

**Equal Opportunities Commission's submission to
the Meeting of Constitutional Affairs Panel on 17 November 2008**

**Public Consultation on the Code of Practice on Employment
under the Race Discrimination Ordinance**

Introduction

The Equal Opportunities Commission (the EOC) published on 13 October 2008 the draft Code of Practice on Employment under the Race Discrimination Ordinance (the Code) for public consultation. The draft Code is enclosed for Members' information.

Background

2. The Race Discrimination Ordinance (RDO) was gazetted on 18 July 2008. The enabling provisions (sections 59 to 63) which empower the EOC to implement this new piece of legislation came into effect on 3 October 2008.
3. Under section 63(1) of the RDO, the EOC may issue codes of practice to provide practical guidance for the purpose of elimination of discrimination, harassment and vilification, or promotion of equality of opportunity and harmony between persons of different racial groups.

The Code

4. The Code is intended to explain the RDO and to give practical guidance on how to prevent racial discrimination in employment situations as well as other types of occupational relationships and work related matters (such as contract workers, commission agents, partnerships, vocational training and the services of employment agencies). Primarily, the Code is intended to help employers to understand and comply with the Ordinance and to promote racial equality in the workplace by encouraging good practice. It is also intended to give employees a general understanding about the law and their rights, so that they know how to protect their rights and what to do if they feel they are discriminated against by their employers.

5. The draft Code is divided into 9 sections, as follows :

- Section 1 : gives an introduction to the Code;
- Section 2 : deals with the meaning of race under the RDO;
- Section 3 : explains the definition of employment under the RDO;
- Section 4 : provides an overview of the basic legal concepts relating to racial discrimination and harassment and other unlawful acts;
- Section 5 : deals with liability of both employers and employees for unlawful acts under the RDO;
- Section 6 : provides further explanations on the concepts of direct and indirect discrimination;
- Section 7 : deals with exceptions relevant to employment matters;
- Section 8 : introduces good practice that employers should adopt in order to promote racial equality and to meet their obligations under the RDO;
- Section 9 : explains possible actions that may be taken by a person who feels that an unlawful act under the RDO has been done against him or her.

6. The draft Code is written in non-legalistic language. In each of the sections, illustrations are used to facilitate easy understanding of the new legislation and to provide practical guidance on work related matters. Some of the illustrations given by the draft Code are based on actual cases decided by Courts in overseas jurisdictions with similar discrimination legislation. Without the benefit of local cases decided under the new legislation, these illustrations serve to explain the RDO and how the Hong Kong courts may make reference when deciding cases in similar situations.

Procedures and Timeline

7. Section 63 of the RDO governs the procedures for the issue of the Code. It stipulates that when the EOC proposes to issue a code of practice, it shall prepare and publish (otherwise than in the Gazette) the Code and consider any representations made to it. The EOC shall also consult stakeholders as it thinks appropriate.

8. It is understood the Government indicated that the substantive provisions of the new legislation will come into force around mid-2009 after the Code of Practice on Employment under the RDO has been issued by the EOC. To take into account the time element, the public consultation is conducted from 13 October 2008 to 8 December 2008. The EOC is presently anticipating that the Code would be ready for issuance by April 2009.

9. Following the recent publication of the draft Code, the EOC is now inviting comments and representations from the public. At the same time, it will meet with stakeholders, including racial minority groups, non-governmental organizations, trade unions and employers' associations, and conduct eight public consultation meetings at different locations to collect views and comments from various sectors of the community. Two of the public consultation meetings are multi-lingual sessions targeting ethnic minority communities.

10. After the public consultation period, the EOC will then consolidate the views and comments received and revise the Code for gazetting and the revised Code will then be laid before the Legislative Council for negative vetting. A copy of the draft Code and the schedule of the public consultation meetings are enclosed for Members' information.

Equal Opportunities Commission
November 2008

Encl. (1) a copy of the Code - issued to All Members in October 2008

(2) schedule for public consultation meetings

《種族歧視條例僱傭實務守則》公眾諮詢會議

Public Consultation Meetings on
Code of Practice on Employment under the Race Discrimination Ordinance

會議場次 Meeting No.	地區 Region	日期 Date	地點 Venue	地址 Address	時間 Time	語言 Language
1	九龍區 Kowloon	2008年11月1日 (星期六)	青年會專業書院 104 室 Room 104	九龍窩打老道 23 號 23 Waterloo Road Kowloon	第一場 Session 1 : 2:30 – 4:00pm	廣東話 Cantonese
2		1 November, 2008 (Saturday)	YMCA College of Careers		第二場 Session 2 : 4:30 – 6:00pm	英語 English
3	新界區 New Territories	2008年11月8日 (星期六)	屯門大會堂演講室(二) Lecture Room (2)	新界屯門屯喜路 3 號 3 Tuen Hi Road Tuen Mun, N.T.	第一場 Session 1 : 1:30 – 3:00pm	廣東話 Cantonese
4		8 November, 2008 (Saturday)	Tuen Mun Town Hall		第二場 Session 2 : 3:30 – 5:00pm	英語 English
5	港島區 HK Island	2008年11月15日 (星期六)	香港小童群益會 502 室 Room 502	香港灣仔駱克道 3 號 3 Lockhart Road Wanchai, Hong Kong	第一場 Session 1 : 2:30 – 4:00pm	廣東話 Cantonese
6		15 November, 2008 (Saturday)	The Boys' & Girls' Clubs Association of Hong Kong		第二場 Session 2 : 4:30 – 6:00pm	英語 English

多種語言諮詢會議 Multi-lingual Session

會議場次 Meeting No.	日期 Date	地點 Venue	地址 Address	時間 Time	語言 Language
7	2008年11月29日 (星期六) 29 November, 2008 (Saturday)	平等機會委員會 Equal Opportunities Commission	香港太古城太古灣道 14 號 太古城中心三座 19 樓 19/F, Cityplaza Three 14 Taikoo Wan Road, Taikoo Shing Hong Kong	第一場 Session 1 : 2:30 – 4:00pm	英語 English 印度語 Hindi 印尼語 Indonesian 尼泊爾語 Nepali
8				第二場 Session 2 : 4:30 – 6:00pm	英語 English 菲律賓語 Tagalog 泰語 Thai 巴基斯坦語 Urdu

報名表格 Enrollment Form

地址 Address: 香港太古城太古灣道 14 號太古城中心三座 19 樓
19/F, Cityplaza Three, 14 Taikoo Wan Road, Taikoo Shing, Hong Kong

傳真號碼 Fax Number: 2877 7600

本人報名參加第 1/2/3/4/5/6/7/8* 次的諮詢會議。(請圈出 閣下選擇的場次)

I would like to participate in Consultation Meeting No. 1/2/3/4/5/6/7/8*. (Please circle your chosen meeting number)

姓名 Name	機構名稱 (如適用) Organization (if applicable)	電話 Telephone	傳真 Fax	電郵 Email address
1.				
2.				
3.				

請填妥報名表格，以郵遞、傳真（號碼：2877 7600）或電郵（karentang@eoc.org.hk）方式交回平等機會委員會。名額有限，報名從速，請 閣下盡量以傳真或電郵報名，以便及早預留座位，大會將會以電郵或電話通知參加者有關詳情。

Please complete the enrollment form and return it to us by post, fax (fax number: 2877 7600) or email (karentang@eoc.org.hk). Places are limited and are available on a first-come, first-served basis. Registration by fax or email may help you secure a place earlier. Bookings will be confirmed by telephone or email.

查詢 Enquiries: 2511 8211

This document is issued by the Equal Opportunities Commission for the purpose of public consultation under Section 63 of the Race Discrimination Ordinance.

Please forward your comments on this document in writing to the Equal Opportunities Commission by 8 December 2008:

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Code of Practice on Employment under the Race Discrimination Ordinance

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1 Introduction

This section gives an introduction to the Code.

- (i) Section 2 deals with the meaning of race under the Race Discrimination Ordinance (the Ordinance). Apart from explaining personal characteristics that would be regarded as race, it also explains the matters which would not be regarded as racial discrimination.
- (ii) Section 3 explains the definition of employment under the Ordinance and the types of work relationships or matters which are protected under it. Matters that are not covered by the Ordinance and the limits of its protection are also dealt with.
- (iii) Section 4 provides an overview of the basic legal concepts relating to racial discrimination and harassment and other unlawful acts.
- (iv) Section 5 deals with liability for unlawful acts on the part of both employers and employees. Information is provided on how employers may be relieved of liability by taking reasonably practicable steps to prevent their employees from acting unlawfully.
- (v) Section 6 provides further explanations on direct and indirect discrimination to supplement the basic concepts introduced in Section 4. For direct discrimination, it explains matters such as the need of an appropriate comparison with a comparator, the relevance of motive, burden of proof and evidence. For indirect discrimination, it explains the element of requirement or condition, comparison of proportions and what is a justifiable requirement or condition.
- (vi) Section 7 deals with exceptions relevant to employment matters and things which are not affected by the Ordinance. These include genuine occupational qualification, special skills and experience not readily available in Hong Kong, existing employment on local and overseas terms, and special measure to provide opportunities to disadvantaged racial groups.
- (vii) Section 8 deals with good practice that employers should adopt in order to promote racial equality and to meet their obligations under the Ordinance.

