

**For discussion
on 17 May 2010**

Legislative Council Panel on Constitutional Affairs

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

Purpose

This paper seeks Members' views on the draft Revised Code of Practice on Employment under the Disability Discrimination Ordinance (the revised code).

Background

2. The Equal Opportunities Commission (the EOC) published the draft revised code on 8 April 2010 for public consultation. The period of consultation will last for three months until 8 July 2010. The draft revised code is **at Annex** for Members' reference.

3. The EOC is a statutory body set up to implement the anti-discrimination ordinances, including the Disability Discrimination Ordinance (the DDO). Section 62 of the DDO stipulates the EOC's primary function to work towards the elimination of disability discrimination. The EOC may also issue codes of practice, pursuant to Section 65 of the DDO to provide practical guidance for the above-mentioned purpose.

The Existing Code of Practice on Employment under the DDO (the code)

4. The existing code has been in use since 1997, providing general guidance to employers in Hong Kong on implementing equality of opportunities between persons with disabilities and those without. It was kept simple at the time, adhering to the original wording of the ordinance to provide a quick jumpstart on the implementation of a newly enacted piece of

legislation.

5. In the past years, as the public gains wider knowledge on the DDO, there have been numerous developments in the international arena (including the coming into effect of the Convention on the Rights of Persons with Disabilities causing a paradigm shift of approach toward persons with disabilities and development of overseas jurisprudence) and in the local context (in terms of the expansion in local case law) in the advancement of the rights of person with disabilities. These developments have prompted for the updating of the existing code to ensure that it continues to encourage and nourish a healthy and productive partnership between employers and employees on working to achieve an equitable workplace for all.

The Revised Code

6. The revised code uses a structured layout for specific and topical application of the DDO. Each chapter begins with an introductory paragraph that highlights the relevance of the topics to be discussed with emphasis on the spirit of the law. There are abundant case illustrations with contrasting effect to demonstrate the application of principles in varying circumstances. These case illustrations were derived from overseas and local precedents, of which some were constructed based on frequently complained situations in the local context. All illustrations were thoroughly analyzed followed by good practice suggestions where possible.

7. The revised code contains twelve chapters as follows:

- | | |
|---------------|---|
| Chapter 1: | states the purpose and status of the code; |
| Chapter 2: | gives an overview of how the DDO is applied in the employment context; |
| Chapters 3-5: | explains the essential terminologies and concepts in the DDO, such as the intertwined relationship among inherent requirements, reasonable accommodation and unjustifiable hardship; |
| Chapters 6-8: | takes the readers through the employment cycle on recruitment, promotion, transfer, dismissal and management of sick leave to reinforce the concepts and definitions mentioned in the |

	previous chapters;
Chapter 9:	deals with disability harassment and vilification;
Chapters 10 & 11:	discusses different levels of liability when committing unlawful discrimination and the benefits of an equal opportunities employer;
Chapter 12:	outlines the various roles and functions of the EOC and lists the channels of redress, including lodging a complaint with the EOC.

Public Consultation and Legislative Procedures

8. Section 65 of the DDO governs the procedures of the issue of the revised 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 may also consult stakeholders as it deems appropriate.

9. In producing this revised code, the EOC has consulted representative non-governmental organisation (NGO) groups and human resources practitioners representing employers of all sizes, including government agencies. The revised code has now been published for public consultation to invite written comments and representations from the public.

10. During the three-month public consultation, the EOC would further meet with stakeholder groups and conduct public forums to collect views and comments from the community. The EOC endeavors to ensure that all our public forums are as accessible in terms of venue location and audience's participation during the sessions. Accessible transportation and special arrangements including sign language interpretation, assistive listening devices and other languages interpretation are available upon request. There will also be specific visits paid to employers' and employees' groups as well as relevant NGOs, including six visits to our ethnic minority communities to prepare them for better participation in the consultation exercise. The revised code is available in English and Chinese. Additionally, it is also available in Braille print, larger print and audio version, and has also been translated into six minority languages (Urdu, Hindi, Nepali, Tagalog, Thai and Indonesian).

