



EQUAL OPPORTUNITIES COMMISSION  
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9 January 2014

Miss Betty MA  
Clerk to Panel on Manpower  
Legislative Council  
Legislative Council Complex  
1 Legislative Council Road  
Central, Hong Kong

Dear Miss MA,

**Panel on Manpower and Panel on Welfare Services  
Women Employment**

I refer to your letter dated 13 December 2013 to Dr. CHOW regarding the 4-18 requirement.

Your letter refers to census figures showing that the 4-18 requirement adversely affects more women than men in 2011. In principle, a requirement that adversely affects more women than men could be indirect discrimination against women, unless it can be justified by objective factors unrelated to sex.

In the UK, a requirement of 16 hours or more per week for redundancy pay and unfair dismissal compensation was held by the Court to be incompatible with European equality law (*R v Secretary of State for Employment ex parte Equal Opportunities Commission* [1995] 1 AC 1). The UK Government tried to justify the requirement by saying that it was aimed at making part-time work more available than it would be if employers were made to pay these benefits to part-time workers. While accepting that more part-time work was a legitimate aim, the Court held that the evidence produced by UK Government was insufficient to show that the requirement was effective in achieving that aim. The Court also held that in the light of significant discriminatory effect on women, the distinction between part-time and full-time workers could not be a suitable means to increase part-time work and held that the requirement was not justified. After this case, both the European Union and

the UK implemented regulations to ensure that part-time workers have proportionally equal rights as full-time workers.

The question of justifying an indirectly discriminatory requirement will depend on the benefit in question, its policy aim and whether there is evidence that it is rationally or proportionally connected to the aim. The European Court in *Inge Nolte v Landesversicherungsanstalt Hanover* (Case C-317/93) held that a 15 hours per week requirement for payment under a compulsory contributory insurance scheme was justified. In another UK case, the Court held that a 2 year service period for unfair dismissal claims was not discriminatory after considering statistics from 1985 to 1993 (*Secretary of State for Employment ex parte Seymour Smith* [2000] UKHL 12).

The 4-18 requirement is provided under the Employment Ordinance. The Sex Discrimination Ordinance does not have the effect of overriding the force of another piece of primary legislation. However, even if the SDO may not be used to challenge the requirement, a challenge may still be made under the equality provisions of Hong Kong Bill of Rights Ordinance or the Basic Law. In the light of the 2011 census figures, there is a possibility that the 4-18 requirement could be legally and successfully challenged for discriminating against women. We urge the Government to review its policy aim and whether there is sufficient evidence to justify it and to ensure that it complies with the principles of equality.

Yours sincerely,



Herman Poon

Chief Legal Counsel

Equal Opportunities Commission