- (viii) Section 9 explains that a person who feels that an unlawful act has been done against him or her may lodge a complaint with the Equal Opportunities Commission (EOC). The EOC's role and functions in handling the complaint are outlined. It also explains that such a person may take legal proceedings and the options that may be open in this regard.

1.1 Purpose of the Code

- 1.1.1 The Ordinance was enacted in 2008 to make racial discrimination and harassment and other related acts unlawful in specified fields, i.e., different areas of activities in the society. Part 3 of the Ordinance deals with discrimination and harassment in employment and work related matters.
- 1.1.2 This Code of Practice (the Code) is intended to explain the Ordinance and to give practical guidance on how to prevent racial discrimination in employment situations. Primarily, the Code is intended to help employers to understand and comply with the Ordinance and to promote racial equality in the workplace by encouraging good practice. It is also intended to give employees a general understanding about the law and their rights, so that they know how to protect their rights and what to do if they feel they are discriminated against by their employers.
- 1.1.3 In addition to employer and employees, the Ordinance also deals with other occupational relationships and work related matters (such as contract workers, commission agents, partnerships, vocational training and the services of employment agencies). Generally, the principles and good practice that apply to employment situations will also apply to other types of occupational relationships and work related matters. The Code will also deal with these other types of relationship and matters as appropriate.
- 1.1.4 The Code should be read as a whole and in the spirit of promoting racial equality. It should not be read narrowly or approached in a minimalist way.

1.2 Status of the Code

- 1.2.1 The Code is issued by the Equal Opportunities Commission (the EOC) under the Ordinance [s.63]. After the EOC proposed to issue the Code, it conducted consultation with the public in general as well as specific stakeholders. After consultation, the proposed Code was put before the Legislative Council for negative vetting and then became effective on [date] in its present form.
- 1.2.2 The Code sets out the EOC's approach and understanding of the law. However, the Code does not directly impose any legal obligations or has any binding legal effect, and failure to observe the Code will not in itself lead to any liability [s.63(14)]. The Code is not intended to be and is not a complete and definitive statement of the law. Only the Courts can give definitive rulings on the law.
- 1.2.3 However, the Courts will take into account of any relevant parts of the Code in deciding cases. If, for example, an employer is able to show to the Court that relevant recommendations of the Code have been observed, it will reduce the chance of an adverse decision by the Court against the employer. If employers do not follow the recommendations of the Code, in the event of a claim against them, they may need to explain in what other ways, if any, their obligations under the Race Discrimination Ordinance are observed and complied with.

1.3 Use of illustrations and suggestions of good practice

- 1.3.1 In order to explain the workings of the Ordinance, the Code will seek to illustrate how principles and concepts under the Ordinance may apply to particular situations. While most of the illustrations relate to racial discrimination in employment situations, the Code also makes use of some non-employment situations to illustrate principles and concepts applicable to racial discrimination generally.
- 1.3.2 The Ordinance is a new piece of legislation. There are so far no court decisions in Hong Kong under it. Court decisions under other discrimination laws in Hong Kong or elsewhere (such as Australia and the United Kingdom) may help in understanding how the Ordinance works. Some of the illustrations given by the Code are based on

actual cases decided by Courts under similar discrimination law.

- 1.3.3 The application of discrimination law depends very much on the facts of each particular case. The illustrations used in the Code are intended to facilitate a general understanding of the law. They may not cover all the relevant facts of a specific situation actually encountered by the reader, and therefore may not be directly applicable. Appropriate legal advice should always be sought.
- 1.3.4 The Code will give suggestions of good practice. Employers may adopt these suggestions as appropriate, adjusting them according to the nature and scale of their own organizations and available resources.
- 1.3.5 While the Code is intended to explain the law and to give practical guidance and suggest good practice, there will be questions about the law which the Code cannot give any definitive answers. The answers to these questions will have to wait for authoritative rulings from the Courts. The Code is not a substitute for taking appropriate legal advice in relation to any specific situation.

2 Meaning of race under the Ordinance

2.1 What is meant by race

- (i) Under the Ordinance, race means a person's "race", "colour", "descent" or "national or ethnic origin" [s.8(1)(a)].
- (ii) The Ordinance further elaborates on the meaning of "descent" [s.8(1)(c)] by providing that discrimination on the ground of descent means discrimination against members of communities based on forms of social stratification such as a caste system or similar systems of inherited status which nullify or impair their equal enjoyment of human rights.
- (iii) There is no elaboration relating to the meaning of "race", "colour", and "national or ethnic origin". In the absence of case law in Hong Kong, the general usage of these terms will be relevant.
- (iv) It is best to illustrate the meanings of all these terms by contrasting people from different groups. Their meanings are not mutually exclusive. They may be overlapping and cannot always be clearly separated in every situation. Some of the illustrations below are based on overseas case law.

2.1.1 Race

Illustration 1:-

A European person and an Asian person belong to different races. Generally, they have different bodily features, and they have different cultures and ways of life. Despite these differences, if they work for the same employer doing the same job, they may attain the same level of performance and should be treated equally in relation to remuneration. Discrimination by way of unequal remuneration between a European person and an Asian person, when their levels of performance are both the same, is likely to be unlawful racial discrimination.

2.1.2 Colour

Illustration 2:-

Among the different bodily features between people of different races, skin colour is perhaps the most noticeable. For instance, African people, European people and Asian people generally have different skin colours (black, white and yellow). Discrimination by skin colours is clearly a form of race discrimination. Discrimination between a person with black skin and a person with white skin is likely to be unlawful.

2.1.3 Descent

The Ordinance says [s.8(1)(c)] that descent means forms of social stratification such as caste and analogous systems.

Historically, in many parts of the world, there were strict social systems where people were divided into different classes (castes) by birth. Opportunities in life, including education and career opportunities, were defined by the caste a person belonged to. In these systems, people born into lower castes suffered discrimination generally and could not develop their full human potential despite their ability and personal character. Some of these systems remain in operation to varying degrees in different parts of the world today. If discrimination against a person were to occur in Hong Kong because of the caste that person belongs to, it is likely to be unlawful.

2.1.4 National origin

National origin generally refers to the nation that people belong to. In times when the world's population was static, people living in the same country generally belonged to the same nation. People living in different countries generally belonged to different nations. As migration occurred on larger scale and nations expanded or were conquered, people having different national origins began to live in the same countries. These people may retain their own national origins after many generations or even after their original nation states long ceased to exist as a separate political entity. Today, people having different national origins may have the same nationality, hold the same passport and have very similar ways of life.

Illustration 3:-

English people, Scottish people, Irish and Welsh people from the United Kingdom are all of different national origins, even though they may all hold the same United Kingdom passport. Discrimination between an English person and a Scottish person is likely to be unlawful.

2.1.5 Ethnic origin

Similar to people sharing a common national origin, there are distinct communities of people in different parts of the world who, within their own group, share a long history, maintain their own common cultural traditions, ways of life, family and social customs and manners. These groups of people set themselves apart from other people around them and are regarded as a separate ethnic group. Ethnic origin is the identification by a person as a member of such groups.

Illustration 4:-

The Sikh people from the Punjab region straddling India and Pakistan have the same skin colour, bodily features and common ancestors as the Hindus living in the same area around them. But the Sikh people have their own cultural traditions and history. In terms of outward appearance, Orthodox Sikhs do not cut their hair and they wear a turban. They are a distinct ethnic group. Discrimination against a Sikh person may be unlawful.

2.2 What is not regarded as racial discrimination

The Ordinance makes it clear that using specified matters as criteria to treat people, and the differences resulting from these criteria, will not be regarded as racial discrimination [s.8(2)&(3)]. The reasons for specifying these matters would seem to be that they are not generally regarded as race related or that they relate to policies which should be free from race discrimination challenges. These matters are set out below with illustrations, but they are not necessarily employment related.

2.2.1 New Territories indigenous inhabitants

There are people who are descendents through the male line from people who lived in 1898 in villages in Hong Kong. The Ordinance

describes these people using the terms “indigenous inhabitant” and “established village”.

“Indigenous inhabitant” is a term used in the Village Representative Election Ordinance Cap.576. It refers to a person who was in 1898 a resident of an Indigenous Village within the meaning of that ordinance, or a person who is descended through the male line from such residents.

“Established village” is a term used in the Government Rent (Assessment and Collection) Ordinance Cap.515. It refers to a village that was in existence in Hong Kong in 1898 within the meaning of that ordinance.

Differences in treatment would not be racial discrimination if they are based on whether a person is or is not a descendent from these old villages.

Illustration 5:-

A shop owner who runs a small shop in a village who would only employ indigenous inhabitants from the village as the shopkeeper does not racially discriminate against the other people.