11. At the end of the public consultation, the EOC would consolidate all the views and comments received and issue a consultation report. The revised code would also be modified as necessary and published in the Gazette. It would then be laid before the Legislative Council for negative vetting. The revised code is expected to become effective and be issued towards the end of 2010.

Equal Opportunities Commission
May 2010

Revised Code of Practice on Employment under the Disability Discrimination Ordinance

For Public Consultation

You are invited
to give your comments in writing to the
Equal Opportunities Commission
by 8 July 2010



平等機會委員會
EQUAL OPPORTUNITIES COMMISSION

April 2010

This document is issued by the Equal Opportunities Commission for the purpose of public consultation under Section 65 of the Disability Discrimination Ordinance.

Please forward your comments on this document in writing to the Equal Opportunities Commission by 8 July 2010:

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Chapter 1: Introduction

- 1.1 The Equal Opportunities Commission (EOC) is a statutory body responsible for the regulation and implementation of the anti-discrimination ordinances, namely the Sex Discrimination Ordinance (SDO), the Disability Discrimination Ordinance (DDO), the Family Status Discrimination Ordinance and the Race Discrimination Ordinance (RDO). Section 62 of the DDO stipulates the EOC's primary function to work towards the elimination of disability discrimination, harassment and vilification. Pursuant to Section 65 of the DDO the EOC is vested with the authority to issue or revise codes of practice on areas where it deems appropriate for better performance of its function and where applicable to assist employers to take reasonably practicable steps to prevent discrimination in the workplace.
- CAP 480
CAP 487
CAP 527
CAP 602
- S 65 (1) & (11)
- S 65 (12)

Purpose of the Code

- 1.2 The DDO has been in effect for over ten years since 1996. In the past years, as the public gains better and broader knowledge of the provisions in the DDO, there have been developments in legal jurisprudence and an increase in the number of complaints lodged with the EOC in relation to the DDO. Relevant facts from complaints handled as well as cases decided in court reveal trends in certain human resources management practices common in the Hong Kong workplace, such as sick leave management and work injury issues. It is, therefore, timely to revise the code of practice on employment so that it continues to encourage and nourish a healthy partnership between employers and employees (and other concerned parties) on working towards an equitable workplace for all. The revised code interprets

important concepts in the DDO in greater details and instills good practice suggestions for employers and employees to better understand their respective rights and responsibilities under the DDO and thus in turn respect and refrain from infringing the rights of others.

Status of the Code

1.3 This Code of Practice (Code) replaces the previous *Disability Discrimination Ordinance: Code of Practice on Employment* published by the EOC in January 1997.

1.4 Although the Code is not in itself an authoritative statement of the law and it does not create legal obligations, it is a statutory code that has been laid before the Legislative Council to provide recommendations for good employment procedures and practices. Although non-compliance with the Code may not result in automatic legal consequence, the Code shall be admissible in evidence and the court shall take into account relevant parts of the Code in determining any question arising from proceedings under the DDO ¹. Therefore, implementing the recommendations in the Code helps employers to reduce the risk of committing unlawful act(s) and limit chances of incurring vicarious liability. The Code should also be used to prevent disability discrimination and promote equal opportunities in the workplace.

S 65 (12)

S 65 (13)

S 65 (12)

Application of the Code

1.5 This Code provides employers in Hong Kong with practical guidance on how to prevent disability discrimination, harassment and vilification to better

S 65 (12)

¹ See *Teval (HK) Ltd. v Goubatchev* [2009] UK EAT

implement the DDO in the workplace. It also helps employees to understand their rights and responsibilities under the DDO.

- 1.6 Chapter 2 provides an overview of how the DDO is applied in the employment context. Chapter 3 specifies the breadth and coverage of the definition of disability.
- 1.7 Chapter 4 explains direct and indirect disability discrimination. Chapter 5 deals with the correlation among “inherent requirement,” “unjustifiable hardship” and “reasonable accommodation”. Chapter 6, 7, and 8 put the legal concepts outlined in the preceding two chapters into human resources management context and show how they may be applied in certain employment scenarios.
- 1.8 Chapter 9 elaborates on the definition of disability harassment and vilification.
- 1.9 Chapter 10 explains the liability of unlawful disability discrimination and discusses the statutory defence of “reasonable and practicable steps” against vicarious liability. Chapter 11 explains the principle of equal opportunities and provides proactive and positive implementation criteria.
- 1.10 Chapter 12 explains the three major functions of the EOC so that employers and employees could gain a better understanding of how the EOC may assist in discrimination cases, in particular how complaints and legal assistance applications are handled through essentially different mechanisms and procedures.
- 1.11 Each chapter of the Code should be viewed as part of an overall explanation of the provisions in the

