： 第 4 及 12(2)(c)(ii)條

5.15.1 所需遷就的合理程度； 第 4(a)條

5.15.2 可能帶給任何有關人士的利益或令其蒙受 第 4(b)條

[24] 見 *Commonwealth v HR&EO Commission* (1998) 152 ALR 182 at 217

[25] 見 *M 訴 律政司司長* DCEO 8/2004 supra at 265 (ii)

升職與調職(獲得機會及其他利益)

8.9 ***升職***是從一個職位轉往另一個責任較大或較高薪的職位；而***調職***通常是指從一個職位橫向轉往另一個薪酬相若的職位。

第 11(2)(a)條
其他利益包括培訓、獲得服務或設施等

8.10 升職通常會獲得加薪，因此失去升職機會即在薪酬福利方面受較差的待遇。調職雖然一般是指轉往另一職位而薪酬維持不變，但失去調職機會可能導致無形的損失，例如不能獲得較理想的職業前途和升職機會，甚至蒙受情感創傷等。根據《殘疾歧視條例》，收入損失、被剝奪職業前途和~~情感創傷~~感情損害，均可被視為***不利***。

8.11 假如僱主對殘疾僱員的殘疾作出錯誤假設，令該殘疾僱員得不到平等的升職或調職考慮，即屬歧視。以下是有關升職或調職機會方面的直接和間接殘疾歧視的例子：

第 6 條

> 僱員 R 任職會計助理五年，在過去一年，她曾經因為腰背痛而放較多病假。她的所有病假都有醫生證明。R 在過去五年的工作表現被評為「有效率」，然而她的上司認為 R 先應改善健康，才獲考慮升職。最終 R 在今年不獲考慮晉升。
>
> 基於 R 的病假而剝奪她升職機會，可能構成直接的殘疾歧視。

管理與殘疾有關的缺勤事宜見第 7 章

> 僱員 S 任職會計五年，表現一直備受讚賞。他獲推薦於年底晉升。S 在八月不幸在車禍中受傷，需要留院三星期，其後再需接受每星期兩次的物理治療，為期約兩個月，始能完全康復。
> 公司政策規定，員工在該年放假超過三星期，將不獲考慮晉升，因此，縱使 S 的工作

僱主的責任 — 轉承責任

10.5 根據《殘疾歧視條例》第 48(1)條：「任何人在其受僱用中所作出的任何事情，…須視為亦是由其僱主所作出的，不論其僱主是否知悉或批准他作出該事情。」所指的是不論是否知悉或批准，僱主要對僱員在受僱期間所做出的違法歧視或騷擾行為負上轉承責任。

第 48(1)條

10.6 條例要求僱主和主事人需負上責任，目的是要他們在法律上有義務去消除和預防工作間的違法歧視和騷擾，藉此鼓勵僱主能主動地為工作間營造沒有歧視的文化。試想，僱主從僱員的工作中獲利，若僱員在執行工作時侵害其他人的權利，僱主負上責任是合理的。

「受僱用中」

10.7 「受僱用中」的釋義是決定相關的歧視是否屬工作範圍內的違法行為。一旦被裁定在受僱用中發生違法歧視，不單該歧視者要負上個人責任，其僱主亦要負上轉承責任。「受僱用中」的意思應以最普遍常用的意思來詮釋，涵蓋一般人視為在受僱用中作出的行為。

~~第 14(4)條~~

見第 2 章 ~~2.11~~2.8 段

Jones v Tower Boots Co. Ltd. **[1997] 2 ALL ER 406**

一名 16 歲混血少年遭受到同事的種族騷擾，有關行為非常嚴重，包括口頭凌辱和身體傷害。僱主辯稱有關行為不是在僱員的工作範圍內發生。僱主指出，由於所投訴的行為極之錯誤，僱主並無授權有關僱員（騷擾者）作出這樣的行為。

不過，法庭裁定本案中受害人所遭受的種族騷擾僱主責無旁貸。法庭認為僱主若不須就有關的種族騷擾行為負責的話，會嚴重地損害歧視法例的精神。