2.2.2 Permanent residency, right of abode, right to land, restriction or condition of stay, permission to land and remain

People may or may not be permanent residents of Hong Kong. They may or may not have the right of abode or the right to land in Hong Kong. People coming to Hong Kong may need to obtain permission before they can land and remain here. Their stay in Hong Kong may also be subject to restrictions or conditions imposed under immigration law.

Differences in treatment would not be racial discrimination if they are based on whether a person

- ◆ is or is not a permanent resident, or
- ◆ have or have not the right of abode or the right to land, or

- ◆ Have or have not permission to land and remain or
- ◆ is or is not subject to restrictions or conditions of stay.

Illustration 6:-

A company who would only employ permanent residents who have the right of abode in Hong Kong without any restriction or condition of stay does not racially discriminate against other people.

2.2.3 Length of residency

Different people may have lived in Hong Kong for different periods of time. Differences in treatment based on a person's length of residence in Hong Kong being different from other people would not be unlawful racial discrimination.

Illustration 7:-

In a recruitment exercise, if a candidate is chosen because he has lived the longest in Hong Kong when compared to other candidates who are equally or even better qualified, it would not be unlawful racial discrimination against these other candidates.

2.2.4 Nationality, citizenship or resident status of other countries

People in Hong Kong may have different nationality, citizenship or resident status of other countries. Treating people differently based on these matters would not be unlawful racial discrimination. Nationality, citizenship or resident status are not necessarily the same as race, national or ethnic origin because people of different races or national origins may have the same nationality.

Illustration 8:-

A company having business in the United States of America chooses to employ a person who is of American nationality and holds a American passport does not racially discriminates against people who are not of American nationality and do not hold an American passport.

Although using the above criteria will not be regarded as racial discrimination, employers should consider carefully whether it is necessary to adopt these criteria in any of their processes or decisions.

If employers use these criteria without good reasons, they may not be making the best decision or recruiting the best talents as the pool of talented and loyal candidates or employees available to them will be limited.

In addition, even where employers purports to adopt the above criteria, if these criteria are not objectively necessary or there is evidence that they are not applied consistently, there are likely to be risks of allegations that the criteria are not genuinely applied but are only a cover for racial discrimination. If it is established that the purported criteria are not genuine, this may lead to successful claims of unlawful racial discrimination.

Illustration 9:-

A company refuses to employ an accountant of South East Asian origin who does not have permanent residency in Hong Kong, saying that it will only employ permanent residents. However, if evidence emerges that it would in fact employ people of European origins who are not permanent residents, this is likely to be unlawful racial discrimination. If another person of South East Asian origin, who is a permanent resident and who is otherwise eligible, is refused employment, racial discrimination may also be shown.

3 Scope of employment protection

Under the Ordinance [s.10], employers must not discriminate against job applicants and employees or harass them on the ground of their race.

3.1 Meaning of employment

- (i) The Ordinance [s.2] defines “employment” as a contract of service or apprenticeship, or a contract to personally do any work. Anyone who has to personally work under a contract is likely to be an employee, and the other party to the contract would be the employer. Anyone who applies for such a contract would be a job applicant. The Ordinance protects the job applicant and the employee from racial discrimination and harassment.

Illustration 10:-

A self-employed carpenter who contracted with a shop-owner to personally do some repair work at the shop would be an employee of the shop-owner for the purposes of the Ordinance. It would be unlawful for the shop-owner to racially harass him when doing the repair work.

- (ii) The Ordinance applies to employment both in the private sector and the public sector. The Government and other public bodies are also bound by the Ordinance and must not discriminate in employment and related matters.

3.1.1 Work wholly or mainly outside Hong Kong

3.1.1.1 The Ordinance only protects employees who work wholly or mainly in Hong Kong. It does not protect people who work wholly or mainly outside Hong Kong. [s.16(1)].

Illustrations 11:-

A factory supervisor employed by a Hong Kong company to work in a factory in Guangzhou is unlikely to be protected under the Ordinance. On the other hand, an

account manager who works in Hong Kong most of the time but needs to travel to the Guangzhou factory only once a month is likely to be protected under the Ordinance.

3.1.1.2 People who work on:-

- (a) a ship registered in Hong Kong; or
- (b) an aircraft registered in Hong Kong and operated by a person whose principal place of business is in Hong Kong or is ordinarily resident in Hong Kong,

are protected, even if they work mainly outside Hong Kong [16(2)].

Illustration 12:-

A hovercraft captain who spends more of his working time in open sea outside Hong Kong waters than in Hong Kong waters, but the hovercraft is registered in Hong Kong, will be protected by the Ordinance.

3.2 Small employers [s.10(3), (8) & (9)]

- (i) For the first 3 years after the enactment of the Ordinance, there is a grace period during which the prohibition on employment discrimination will not apply to employers who employ no more than 5 employees. If a company is controlled by another company or if 2 companies are controlled by a third person, the employees of both companies are included for the purposes of counting the number of employees.
- (ii) The grace period does not apply to the employment of domestic helpers.
- (iii) The grace period will expire on [16 July 2011] (3 years after the enactment of the Ordinance), by which time the Ordinance will apply to all employers big or small.

3.3 Domestic helpers [s.10(7)]

- (i) The prohibition on employment discrimination does not apply to the recruitment of domestic helpers who work in the place where the employer or his or her near relatives live. Once employed, however, the domestic helper will be protected under the Ordinance.

Illustration 13:-

A person may choose not to employ a domestic helper who has a particular national origin, and instead employ only domestic helpers with another national origin. This choice is not unlawful under the Ordinance.

Where the employer employs two domestic helpers having different national origins, there should be equality between them. It is likely to be unlawful if one is paid more than the other because of national origin.

3.4 Religion [s.23]

- (i) The prohibition on employment discrimination does not apply to employment for organized religion if the employment is limited to persons from particular racial groups in order to comply with the doctrines of the religion or to avoid offending the religious susceptibilities of its followers.

3.5 Other occupational relationships

Apart from the employer-employee (or job applicant) relationship, other forms of working relationship are also protected by the Ordinance. These are:-

3.5.1 Contract workers [s.15]

Contract workers are people who are employed by a contractor or sub-contractor to do work for a third person (called the principal). A contractor is someone who undertakes work for the principal under a contract made directly with the principal. The sub-contractor is someone who undertakes work that a

contractor has undertaken for the principal. Though contract workers are not employed by the principal, the principal must not discriminate against the contract workers.

Illustration 14:-

A cleaning contractor employs cleaners, and under a contract with a trading firm (the principal), sends the cleaners to the trading firm to clean its office. When the cleaners who are sent to the office turn up at the office, the trading firm discovers that one of the cleaners is of South Eastern Asian origin, and does not allow him to enter the office to do cleaning work, but requires him to leave the office immediately. The other cleaners are of Chinese origin and are allowed to do their work in the office. This is likely to contravene the Ordinance.

3.5.2 Partners [s.17]

If a partnership firm has 6 or more partners, it must not racially discriminate against any of its partners or any person who wishes to become a partner.

Illustration 15:-

It is likely to be unlawful if a solicitors' partnership firm refuses to allow a solicitor of South Eastern Asian origin to join the firm as a partner, when he is otherwise suitable to do so.

3.5.3 Commission agents [s.22]

Commission agents are people who are paid a commission for doing work for their principal, for example, insurance agents who are paid by commission for selling insurance policies for an insurance company. The principal must not discriminate against its commission agents.

Illustration 16:-

It is likely to be unlawful if an insurance company pays less commission to an agent who is not of Chinese origin than other agents when all of them perform equally good.

3.5.4 Barristers [s.35]

Barristers in Hong Kong work together with other barristers from sets of chambers in which they hold a tenancy. For people who wish to practise as a barrister, they have to undertake a pupillage with a practicing barrister.

Under the Ordinance, barristers or their clerks must not discriminate against a person in relation to offering a tenancy or pupillage.

It is also unlawful for any person to discriminate against a barrister in relation to giving instructions to him or her or accepting instructions for him or her.

Illustration 17:-

It is likely to be unlawful for a group of barristers practicing in a set of chambers to refuse another barrister of South Eastern Asian origin to join that set of chambers when he is otherwise suitable to do so.

3.6 Other work related matters

In addition, other work related matters are also covered by the Ordinance. These are:-

3.6.1 Vocational training [s.20]

Providers of vocational training are covered by the Ordinance and must not discriminate against people who want to be or are being trained.

However, providers of vocational training are not obliged to make different arrangements for different racial groups regarding holidays and medium of instructions. [s.20(2)]

Illustration 18:-

It is unlawful for a technical college to refuse a student of South Eastern Asian origin to enroll in a mechanic training course when he is otherwise suitable to do so. But once admitted, the college

is not obliged to make different arrangement for him regarding holidays and medium of instructions.

3.6.2 Employment agencies [s.21]

Employment agencies providing services of finding employment for workers or providing guidance on careers or supplying workers to employers are covered by the Ordinance and must not discriminate against people who want to be provided with their services.

Illustration 19:-

It is likely to be unlawful for an employment agency to refuse to find jobs for a person of South Eastern Asian origin who is seeking jobs.