DDO on employment. A purposive approach should be adopted when making reference to this Code. The Code should be read as a whole with reference to the DDO and not be construed too narrowly or literally. It is intended to explain the principles of the law, to illustrate how the DDO might operate in certain situations and to provide general guidance on good practice.

- 1.12 The Code aims to provide practical guidance but it is not a substitute for legal advice. Employers should consult legal practitioners for appropriate advice on the possible legal implication(s) of particular issues or situations.

Examples in the Code

- 1.13 Examples are given in boxes for illustrative purpose. They refer to particular situations to demonstrate how principles and concepts in the legislation should apply generally. Some of the examples are based on cases which have been decided by the courts, others have been adapted from enquiries and complaints received by the EOC.
- 1.14 Examples relating to men or women are given in an alternative manner strictly for the purpose of illustration. They bear no implications to any particular gender and are equally applicable to persons of any gender.

Chapter 2: Application of the DDO in Employment

5

- 2.1 With employment field being the major source complaints of discrimination, this Code concentrates on disability discrimination and harassment that occur within the field of employment as elaborated in Part III of the DDO. The field of employment encompasses a range of employment relationships covering most employment arrangements of a significant majority of the workforce, including foreign domestic helpers.
- 2.2 This chapter outlines the spectrum of employment relationships that are construed broadly under the DDO as having the employer-employee relationships, including, amongst others, applicants for employment, employees, commission agents, contract workers, employment agencies. It also gives an overview of what constitutes unlawful discrimination and harassment in the employment context.

The scope of employment under the DDO

- 2.3 The DDO stipulates that it is unlawful for an employer to discriminate against or harass an employee on account of his or her disability in the course of the employee's employment with the employer. S 11 & 22
- 2.4 The scope of employment under the DDO is essentially wider than what is generally understood as employment under common law and/or the labour legislation.
- 2.5 The DDO defines "employment" as employment under a contract of service or an apprenticeship or a contract personally to do any work. In this sense, employment would include working full-time, part-time or on any kind of contract, be it permanent S 2

or temporary, oral or written. Protection begins from the pre-employment stage applicable to job applicants and extends to post employment situations when the person has left the employment. S 11 (a)

2.6 The following employment related situations are also included in Part III and IV of the DDO:

2.6.1	Contract workers	S 13
2.6.2	Partners in firms	S 15
2.6.3	Persons undergoing vocational training	S 18
2.6.4	Persons seeking employment through services of employment agencies	S 19
2.6.5	Commission agents	S 20
2.6.6	Barristers	S 33

Working wholly or mainly outside Hong Kong

2.7 In order for a situation to fall within the scope of employment, the relevant discriminatory conduct must come within the course of the aggrieved person's employment.

2.8 For the purpose of DDO, every employment is treated as employment at an establishment in Hong Kong, unless the employee does his/her work wholly or mainly outside Hong Kong. However, even if the work is done mainly outside Hong Kong, it would still be covered by the DDO if employment takes place on a ship registered in Hong Kong, or, an aircraft registered in Hong Kong **and** operated by a person who has his principal place of business, or is ordinarily resident, in Hong Kong. In other words, if the employee does his/her work wholly outside Hong Kong, the DDO does not apply to that employment. S 14 (1)
S 14 (2)

Global Account Executive A is employed by a trading

company in Hong Kong. He works mostly in Hong Kong during his employment with the company except for having to take overseas business trips with duration ranging from overnight to less than a week at the frequency of about once a month. When A is dismissed on the ground of his disability, he should be protected under the DDO.

Another Global Account Executive B of the same company is hired as the local manager of the company subsidiary on the Mainland. The person spends most of her working time on the Mainland apart from being required to attend management meetings once a month at the company headquarters in Hong Kong. B is also dismissed on the ground of her disability, but she would not likely be protected under the DDO.

