

10 June 2009

The Subcommittee on Race Discrimination (Formal Investigations) Rules,
Race Discrimination (Investigation and Conciliation) Rules and
Code of Practice on Employment under the Race Discrimination Ordinance
Legislative Council
Legislative Council Building
8 Jackson Road, Central
Hong Kong

Dear Sir,

Racial Discrimination Ordinance Guidelines

The Hong Kong General Chamber of Commerce is pleased to submit its views, contained below, on the captioned guidelines. Our members are in support of the underlying legislation and believe that racial discrimination legislation should be implemented in Hong Kong as soon as possible. Our concerns, however, are that the law and associated guidelines must be well drafted and that actual implementation is both effective and minimally disruptive to business operations and costs.

We wish to express our concern that the guidelines are still unclear in the area of expatriate benefits and overseas contracts, and that submissions made last year to that effect had remained unanswered. In particular,

1. What is the position under the Code/RDO of an overseas employee recruited on the basis of *what were at the time* special skills and expertise, if such skills or expertise become more commonly available? Would recruitment within Hong Kong change the circumstances?
2. Does the provision of repatriation terms after working in Hong Kong and requiring a valid work permit under the selection criteria constitute discrimination under the RDO?
3. An exception to discrimination under RDO is that it does not apply to an act done by employer for the benefit of a person employed in Hong Kong (but who is not ordinarily resident in Hong Kong) in order to train him in skills which are intended to be used wholly outside of Hong Kong. The Code does not, however, explain in detail how this exception will apply in practice. For example, what is meant by "ordinarily resident" and would such condition apply in the case of secondment or regular rotation?

4. The terms “overseas and local terms of employment” are defined by reference to status as permanent residency. Yet, the Code does not explain what happens after an expatriate obtains permanent residency (PR) after seven years in Hong Kong. For example, is the company obliged to align his employment terms with those of local employees, upon achieving PR status?
5. In the case of overseas employees and those on local terms, the Code reiterates that differentiation is allowed if it falls within Section 14 and Schedule 2 to the RDO. However, there are no illustrations or examples to explain these further. Please provide more illustrations or examples.
6. It is not clear how claims of "reverse discrimination" (i.e. exclusion of a member of majority class that are not commonly discriminated against to compensate those who are traditionally being discriminated) will be dealt with under the RDO.
7. Para 3.3 (2) – When assessing how much of the “whole period of employment” of an employee is spent working in Hong Kong (as opposed to outside Hong Kong), it is not clear from para 3.3(2) and illustration 4 whether the assessment should only be based on historical facts (i.e., contractual or prospective allocation of time between Hong Kong and outside Hong Kong for future purposes should be ignored). For example, if a 5 year fixed-term contract provides that the relevant employee should spend 60% of his time outside Hong Kong and 40% in Hong Kong and 2 years of the 5 year term has expired but, during those 2 years, the employee actually spent 55% of his time in Hong Kong, how should the assessment be made? Should the contractual time allocation between Hong Kong and outside Hong Kong for the rest of the fixed-term period (i.e. the remaining 3 years) be taken into account?
8. Para 5.3.4(3) – The recommendation to advertise in both Chinese and English media would appear to be too onerous, especially for SMEs. If making such a recommendation is a must, then all recommendations should be qualified to the effect they are not mandatory.
9. Para 5.3.12/Para 6.1.1(c) – “accent requirement” would appear, from 5.3.12(1), to be a requirement capable of becoming a requirement as long as it commensurate with the satisfactory performance of a job, but 5.3.12(2) would appear to be saying that any accent requirement, by its very nature, is not legitimate. Like Para 5.3.12(2), Para 6.1.1(c) would appear to have the same problem in respect of language as well as accent. Confusion could be avoided if Paras 5.3.12(2) and 6.1.1(c) can be appropriately qualified.
10. Chapter 5.3.9 of the Code provides that if recruitment is done through employment agencies or employment services, employer should advise them that they should comply with the RDO and follow recommendations in the Code in so far as practicable. The Code should clarify that if employers instruct the agency or employment services that there should be no discrimination in the recruitment process, the employer is not liable if the agencies/employment services are found to have infringed the provisions of the RDO.

11. Chapter 5.3.10 of the Code provides that employers should maintain the principle of “equal pay for equal work” which is not in the draft Code, and large organizations in public and private sectors should take a lead in implementing this principle. This seems to go beyond race discrimination, and the scope of the RDO.
12. Chapter 5.3.12 of the Code also provides that a person's accent in speaking a language can be related to his race and employers should ensure that employees and workers are not discriminated against or harassed because of their accent. This applies to all aspect of employment including promotion, transfer and training. This can be difficult to monitor and implement.

We would appreciate your clarification on these points. If it would be of help, we would be happy to arrange a meeting for your colleagues to meet with our interested members so that we can have a dialogue. If you have any questions, please contact Mr David O’Rear, Chief Economist of the Chamber, at 2823-1242.

Sincerely,



Alex Fong
CEO