4 Overview of unlawful acts under the Ordinance

4.1 What is “discrimination”

The Ordinance defines different types of discrimination. They are:-

4.1.1 Racial discrimination

Racial discrimination has 2 meanings under the Ordinance [s.4]. There is racial discrimination if a situation falls into either or both of these meanings. They are:-

4.1.1.1 Direct discrimination [s.4(1)(a)]

Direct discrimination happens when person A treats person B less favourably (i.e., in a different and worse way) than other people because of person B’s race. The Ordinance does not actually use the words “direct discrimination” but this is how this form of discrimination is commonly known. Under the Ordinance, segregation of different racial groups is direct racial discrimination [s.4(3)].

Illustration 20:-

A simple example of direct discrimination is the way the South Eastern Asian contract cleaner is treated in the illustration 14 above. The treatment he receives from the principal is different and worse than the treatment of the other cleaners and this is because he is of South Eastern Asian origin and the other cleaners are Chinese. This is likely to be unlawful direct racial discrimination.

4.1.1.2 Indirect discrimination [s.4(1)(b), and s.4(2) to (5)]

Even when everyone is treated in the same way, but if this same treatment has an adverse impact on, or if it causes a disadvantage to, people of a particular racial group, this is also considered as discrimination and is commonly known as indirect discrimination (though the Ordinance actually does

not use the words “indirect discrimination”).

Under the Ordinance, the same treatment has to be a requirement or condition that is imposed equally on people from different racial groups.

Whether the requirement or condition has an adverse impact on, or causes a disadvantage to, any particular racial group is decided by comparing the proportions of people in different racial groups who can comply with the requirement or condition. If the proportion of people in a particular racial group who can comply is considerably smaller than other groups, the requirement or condition would be indirectly discriminatory against that racial group.

Despite adversely affecting some racial groups or putting them at a disadvantage, the requirement or condition may be justifiable if its objective is legitimate and it is a proportional and appropriate means to achieve that objective. A justifiable requirement or condition is not unlawful.

Illustration 21:-

A requirement that pupils in a school must not wear headdress, if strictly applied to all pupils, may be indirectly discriminatory against Sikh pupils who could not in practice comply with it because they would be losing their ethnic identity if they are not allowed to wear their turban.

Further explanation of these 2 types of discrimination is given in Section 6.

4.1.2 Discrimination on the ground of near relative’s race

Discrimination on the ground of the race of a near relative [s.5] happens when person A treats person B less favourably (i.e., in a different and worse way) than other people because of person B’s near relative’s race. A near relative means a person’s spouse, parent or child (including born out of wedlock, adopted or step child), grandparent or grandchild, sibling and in-laws [s.2].

Illustration 22:-

It is likely to be unlawful if a good performing manager in a company is not chosen for promotion to director, even though he is eligible, because his wife is of South Eastern Asian origin, so that they are not considered suitable for company social functions usually attended by directors and their spouses.

4.1.3 Discrimination by way of victimization

When an unlawful act happens under the Ordinance (such as racial discrimination), the victim may wish to raise the matter internally with his or her employer. He or she may also formally complain to the EOC, and may even take legal action in Court. There may be people who would give information or evidence in relation to the case. People who intend to or have taken such action are often concerned about possible reprisal by their employers who would treat them unfairly for taking action. In order to protect these people from unfair treatment, the Ordinance makes it unlawful to discriminate against them. This type of discrimination is called discrimination by way of victimization.

Discrimination by way of victimization happens if person A treats person B less favourably (i.e., in a different and worse way) than other people because person B or a third person has done an act protected under the Ordinance. Protected acts under the Ordinance are [s.6]:-

- ◆ Bringing proceedings under the Ordinance
- ◆ Giving information or evidence in connection with proceedings under the Ordinance
- ◆ Doing something under or by reference to the Ordinance (such as lodging complaint to EOC)
- ◆ Alleging that someone has contravened the Ordinance (such as raising the matter with the employer internally)

Even if person B or the third person in fact has not done or intended to do any protected act, it is still discrimination by way of victimization if person A treats person B in a different and worse way than other people because person A knows or suspects person B or the third

person intends to do or has done any protected act.

Illustration 23:-

If a manager of foreign national origin complains of racial discrimination in that he was paid less annual bonus than other managers, and the company then decides to dismiss him because he makes this complaint, it is likely to be unlawful discrimination by way of victimization.

4.2 Application to different aspects and stages of the employment relationship

4.2.1 The Ordinance applies to all stages and aspects of an employment relationship. In terms of different stages of employment, it applies from recruitment through the duration of employment to termination, and may even apply after termination. In terms of different aspects of employment, it applies from remuneration and benefits to working conditions and to opportunities for promotion, transfer and training. The employer must not discriminate against a job applicant or an employee in any stage or aspect.

4.2.2 In relation to recruitment, the employer must not discriminate against a job applicant [s.10(1):-

- ◆ In the arrangement made for determining who should be offered employment

Illustration 24:-

It is likely to be unlawful to refuse to interview a job applicant because he is not Chinese.

- ◆ In the terms on which the employment is offered

Illustration 25:-

If job applicants are divided into different racial groups and are offered different remuneration according to their groups, this is likely to be unlawful racial discrimination.

- ◆ By refusing, or deliberately omitting to offer employment

Illustration 26:-

It is likely to be unlawful to refuse to offer employment to a job applicant because he is not Chinese, when he is otherwise the most suitable candidate.

4.2.3 In relation to the duration of employment and to termination, the employer must not discriminate against an employee [s.10(2)]:-

- ◆ In the terms of employment

Illustration 27:-

It is likely to be unlawful for an employer to require South Eastern Asian worker to work longer hours than other workers.

- ◆ In the opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or refusing or deliberately omitting to afford access to these things

Illustration 28:-

It is likely to be unlawful if staff who are of European origins are given priority when considered for promotion over other staff not of European origins.

- ◆ By dismissing the employee or subjecting him to any other detriment

Illustration 29:-

It is likely to be unlawful if staff who are not of Chinese origin are chosen first for redundancy in a downsizing exercise.

4.2.4 Dismissal includes non-renewal of employment and constructive dismissal.

4.2.5 Even after termination of employment, there may still be things that an employer may do which would be covered by the Ordinance. If something is so connected with the previous employment, for example, giving a reference letter, the employer must not discriminate against a former employee.

Illustration 30:-

If the manager in the illustration 22 above resigns and leaves the company after complaining to the company of unlawful discrimination, it is still likely to be unlawful if the company then refuses to give him an accurate performance reference for his future employers in retaliation for making a complaint of unlawful discrimination.

4.2.6 While employers may continue any retirement arrangements made before the commencement of the Ordinance [s.10(4)], these arrangements must not discriminate against employees in relation to promotion or demotion, transfer, training or termination of employment [s.10(5)].

4.3 What is meant by “racial harassment”

Under the Ordinance, racial harassment has 2 meanings [s.7]. There would be racial harassment if any situation falls within either or both meanings:-

4.3.1 Unwelcome conduct harassment [s.7(1)]

Racial harassment happens when person A does something which is unwelcome to person B because of person B’s race or his near relative’s race.

The thing done by person A could be any conduct or behaviour, including just saying or writing something which is unwelcome for person B, but it must be such that, if there were a reasonable person observing the situation, knowing all the relevant circumstances, that person would also think that person B would be offended, humiliated or intimidated by it. There is liability for harassment even if person A has no intention or motive to offend, humiliate or intimidate person B.

This type of harassment is usually targeted at the victim and would not occur if the victim is not present.

Illustration 31:-

A newly joined worker of South Eastern Asian origin is called “Ah Cha” by his co-workers because they could not pronounce his name. The South Eastern Asian worker does not welcome such name-calling and finds it disrespectful and offensive, but his co-workers continued to do

so despite his objection. This is likely to be unlawful racial harassment.

4.3.2 Hostile environment harassment [s.7(2)]

Racial harassment may also happen when person A by himself or together with other people does something, on the ground of person B's race or his relative's race, that makes person B's work environment hostile or intimidating. Again, the thing done by person A may be any conduct or behaviour, including just saying or writing something. If it makes person B's work environment hostile or intimidating to him, it could be unlawful racial harassment.

Although the victim may be affected by the harassing conduct, this type of harassment is not necessarily targeted at the victim as it may persist or be maintained for a period of time even if the victim is not present throughout that period.

Illustration 32:-

If emblem of the Nazi regime in Germany during the second world war is prominently displayed in the office, Jewish staff may be offended and intimidated. Such display is likely to constitute a hostile or intimidating environment for them.

Behaviour may be both unwelcome conduct harassment and hostile environment harassment at the same time.