2.9 When a person works mainly in Hong Kong, the DDO applies even if the act of discrimination takes place outside Hong Kong. This means that the DDO applies to a person who is discriminated against when he/she works outside Hong Kong, as long as he/she has worked more time² in Hong Kong than outside Hong Kong in the whole period³ of his/her employment.

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

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

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

Flight Attendant C spends her working time mostly

² See *Carver v Saudi Arabian Airlines* [1999] ICR 991

³ See *Saggar v Ministry of Defence* [2005] IRLR 618

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

“In the course of employment”

- 2.11 Events occurred outside work hours and away from work premises could still come within the employment relationship provisions if it is closely work related. For example, unlawful discrimination and harassment could also take place during business trips overseas or company outings. On the other hand, an incident of a private nature arises outside work hours and away from work premises between work colleagues or a supervisor and staff, may not necessarily come within the employment relationship provisions. The key is the essential nexus between the subject incident and the employment that needs to be established.

S 14 (4)

Office Attendant E who has mild intellectual disability was insulted by his co-worker who called him “a retard” whilst the two were on their way to deliver a package. Although the harassment incident took place outside the physical premises of the office, it would very likely be considered as a work-related incident. The fact that the two were discharging their assigned duty could be an indication that the harassment had taken place in the course of the affected persons’ employment.

Other employment related matters

Commission agents

- 2.12 It is unlawful for a person acting in the capacity as a principal to discriminate on account of a person's disability when engaging a commission agent, including in the terms afforded, by denying or limiting access to any benefits, including opportunities for promotion, transfer or training or by terminating the engagement or by subject the commission agent to any other detriment.

S 20

See paragraphs 10.16 – 10.19 in Chapter 10 for liability of a principal

Contract workers

- 2.13 A contract worker is a person employed by a contractor or sub-contractor to do work for a principal. A contractor is someone who undertakes work for the principal under a contract made directly with the principal. A sub-contractor is someone who undertakes work that a contractor has undertaken for the principal. Although not directly employed by the principal, the DDO protects a contract worker from disability discrimination and harassment by the principal as if the latter were an employer.
- 2.14 As the complexity of the labour market increases, it can be anticipated that there will be different kinds of employment arrangements entered into under different kinds of contractual relationships. Ultimately, it would be the court's decision whether a person is a "contract worker" after due consideration of individual circumstances of each case. It would be advisable for an employer to make sure that their contractors, and, in turn, the sub-contractors are aware of the requirements and obligations under the DDO.

S 13 (1)

S 13 (6)

S 13 (6)

Employment agencies

- 2.15 Employment agencies are also covered under the

S 19

DDO and it is unlawful for an agency to discriminate in the provision of their services on the ground of a person's disability.

- 2.16 Where recruitment is done through employment agencies, including private agencies, employment services provided by Government Departments, educational establishments or non-governmental organisations, the employer should advise them that they are obliged to comply with the DDO and not to discriminate against person(s) with a disability in their selection process. Employers could incur liability from the unlawful act(s) of disability discrimination committed by these agencies through their principal and agent relationship. S 48
- 2.17 It is unlawful for employers to instruct or pressure employment agencies to commit discriminatory acts, for example, selectively screen out job applicants with disabilities or disadvantage them on the terms and conditions of employment. In this connection, an employment agency that carries out instruction(s) from an employer to do an act which may be discriminatory without reasonable justification(s) from the employer could be liable for aiding unlawful acts of discrimination. S 44 & 45
See also paragraph 10.4 in Chapter 10
S 49(1)
S 49(3)

Chapter 3: Definition of Disability under the DDO

3.1 “Disability” is an evolving concept; it results from the interaction between persons with disabilities and attitudinal and environmental barriers that hinders full and effective participation of persons with disabilities in society on an equal basis with others.⁴ The Convention on the Rights of Persons with Disabilities (the CRPD) marks a major shift in attitudes and approaches to persons with disabilities. Adopting a rights-based approach, persons with disabilities are no longer regarded as **objects** of charity, medical treatment and social protection; but as **subjects** with rights, who are capable of being active members of society.