4.4 Relationships where racial harassment is unlawful

Racial harassment is unlawful when it occurs in situations specified under the Ordinance. Protection under the Ordinance is not afforded in situations not specified. In work related situations, the specified situations are [s.24]:-

- ◆ An employer to racially harass a job applicant
- ◆ An employer to racially harass an employee
- ◆ An employee to racially harass a job applicant or another employee of the same employer

- ◆ A principal to racially harass a contract worker (if an employee of the principal racially harasses a contract worker, the principal as employer would be treated as having done the harassing conduct and be liable [s.47], and the employee would then be liable for aiding the harassing conduct [s.48])
- ◆ A contract worker to racially harass another contract worker
- ◆ A partner of a partnership firm to racially harass another partner or a person applying to be a partner
- ◆ A principal to racially harass a commission agent
- ◆ A commission agent to racially harass another fellow commission agent
- ◆ A job applicant to racially harass an employer
- ◆ Person A to racially harass person B, if person A lives in a place where person B is employed by a third person to work, whether or not person B also lives in that place

Illustration 33:-

If a person employs a domestic helper to work at home, other people who lives in the household must not racially harass the domestic helper.

- ◆ Providers of vocational training to racially harass people who want to be trained or are being trained [s.25(3)]
- ◆ Employment agencies or their staff to racially harass people who want to be provided with their services [s.25(4)]

4.5 Vilification and the offence of serious vilification

- 4.5.1 In addition to racial harassment, both employers and employees should note that work activities may be regarded as activities in public, and that any activity in public may be unlawful if it is done to incite hatred towards, serious contempt for, or severe ridicule of other people because of their race. Such an activity is called vilification under the Ordinance. [s.45]

- 4.5.2 Activity in public include any form of communication to the public or conduct observable by the public, such as speaking, writing, gestures or wearing of clothing, displaying signs, flag, emblems and insignia.

Illustration 34:-

A street procession displaying slogans that tend to justify the Holocaust by degrading Jewish people is likely to constitute unlawful racial vilification against Jewish people.

- 4.5.3 An act of vilification done with intent and involves threats of physical harm to people of the targeted race or their property is a criminal offence punishable on conviction by fine at a maximum at \$100,000 or imprisonment for a maximum of 2 years. [s.46]

4.6 Other unlawful acts under the Ordinance

In addition to the different forms of discrimination, racial harassment and vilification mentioned above, there are other acts relating to employment activities which are unlawful under the Ordinance. These other unlawful acts include:-

4.6.1 Discriminatory advertisements

Under the Ordinance [s.42], it is unlawful to publish or cause to be published an advertisement which indicates, or might reasonably be understood to indicate, that:-

- ◆ the job will not be given to someone from certain racial group(s) or with certain racial characteristics, or
- ◆ some unjustifiable racially discriminatory requirements or conditions will be applied to the job applicant or job holder.

Illustration 35:-

An advertisement saying that Chinese dish-washers are wanted for a restaurant is likely to be unlawful because it indicates that people from other racial groups who are not of Chinese origin would not be given the job.

Illustration 36:-

An advertisement saying that ability to speak French fluently is required for the job of a room cleaner in a hotel is likely to be unlawful if this language ability is not necessary for room cleaning but has an adverse impact on most Chinese people who could not speak French fluently but are otherwise qualified for the job.

4.6.2 Instructions and pressure to discriminate

If person A has authority over person B, or if person B usually acts on the wishes of person A, it would be unlawful [s.43] for person A to make or try to make person B to do an unlawful act under the Ordinance (such as to racially discriminate or harass a third person).

Illustration 37:-

The managing director of a company usually does whatever the major share-holder tells him to do. The major shareholder tells him not to give the job of general manager to an applicant because the applicant is not of Chinese origin. This is likely to be unlawful.

Even if person A does not have authority or influence over person B, it would still be unlawful [s.44] for person A to induce or try to induce person B, by offering some benefit to or by threatening person B, to do an unlawful act under the Ordinance (such as to racially discriminate or harass a third person).

5 Liability for unlawful acts

5.1 Employer and principal liability

5.1.1 Anything done by an employee is treated as done by the employer as well under the Ordinance, even if the employer did not know or approve of what the employee had done [s.47(1)]. This means that if an employee racially harassed another employee, the employer would be treated having done the same thing and would be liable for the harassment. The employer can only escape from being held liable for employees' unlawful acts if he can show that he has taken reasonably practicable steps to prevent the employee from doing the act.

5.1.2 Similarly, anything done by an agent with the authority of the principal is treated as done by the principal as well, and the principal would be held liable for unlawful racial discrimination or harassment done by the agent [s.47(2)]. Under the Ordinance, authority from the principal does not have to be given expressly or before the agent's act, and the Court may hold that authority was implied in the circumstances of the case or was given after the agent's act.

5.1.3 An employer's liability for unlawful acts under the Ordinance may extend to situations outside the workplace or working hours, if they are sufficiently work-related.

Illustration 38:-

An office New Year dinner is held in a restaurant after office hours, attended by all staff. An employee racially harasses a colleague. The employer is likely to be liable for the harassment.

5.2 Employee liability for aiding employer's unlawful acts

5.2.1 It is unlawful for a person to knowingly help another person to do an unlawful act under the Ordinance, such as to discriminate a third person [s.48(1)].

5.2.2 When an employee or an agent does an act, and if the employer or the principal would be liable for the act, the employee or agent will be

treated as helping the employer or principal to do the act and may be personally liable for so helping. [s.48(2)].

Illustration 39:-

If a manager racially discriminates against a job applicant by refusing to offer him a job because he was not of Chinese origin, the company as employer will be treated as having done the same thing and will be liable for unlawful racial discrimination. Although the manager is not himself the employer and therefore cannot directly be liable for the refusal, he would be liable for aiding the company to unlawfully racially discriminate against the job applicant.

5.3 Employee's direct liability

5.3.1 An employee will be directly liable for racially harassment or vilification against other people.

Illustration 40:-

The employee in the illustration 38 above will be directly liable for the harassment.

5.3.2 In addition, as mentioned in paragraph 5.1 above, the employer will also be liable for the employee's harassing act, unless the employer has taken reasonably practicable steps to prevent the harassment.

5.4 Reasonably practicable steps by an employer to prevent unlawful acts [s.47(3)]

If an employee has done an unlawful act for which the employer would be held liable, the employer may escape liability by showing that he or she had taken reasonably practicable steps to prevent the employee from doing so.

The emphasis is to prevent. An unlawful act is not prevented by remedial action after it had occurred. So it is not good enough to only show that remedial action was taken after an unlawful act had occurred.

The employer must show that he has taken action to prevent the unlawful act before it occurs. To do this, the employer should adopt good practice to avoid discrimination and to promote racial equality in the workplace. Taking reasonably practicable steps to prevent employees acting unlawfully must be part of the employer's good practice. Although it is not good enough to show

only that proper remedial action was taken after the event, it does not mean that remedial action is not important. Only by taking proper remedial action in line with an established framework of good practice can it be said that there is effective prevention of unlawful acts.

Good practice which an employer should adopt will be discussed further in Section 8. Elements of good practice which are especially relevant to taking reasonable steps to prevent employees acting unlawfully are highlighted below:-

5.4.1 Policy

The first thing an employer should do is to make it clear to the employees that racial discrimination and harassment is not acceptable. To do this, it is recommended that an employer should draw up a written equal opportunities policy. Such a policy should include explicit reference to racial equality and should explain that:-

- ◆ No job applicant or employee would be treated less favourably on the ground of his or her race than other applicants and employees;
- ◆ No adverse impact or disadvantage for job applicants or employees of any particular racial group would be caused by any requirement or condition in the rules and practices of the employer, unless the requirement or condition can be justified as a proportionate and appropriate means to achieve a legitimate objective;
- ◆ Opportunities for employment, training and development are equally open to all regardless of race;
- ◆ Everyone's dignity is to be respected. No job applicant or employee is to be subjected to racial harassment in any way;
- ◆ All staff should familiarize themselves with the types of behaviour which are not acceptable (examples should be provided for reference);
- ◆ There is a grievance system for job applicants and employees to raise any concern or complaints, and that the employer will deal

with such matters properly with appropriate remedial action;

- ◆ No reprisal will be directed against anyone raising concern or complaints, though unfounded complaints made in bad faith may be subject to disciplinary action.

The employer should regularly monitor and review the organization's practices, procedures and policies to ensure that they are consistent with the equal opportunities policy. This should apply to all stages and aspects of employment, including recruitment criteria and arrangements, performance evaluation, employment benefits, opportunities for development and training, grievance and disciplinary procedures, and redundancy selection and procedures.

5.4.2 Training, supervision and remedial action

All employees should be made aware of the Ordinance and the employer's equal opportunities policy and how they apply. Training appropriate to their responsibility should be provided on what is and is not acceptable behaviour. Staff with supervisory functions should be trained to deal appropriately with race equality issues, including proper handling of complaints and concerns, so that proper supervision is exercised and that no decision-making would contravene the Ordinance.

In the event of a complaint or legal proceedings being brought against the employer, the employer may have a better chance of defending a claim if it could be shown that:-

- ◆ All employees have been appropriately trained and made aware of the Ordinance, and the organization's equal opportunities policy, and everyone's rights and responsibilities;
- ◆ All employees are properly supervised and there are proper channels to deal with any grievances and complaints, and that when grievances and complaints do occur, they are dealt with properly by appropriate remedial action.