3.2 Recognising the progression in disability rights, in particular the diversity of persons with disabilities⁵, the DDO adopts a fairly broad definition of disability to encompass most situations where a person should be regarded as having a disability and thus effectively protected by the law.

Defining disability under the DDO

- | | |
|---|------------------|
| 3.3 Section 2 of the DDO defines “disability” broadly in relation to a person to include: | S 2 (1) |
| 3.3.1 Total or partial loss of the person’s bodily or mental functions; | S 2 (1)(a) |
| 3.3.2 Total or partial loss of a part of the person’s body; | S 2 (1)(b) |
| 3.3.3 The presence in the body of organism causing / capable of causing disease or illness; | S 2 (1)(c) & (d) |
| 3.3.4 The malfunction, malformation or | S 2 (1)(e) |

⁴ Preamble (e) of the Convention on the Rights of Persons with Disabilities

⁵ Preamble (i) of the Convention on the Rights of Persons with Disabilities

disfigurement of a part of the person's body;

3.3.5 A disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or S 2 (1)(f)

3.3.6 A disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment that results in disturbed behaviour. S 2 (1)(g)

3.4 In brief, disability encompasses physical, mental, sensory, neurological and learning disabilities. It can be the presence of disease causing organism in a person's body, such as HIV. It also includes the malfunction, malformation or disfigurement of a part of a person's body; or a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment that results in disturbed behaviour.

3.5 Physical or mental impairment includes sensory impairment. Some impairment are visible while many others are hidden, such as mental illnesses and the entire range of mental health conditions, learning disabilities, dyslexia, diabetes, epilepsy, etc.

Persons who do not have a disability currently

3.6 Disability can include not only existing disabilities but also:

3.6.1 **Past disability** - a disability that existed in the past; S 2 (1)(ii)

A job applicant's CV showed that he had been out of employment for a whole year from 1994 to 1995. When queried in this regard during the job interview, he disclosed that after his spouse died he had to take a year off work to recuperate from depression. He was

not offered the job despite his overall high marks in the recruitment exercise. If the employer had formed the decision not to offer him employment because he had had a disability in the past, then the employer may be liable for disability discrimination. The fact that his disability preceded the enactment of DDO in 1996 is irrelevant.

3.6.2 **Future disability** - a disability that might develop in the future⁶; S 2 (1)(iii)

An employee who is a Hepatitis B carrier was dismissed because the employer thought that she would develop into liver cancer in the future. The employer could be liable for disability discrimination.

3.6.3 **Imputed disability** - a disability that has simply been imputed to a person who does not have the particular disability. S 2 (1)(iv)

During the SARS epidemic, a shipping clerk was dismissed because her boyfriend was a nurse in a public hospital. The employer claimed that due to the anticipated close relationship between the employee and her boyfriend, she might have contracted the SARS virus without knowing it. The shipping clerk was however diagnosed not to have the virus. Her dismissal could amount to unlawful discrimination on the ground of imputed disability.

3.7 DDO also covers those who are **associates** of persons with disabilities where he/she is discriminated against or harassed because of his/her particular relationship with a person with a disability. Associates in relation to persons with disabilities include: S (6) (c)

3.7.1 A spouse of the person with a disability; S 2 (1)

⁶ See *K and Others v Secretary for Justice* [2000] 3 HKC 796

- 3.7.2 A person who is living with the person with a disability on a genuine domestic basis;
- 3.7.3 A relative of the person with a disability;
- 3.7.4 A carer of the person; and
- 3.7.5 A person who is in a business, sporting or recreational relationship with the person with a disability.

Employee X is an active volunteer serving AIDS patients. He regularly participates in recreational activities with AIDS patients. His employer dismissed him, alleging that his close association with AIDS patients would affect the company's image and business. The dismissal may constitute disability discrimination against X for being an associate with persons with disability.

Chapter 4: Discrimination under the DDO

Overview

- 4.1 There are two forms of disability discrimination, namely direct discrimination and indirect discrimination. **Direct discrimination** arises from a differential and less favourable treatment accorded to job applicant(s) or employee(s) because of their disability.

An employer refused to hire persons on wheelchair because he thought persons with mobility disability were more prone to work injuries. Because of this stereotypical assumption, G, a candidate with mobility disability, was rejected an interview opportunity. G had therefore been discriminated against on the ground of his disability by being deprived of a chance to an interview.