6 Further details on direct and indirect discrimination

Employer and principal liability

Basic concepts relating to discrimination under the Ordinance are introduced in the overview of unlawful acts in Section 4 above. This Section provides more information to supplement the overview in Section 4 on direct and indirect discrimination.

6.1 Direct discrimination

The following points may be noted about direct discrimination (i.e., less favourable treatment):

6.1.1 Comparison

- (i) The treatment received by a person claiming to be a victim of discrimination must be compared to the treatment received by another person of a different race. This other person may be called a comparator. The comparator does not have to be an actual person. The Court may draw inferences on how a hypothetical comparator would be treated and compare that treatment to the treatment received by the person claiming discrimination.
- (ii) In order to carry out a proper comparison, the circumstances of the comparator must be the same or similar to the circumstances of the person claiming discrimination [s.8(5)&(6)]. When the result of the comparison shows that the person claiming discrimination is treated less favourably than the comparator because of the person's race, then there is direct racial discrimination.
- (iii) In the context of racial discrimination, it would be instructive to ask what would have happened if the person claiming discrimination belongs to another race in order to determine the treatment of the comparator and to decide whether race was the reason for the treatment.

Illustration 41:-

Account managers are normally given one month performance bonus at the end of the year. An account manager of South Eastern Asian origin was only given half a month performance bonus because his sales figures came below the standard quota. Other account managers who were of Chinese origin were given one month bonus because they all met the standard quota.

A complaint by the South Eastern Asian manager of racial discrimination in that he was only given half a month bonus is unlikely to succeed because the relevant circumstances in his situation is different from other account managers, in that his performance was below the standard quota whereas the other managers met the standard. Another way of looking at the matter is that he would have been given half a month bonus even if he was of Chinese origin because of his below quota sales, so race was not the reason for the half month bonus.

If on the other hand, all account managers including the South Eastern Asian manager met the standard quota, but he was still only given half a month bonus, and that he would have been given one month bonus if he was of Chinese origin, then there is likely to be direct racial discrimination.

6.1.2 More than one reason for doing an act [s.9]

If an act is done for more than one reason, but one of the reasons is the race of a person, then it is taken to be done for the reason of the race of the person.

6.1.3 Motive

- (i) Discrimination is a complex phenomenon and often comes as a result of ingrained socio-cultural conditioning. Prejudice leading to discrimination may exist in the mind of the person without the person even realizing it or admitting it to himself or herself. The subjective values of a person may be that certain action is well-meaning, while in fact it amounts to less favourable treatment of another person because of race.

- (ii) For this reason, once it can be shown that a person is treated less favourably and that the reason was race, the fact that there is no ill motive for the treatment, or even if there is a good motive, is not an answer to a discrimination claim.

Illustration 42:-

Upon seeing a worker of South Eastern Asian origin racially harassed and abused by co-workers, the manager feels sympathy for the worker and terminated the worker's employment because he genuinely believes that the worker would be able to obtain a better job with another company because of his good ability. Even though the manager did not harbor any ill motive, it is likely that the termination of employment is unlawful racial discrimination.

6.1.4 Treatment of others may not be determinative

Prejudice is one of many factors affecting behaviour. It may dominate behaviour on some occasions but not on others, depending on what other factors are involved. This means that it is possible for discrimination to occur against some members of a racial group but not others in the same group, or on some occasions but not others, or in respect of some aspects of life but not others. Just because some members of the same racial group are not discriminated against, it does not necessarily mean that no one from that racial group would suffer discrimination. Direct discrimination is concerned with how a particular individual person is treated and whether that person's racial characteristics is a reason for his or her treatment. Though how other people of the same racial group are treated will be a relevant factor to consider, it may not be a complete answer to a claim of discrimination to say that other persons of the same racial group are not discriminated against.

Illustration 43:-

An employer who refuses to offer a job to candidate because the candidate was of South Eastern Asian origin, but was otherwise the most suitable candidate, may not successfully defend a claim of racial discrimination simply by saying that he has other employees of South Eastern Asian origin.

6.1.5 Burden of proof and evidence

- (i) In Hong Kong, it is for the person claiming discrimination to show on the evidence that there was less favourable treatment and that it was because of race.
- (ii) Often the person claiming discrimination cannot point to any direct evidence that an act was done because of race. As recognized by Courts in Hong Kong and in other countries with similar discrimination legislation, it is unusual to find direct evidence of racial discrimination and that few employers will be prepared to admit discrimination even to themselves.
- (iii) Usually the Courts will draw inferences from circumstantial evidence. A difference in treatment between the person claiming discrimination and a comparator, together with a difference in race between them, will often point to the possibility of racial discrimination. In such cases, unless there is clearly a non-racial explanation to the difference in treatment, the Court will look to the employer for an explanation. If no adequate explanation is given by the employer, the Court may draw an inference of racial discrimination.

6.2 Indirect discrimination

As introduced in Section 4 above, indirect discrimination is the application of a requirement or condition that has adverse impact on, or causes a disadvantage to, particular racial groups and which is not justifiable.

6.2.1 Requirement or condition

A requirement or condition in this context means any pre-requisite which has to be attained or complied with before someone can obtain a benefit he or she wishes.

Illustration 44:-

A requirement for staff to wear uniform would be a requirement or condition for the purpose of indirect discrimination because for the employee to be employed he must comply with the requirement of wearing a uniform. The question will then be whether this requirement

has an adverse impact on or causes a disadvantage to any racial group, and if so, whether it is justifiable.

6.2.2 Comparison of proportions

- (i) To determine whether a requirement or condition has an adverse impact on or causes a disadvantage to a particular racial group, the Ordinance compares the proportion of complying persons within that racial group with the proportion of complying persons in other racial groups. If the proportion of complying persons within that racial group is considerably smaller than the proportion of complying persons in other racial groups, then there is an adverse impact or a disadvantage.
- (ii) Compliance, in this context, does not mean the mere possibility of physical compliance. If it is practically difficult or disadvantageous for a person to comply with a requirement or condition, the person will be regarded as not being able to comply, even if it may be physically possible for him or her to do so.

Illustration 45:-

It is the practice and custom of the Sikh people not to cut their hair and to wear a turban. This becomes part of their ethnic identity. A requirement or condition that all employees must cut their hair so as not to touch the collar and must wear a baseball cap as part of their uniform will be a requirement or condition that most, if not all, Sikh people cannot comply with, even though it is physically possible for them to do so if they were to give up their ethnic identity. The proportion of complying persons among the Sikh people who can comply with this requirement or condition will be very small, if any, compared to the proportion of the complying persons within other racial groups.

- (iii) Accurate statistical evidence may be helpful in ascertaining the proportions of the complying persons within different racial groups to which a requirement or condition is applied. But in the absence of statistical evidence, the Court may draw appropriate inferences from circumstantial evidence and may reach appropriate conclusion from common knowledge and

experience.

- (iv) If the difference between the proportions of complying persons within different racial groups is such that one group is considerably smaller than others, then there is an adverse impact or disadvantage, and the requirement or condition is indirectly discriminatory. Whether one proportion is considerably smaller than another is ultimately a question of the Court to decide in all the circumstances.

6.2.3 Justifiable requirements or conditions

- (i) A requirement or condition which has adverse impact on or causes a disadvantage to, a particular racial group is not necessarily unlawful. Such a requirement or condition will not be unlawful if the employer or the person imposing it can show that it is justifiable irrespective of race.
- (ii) The burden is on the employer or the person imposing the requirement or condition to show that it is justifiable.
- (iii) The Ordinance says [s.4(2)] that a requirement or condition is justifiable if it serves a legitimate objective and bears a rational and proportionate connection to the objective.
- (iv) Any lawful objective is likely to be a legitimate objective. Whether the requirement or condition bears a rational and proportionate connection to the objective will involve a balancing exercise between the discriminatory effect of the requirement or condition and the need for imposing it.
- (v) In determining where the balance lies, it is important for all parties to properly explore any feasible alternatives or adjustments to the requirement or condition. Employers should be prepared to be flexible with any policies or rules. If they are inflexible and refuse to seriously explore and consider alternatives or adjustments to any requirement or condition without convincing reasons, the Court may regard them as failing to show that the requirement or condition is justifiable.

Illustration 46:-

A company recruiting an interpreter to assist negotiation with Japanese traders requires applicants for this job to speak, read and write fluent Japanese. Under this requirement, non-Japanese racial groups are likely to be proportionally disadvantaged when compared to Japanese, though individual persons not of Japanese origin may still be able to meet the requirement. In any event, it is likely that the requirement will be justifiable in the light of the objectives of the job.

- (vi) Conversely, employees and people claiming indirect discrimination should also co-operate in exploring alternatives and adjustments. If they unreasonably refuse to co-operate, the Court may accept that the requirement or condition is justifiable.

7 Exceptions and matters not affected

This section deals with exceptions and situations specified under the Ordinance where decisions made because of, or having an impact on, race would not be unlawful.

7.1 Genuine Occupational Qualification [s.11]

The following situations are situations where an employer may lawfully require a job holder to be a person of a particular racial group:-

- ◆ Performer authenticity in dramatic performances or other entertainment

Illustration 47:-

It is likely that the organizer of a traditional Thai dance performance to recruit dancers of Thai origin only for the authenticity of the performance. On the other hand, this may not apply to a clerical staff doing purely administrative work for the organizer.

- ◆ Model authenticity in work of art and visual images

Illustration 48:-

A photographer working on a project to showcase Indian culture may only employ models of Indian origin for authenticity of the work.

- ◆ Authenticity in relation to consumption of food and drink

Illustration 49:-

A restaurant specializing in Russian cuisine may only hire waiters/waitresses of European origin to create an authentic atmosphere.

- ◆ Job holder can most effectively provide personal services promoting the welfare of persons of a particular racial group
- ◆ Job holder can most effectively provide personal services which require familiarity with the language, culture and customs and sensitivity of a particular racial group

Illustration 50:-

A social service organization may lawfully recruit a person of South Eastern Asian origin for the purpose of providing outreaching counseling services to South Eastern Asian youth.

7.2 Training for skills to be used outside Hong Kong [s.12]

It is not unlawful for an employer to provide a benefit to a person not ordinarily resident in Hong Kong in relation to employing this person in Hong Kong for the purpose of training this person in skills which are intended to be used wholly outside Hong Kong.

7.3 Employment of persons with special skills, knowledge or experience [s.13]

- (i) It is not unlawful for an employer to provide a benefit to a person in relation to employing this person in Hong Kong, if the job requires special skills, knowledge or experience not readily available in Hong Kong.
- (ii) The job holder must actually possess the required skills, knowledge and experience and must be recruited or transferred from outside Hong Kong.
- (iii) The benefit must be reasonable taking into account all relevant circumstances and the prevailing terms of employment outside Hong Kong for those skills, knowledge or experience.
- (iv) The benefit may continue to be given to the job holder when his or her contract is renewed or if he or she is promoted or transferred within the same group of companies.

7.4 Existing local and overseas employment terms [s.14 & Sch.2]

For decades before the enactment of the Ordinance, it has been common for employers to employ staff on different terms depending on the staff's residency status. Hong Kong permanent residents are employed on local terms, and non-permanent residents are employed on overseas terms. Overseas terms are generally perceived to be more favourable to the employee than local terms. The continuation, extension or renewal of existing overseas and local terms of employment after the commencement of the Ordinance will not be unlawful. This applies both to the private sector and the public sector (covering judicial officers, officers of the Independent Commission Against Corruption, specified

English teachers and other public officers).

7.5 Special measures [s.49]

- (i) Because of discrimination or other disadvantages in the past, people from particular racial groups may have been deprived of the opportunity to gain the necessary qualification or experience to fully realize their career potential. In such circumstances, it is not unlawful to take measures to specifically help people from disadvantaged racial groups so that they have the opportunity to compete on equal terms with other people. These measures are called special measures under the Ordinance and may include facilities and services such as language classes or other types of training and education.
- (ii) The Ordinance specifically allows training arrangements to be specifically provided for particular racial groups, or encouragement to be given to persons from these groups to apply for jobs, if these groups are under-represented or absent in any job or profession. [s.51 &52]
- (iii) Before designing and implementing special measures, it is recommended that appropriate data should be obtained, through a survey or other monitoring exercise or mechanism, to ascertain whether and how any particular racial groups are disadvantaged or underrepresented. Special measures should be inclusive of all the disadvantaged groups, and should not favour some group but not others who are equally disadvantaged.
- (iv) It is important to note allowable special measures are only meant to provide opportunities to disadvantaged groups so that they may compete for jobs on equal terms with other people. They do not mean providing jobs or job quota only for persons from particular racial groups. To decline a job or any form of employment because the applicant is not a person from a disadvantaged racial group is discrimination because of race and may be unlawful.

8 Good practice

Good practice is the key for promotion of racial equality and for employers to meet their obligations under the Ordinance to prevent racial discrimination and other unlawful acts. Adoption of good practice will help to avoid and defend claims of unlawful acts.

A systematic approach is the best way to develop and maintain good practice. Adopting such an approach, it is recommended that employers should draw up and properly implement an equal opportunities policy. While the policy may incorporate other kinds of equality, it should explicitly include all elements of racial equality.

8.1 Drawing up policy

As already mentioned in paragraph 5.4.1 above, the following should be explained in the equal opportunities policy in relation to racial equality:-

- ◆ No job applicant or employee would be treated less favourably on the ground of his or her race than other applicants and employees;
- ◆ No adverse impact or disadvantage for job applicants or employees of any particular racial group would be caused by any requirement or condition in the rules and practices of the employer, unless the requirement or condition can be justified as a proportionate and appropriate means to achieve a legitimate objective;
- ◆ Opportunities for employment, training and development are equally open to all regardless of race;
- ◆ Everyone's dignity is to be respected. No job applicant or employee is to be subjected to racial harassment in any way;
- ◆ All staff should familiarize themselves with the types of behaviour which are not acceptable (examples should be provided for reference);
- ◆ There is a grievance system for job applicants and employees to raise any concern or complaints, and that the employer will deal with such matters properly with appropriate remedial action;

- ◆ No reprisal will be directed against anyone raising concern or complaints, though unfounded complaints made in bad faith may be subject to disciplinary action.

8.2 Implementation

It is not good enough just to draw up an equal opportunities policy. Employers must make sure that their policy is properly implemented. Employers are likely not to have met their obligations if their policy exists only on paper.

The policy should apply to all aspects and stages of employment, covering recruitment, remuneration and benefits, terms and conditions of work, career development and training, performance evaluation, grievance and disciplinary matters, termination and redundancy.

In order to ensure that the policy will be implemented properly, there should be clear allocation of responsibility. Designated personnel should be appointed to deal with matters relevant to the policy. There should be a senior level leadership responsible for the effective promotion and implementation of the policy. In large organizations, this could be delegated to a committee of the board or a body at directorate level. In smaller organizations, this function could be assumed by the general manager, a director or the proprietor of the business.

The following aspects of implementation should be noted:-

8.2.1 Dissemination and training

The policy should be widely disseminated and made known to all recruits and employees. This could be done by various means, such as giving a copy of the policy to them, by paper circulation, by posting it on websites or notice boards. Employees can be asked to sign a record to indicate that they have been made aware of the policy.

Training should be conducted to ensure that all employees are aware of the Ordinance and the employer's equal opportunities policy and how they apply. The training should be appropriate to the employee's level and area of responsibility. Relevant parts of this Code may inform the contents of the training.

All staff should be told that other people's racial dignity must be respected. They should be made aware of what is and is not acceptable behaviour at work. Staff who are concerned with recruitment, or who have supervisory functions, or are concerned with performance assessment, staff planning or development should be aware that all decisions and assessment must be strictly based on merits and relevant information. No stereotypical assumptions or prejudicial judgment should be made about people from different racial backgrounds.

Training needs should be reviewed from time to time. Records of training should be kept as consistent with personal data legislation.

8.2.2 Recruitment

In the recruitment process, the requirements of a job and the selection criteria must be objectively determined and be relevant to the job. There should be careful consideration of the objectives, duties and scope of each job, before arriving at the skills, qualification or experience which are required for the job. Requirement or criteria should not be unnecessarily high. This includes unnecessary language requirement, such as college level Chinese requirement for a manual job, when simple understanding of Cantonese will suffice.

Selection criteria should be based strictly on the skills, qualification or experience required. Criteria and weighting should be determined before commencement of the process, and should not be changed afterwards to accommodate a particular candidate.

It should be noted that vacancy advertisement which indicates the following may be unlawful:-

- ◆ the job will not be given to someone from certain racial group(s) or with certain racial characteristics, or
- ◆ unjustifiable racially discriminatory requirements or conditions will be applied to the job applicant or job holder.

Other matters that should be avoided in the recruitment process include:-

- ◆ Asking for photographs;
- ◆ Refusing an interview just because the Applicant's name or other information indicates that he or she is from a particular racial group;
- ◆ Questions in interview which are not directly relevant to the objective job requirements or selection criteria, such as those about the Applicant's racial, religious or cultural background.

If an employment agency is involved in the recruitment process, the employer should make clear to the agency its stance on racial equality.

8.2.3 During employment

- (i) All decisions about remuneration, bonuses and other benefits, performance evaluation, career development, grievance and disciplinary matters, redundancy selection and termination, must be free of racial consideration. Employers can only give encouragement or targeted training or facilities for persons of particular racial groups, if these groups are under-represented in a job or at a level of the organization. In all other cases, they must not discriminate on the ground of race.
- (ii) In relation to application for internal vacancies or training opportunities, employers should ensure that relevant information reaches all eligible persons equally regardless of race. Selection for training, transfer or promotion should strictly be based on merits and relevant information, and all eligible candidates should be considered regardless of race. No decision or process should be influenced by racial consideration and no stereotypical assumptions or prejudicial judgment should be made about people from different racial background.
- (iii) Consideration or comments about an employee's racial background should be avoided in performance assessment or any selection process. Staff with performance assessment functions should be trained to evaluate performance objectively. There should be proper documentation of any performance issues.