- 4.2 **Indirect discrimination** involves imposing seemingly neutral condition or requirement on everyone, but such condition or requirement has a disproportionate adverse effect on persons with disabilit(ies) and the application of such condition or requirement is not justified in the relevant circumstances.

All job applicants for a clerical position were required to pass a physical fitness test before further consideration for employment opportunity. Although passing the physical fitness test was a requirement applicable to all who were interested in the job, persons with particular disabilities that hinder stamina would more likely to be screened out. This could likely give rise to indirect discrimination unless the requirement was imposed with justifiable cause.

- 4.3 Disability harassment is an unwelcome conduct

S 6 (a)

See paragraphs
4.12 – 4.23 below

S 6 (b)

See paragraphs
4.24 – 4.29 below

S 2 (6)

See paragraphs

towards an employee in relation to his or her disability in circumstances where a reasonable person would have anticipated that the person being harassed would feel offended, humiliated or intimidated. Name calling and mimicking gesture are common examples of disability harassment.

9.3 – 9.9 in
Chapter 9

4.4 Disability vilification refers to any “activity in public” that incites hatred towards, serious contempt for, or severe ridicule of person(s) with a disability.

S 46

See paragraphs
9.10 – 9.13 in
Chapter 9

4.5 Activity in public includes any form or communication to the public, any conduct observable by the public and the distribution or dissemination of any matter to the public. Where the communication may reach the public domain, “activities in public” may include a workplace where members of the public may have access, or, a meeting where clients, visitors to the workplace or other co-workers are present⁷. Therefore, openly making insulting remarks concerning a colleague’s disability in a meeting could amount to disability vilification.

4.6 Victimisation is another form of discrimination covered by the DDO. It occurs where a person (with or without a disability) is being treated less favourably because he or she has or is suspected to have done or intends to do the following:

S 7(1)

4.6.1 Bring proceedings against the employer or any person(s) acting in the capacity of the employer;

S 7(1)(a)

4.6.2 Give evidence or information in connection

S 7(1)(b)

⁷ There has yet been court decision on disability vilification to serve as reference. Analysis on what would be considered as vilification in a workplace is borrowed from cases dealing with racial vilification which is a more prevalent phenomenon in the workplace. See *Korczak v Commonwealth* (HREOC, 16 December 1999); *Jacobs v Fardig* [1999] HREOC CA 9 (27 April 1999); *Rugema v J Gadsten Pty Ltd* [1997] HREOC CA 34; *Hearne v Kelvin Dennis and South Pacific Tyres Pty Ltd* (HREOC, 24 May 2000); *Charan v Commonwealth Insurance Ltd* [2002] FMCA 50; *Miller v Wertheim* [2002] FCAFC 156

with proceedings brought by another person against the employer;

4.6.3 Make allegation of disability discrimination against the employer; S 7(1)(c)

4.6.4 Do anything prescribed by the DDO in relation to the employer S 7(1)(d)

H, an employee with a disability, was refused promotion at work and lodged a complaint of discrimination with the EOC. Colleague J provided information to the EOC as a witness and was dismissed because of this. J's dismissal would likely amount to victimisation, regardless of whether J is with or without a disability.

4.7 It would not be victimisation if a person receives less favourable treatment, e.g. disciplinary action, reprimand, dismissal, etc. for making false allegation(s) and not made in good faith. S 7(2)

K was a substandard performer and had received numerous performance warnings. After receiving another warning from his employer, K claimed that he felt unwell and took on and off sick leave. However, he could not produce any medical certificate to support his sick leave despite repeated requests from his supervisor in accordance with the company policy. Fearing that he might be dismissed, K tried to pre-empt action against him by his employer and lodged a false complaint of disability discrimination against his supervisor. In view of K's deteriorating performance, the employer terminated his employment. K alleged that he was victimised for having made a complaint against his supervisor. Given the facts of this case, K's allegation of victimisation is unlikely to prevail.