- (iv) Employers should consider providing training to employees on racial diversity and sensitivities.

8.2.4 Grievance and disciplinary matters

- (i) Employers should handle all grievance and disciplinary matters without being influenced by racial considerations. Disciplinary actions should be fair and consistent regardless of the employee's race.
- (ii) Allegations of racial discrimination and harassment should be taken seriously and dealt with promptly. No reprisal will be directed against anyone raising concern or complaints, though unfounded complaints made in bad faith may be subject to disciplinary action.

8.2.5 Termination and redundancy selection

- (i) Employers must not terminate employment or make redundancy decision on racial grounds. Termination includes non-renewal of contract and constructive dismissal.
- (ii) Employers must make sure that redundancy selection criteria do not adversely impact or disadvantage any particular racial group.

8.2.6 Language

- (i) Language is a communication tool. The ability to use a specific language is not directly or biologically connected to a person's race characteristics because it is physically possible for a person of any race to learn any language. In this sense, discrimination because of the lack of ability to use a specific language is unlikely to be direct racial discrimination.
- (ii) However, the ability to use a specific language may be used as a requirement or condition which must be met before a benefit can be enjoyed. As the use of specific language(s) need not be the only way of communication because meaningful communication may also be achieved using other languages or non-verbal or other

means of communication, a language requirement which put persons from some racial groups at a disadvantage may be unlawful indirect discrimination if it is not justifiable.

- (iii) Whether or not a language requirement or condition is justifiable will depend on whether other reasonable alternative means of communication are available and whether there has been a reasonable attempt to communicate. If there has been a reasonable attempt to communicate but there are no other reasonable alternative, then the use of a specific language(s) is likely to be justifiable.
- (iv) The ability to effectively communicate with customers and with colleagues is invariably a justifiable requirement or condition of almost all employment. In Hong Kong, English and Chinese are official languages, and Cantonese is the dominant Chinese dialect spoken. The vast majority of the population use either or both of these languages. The ability to use either or both of these languages is likely to be justifiable in most employment in Hong Kong. However, there is a wide range of proficiency level in the use of language. This means that even if some ability to use specific language(s) is justifiable, an unnecessarily high requirement may not.

Illustration 51:-

It is unlikely to be justifiable to require a supermarket cashier to possess Form 5 level Chinese.

- (v) The ability to use languages other than Chinese and English may also be a justifiable requirement or condition for employment if the job requires this ability.

8.2.7 Review and monitoring

- (i) Employers should make sure that all their rules, practices, policies and procedures are consistent with their equal opportunities policy and the racial equality elements in it.
- (ii) Employers should review these other rules and practices to make sure that they do not have any adverse impact on, or causes any

disadvantage to, any particular racial group.

- (iii) In order to do this, employers should gather information about job applicants and employees (including the senior staff) to form a profile of them. Through various methods such as survey by questionnaire or consultation, employers may gather information on the effect of its rules and practices so as to assess whether there is any adverse impact or disadvantage caused to any particular racial group.
- (iv) Review and monitoring should be done for all aspects and stages of employment, covering recruitment, remuneration and benefits, terms and conditions of work, career development and training, performance evaluation, grievance and disciplinary matters, redundancy selection and termination.

8.2.8 Under-represented racial groups

- (i) If the result of review and monitoring indicate that some racial groups are under-represented or absent in some jobs or at some level, employers may, if they choose to, encourage persons from these groups to apply for the job and to advance to higher level by providing targeted training or appropriate facilities to them. However, there is no legal obligation to compel employers to do so.
- (ii) Except for targeted training or facilities to encourage persons from under-represented racial groups, all other decisions about recruitment, remuneration, bonuses and other benefits, performance evaluation, career development, grievance and disciplinary matters, redundancy selection and termination, must be free of racial consideration.
- (iii) It is likely to be unlawful to provide employment or advancement opportunities only to people from particular racial groups, unless the exceptions listed in paragraph 7.1 apply. It is also likely to be unlawful to exempt people from particular racial groups but not others doing the same job from certain duties or requirements of the job.

(iv) In large organizations where there are job applicants and employees from diverse racial backgrounds, employers should pay attention in the review and monitoring process to any significant disparities in relation to the following matters between people from different racial backgrounds:-

- ◆ Number of job applicants and employees proportional to the general population, both for the entire work force and for particular functions or levels within the organization;
- ◆ the success rate of job applicants;
- ◆ remuneration, benefits, bonuses and performance pay;
- ◆ career development and training;
- ◆ rate of termination and disciplinary matters.

(v) If there are disparities, the causes should be investigated. Where racial considerations may have influenced decision-making, employers must prevent this from recurring. Appropriate training or encouragement to under-represented racial groups may also be provided to correct the disparities.

(vi) The process of gathering and analyzing information for monitoring and review requires systematic planning. Employers should consider adopting an action plan to carry this out with targets for different stages and different parts of the organization. Where there are disparities to be addressed, the plan may also provide targets to be achieved in stages.

9 Complaint and legal proceedings

9.1 Complaint handling

Under the Ordinance, a person who feels an unlawful act has been done against him or her may lodge a complaint in writing with the EOC within 12 months of the act.

The EOC is a statutory body created by law. It has functions under different anti-discrimination laws including the Ordinance. Its general functions under the Ordinance are:-

- ◆ To work towards the elimination of racial discrimination, harassment and vilification;
- ◆ Promote equality and harmony between different racial groups;
- ◆ To encourage settlement of disputes under the Ordinance by conciliation;
- ◆ To keep the working of the Ordinance under review.

The EOC's role and responsibilities in relation to dealing with complaints under the Ordinance are outlined below. For further details, please consult specific publications published by EOC.

9.1.1 Investigation

- (i) When a complaint is lodged with the EOC, it will investigate into the complaint. The primary objective of the investigation is to equip the EOC and the parties with appropriate information. It is an exercise to help clarify the issues for the EOC and the parties, so as to maximize the chance of successful conciliation later.
- (ii) Both parties should provide all relevant and appropriate information during the investigation.
- (iii) If, from the information available, the EOC takes the view that the complaint is frivolous, vexatious, misconceived or lacking in substance, the EOC may not conduct or may discontinue an

investigation. Other situations when the EOC may not conduct or may discontinue an investigation include where the complaint is not unlawful under the Ordinance, where more than 12 months have passed since the act was done or where the person aggrieved does not desire the investigation to be conducted or continued.

- (iv) The EOC will maintain an independent and impartial role during the investigation. If investigation is conducted and is not discontinued, the EOC will proceed to help the parties to settle their dispute by conciliation. The EOC will not make any definitive judgment on the merits of the complaint throughout the whole complaint-handling process.
- (v) Information provided during the investigation may be admissible in evidence before the Court if legal proceedings were brought at a later stage.

9.1.2 Conciliation

- (i) As the primary objective of the complaint-handling process is settlement of the complaint by conciliation, the EOC may at any stage of the process explore the possibility of settlement between the parties. This may occur at an early stage soon after the complaint is lodged before any investigation into the details. If parties could not at an early stage reach settlement, then investigation into details will continue.
- (ii) If the EOC does not discontinue the investigation, it will proceed formally to the conciliation process. In the conciliation process, it is for the parties to decide if and how they would agree to resolve their dispute. Everything said and done by a party in the course of conciliation is not admissible in subsequent legal proceedings relating to the dispute except with the consent of that party.
- (iii) If parties are able to reach a settlement, a settlement agreement is usually signed and is legally binding between the parties. Subject to parties' agreement, terms of settlement may include monetary compensation, changes in policy and practices, reinstatement or apology.

9.2 Legal Assistance

- (i) When a complaint has been lodged with the EOC, but there has been no settlement of the complaint, the aggrieved person may apply for assistance from the EOC to take legal proceedings.
- (ii) The EOC will consider all applications for legal assistance but it has a wide discretion to decide whether it will give assistance in any particular case. In this connection, unlike the Legal Aid Department, the EOC is not a legal aid agency for racial equality cases.
- (iii) In deciding whether to provide assistance in each application, the EOC will take into account a wide range of factors including whether the case raises a question of principle, the complexity of the case, the strength of the evidence, and the EOC's own strategic concerns and priorities.
- (iv) If legal assistance is provided by EOC, it may include giving legal advice and representation on the case by EOC's own legal officers or outside lawyers.

9.3 Right to take legal proceedings

- (i) Under the Ordinance, a person who feels that an unlawful act has been done against him or her has the right to pursue the claim directly through legal proceedings in court without lodging a complaint with the EOC or applying for EOC's legal assistance.
- (ii) Legal proceedings under the Ordinance are dealt with in the District Court similar to other civil proceedings. There is a 2 year time limit for taking action from the time when the unlawful act is done. If a complaint has been lodged with the EOC, the time spent by the EOC in investigation and conciliation will not be counted towards the 2 year time limit.
- (iii) In taking legal proceedings under the Ordinance, other than applying for EOC's legal assistance, a person may represent himself or herself by his or her own lawyers, or apply for legal aid from the Legal Aid Department.



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