Special measures

4.8 The DDO, as well as the other anti-discrimination ordinances, have provisions in respect of special measures that are taken with a view to assisting persons with a disability or with a particular disability to achieve a level playing field. They may also be undertaken to enable disadvantaged person(s) with disabilities to overcome inequality of opportunities.

S 50

4.9 In order to come within the provisions of special measures, a measure must be reasonably intended to provide for substantive equality. The measure

4.9.1 Has to be shown that there is existing substantive inequality of resources and opportunities to be redressed, or that the beneficiary of the measure has some special need to be addressed;

4.9.2 Has to be rationally connected to the aim of redressing the inequality or special need;

4.9.3 Must be proportional to the substantive inequality or special need;

4.9.4 Must only last as long as such inequalities still exist.

4.10 The need for special measures must be assessed from time to time, in order to ensure that it does not have the consequence of maintaining unequal or separate standards or treatment. A special measure applied should be lifted once the situation has been rectified or inequality of opportunities no longer exists.

4.11 However, the law does not impose any obligation to take special measure(s). It only allows such measures to be taken with valid reason(s) so as to ensure that persons with a disability or with a particular disability have equal opportunities in

employment, or to provide them with goods, access to services, facilities, opportunities, grants, benefits or programmes to meet their special needs in relation to employment.

Direct Discrimination

4.12 Section 6(a) of the DDO stipulates that: a person discriminates against another person in any circumstances relevant for the purposes of any provision of this Ordinance if on the ground of that other person's disability he treats him less favourably than he treats or would treat a person without a disability.

S 6(a)

4.13 In short, direct disability discrimination in employment means treating an employee with a disability less favourably than another employee without a disability or without the same disability in comparable circumstances on the ground of the former's disability⁸. There are three components of this definition which are essential: 1) cause of treatment (on the ground of), 2) comparator in relevant circumstances (comparable circumstances), and 3) detriment (less favourable treatment).

See paragraphs 10.6 – 10.10 in Chapter 10 for the meaning of "employment" under the DDO

"On the ground of" - causal linkage

4.14 Direct discrimination requires a causal linkage between the aggrieved person's disability and the act under complaint to demonstrate that the aggrieved person has been treated in a particular way on the ground of his or her disability. In other words, it is essential to identify a causal connection between the disability and the discriminatory decision or action, where the disability in question is shown to be a cause of the less favourable treatment received.

⁸ See EOC's view in *Tong Wai Ting v Secretary for Education & Anor* HCAL 73/2009

The existence of a person's disability would not by itself establish a case of disability discrimination.⁹ More information would be needed to substantiate causal linkage.

“But-for-Test”¹⁰

4.15 The “But-for-Test” is an objective test that helps to determine the cause of treatment. To apply this test, one needs to look into the incident as a whole from an objective point of view and ask the question: Would the aggrieved person have received the same treatment **but for** his or her disability? Compare the following two scenarios:

Employee A had recovered from depression. The supervisor doubted Employee A's ability to handle the stress and workload in a more senior position and therefore did not recommend him for promotion despite his good appraisal ratings in the past years.

Ask the question: Would Employee A have been recommended for promotion **but for** his having depression in the past? It appears that Employee A was passed over in the promotion exercise because of his past disability. The employer's decision could constitute direct discrimination on the ground of Employee A's disability.

Employee B who suffered from migraine headache had a record of repeated tardiness and neglect of duties. She had been warned numerous times of her poor performance both verbally and in writing. The employer finally dismissed her after no improvement was shown on her part. Would

⁹ See *Yeung Chung Wai v St Paul's Hospital* [2006] 3 HKC 521

¹⁰ See *Chan Wah v Hang Hau Rural Committee & Others* [1999] 2 HKLRD 286 and *Siu Kai Yuen v Maria College* [2005] 2 HKLRD 775

Employee B have been dismissed **but for** her disability? It appears that B was dismissed because of her substandard performance. Her disability was part of the background information irrelevant to her dismissal.

Act done for two or more reasons

4.16 Section 3 of the DDO provides that if an act is done for two or more reasons and one of the reasons is the disability of a person then the act is taken to be done for the reason of a person's disability. The disability of that person does not have to be shown as the only reason for the unlawful discrimination. It suffices if it were one of the reasons amongst others, whether or not it is the dominant or a substantial reason for doing the unlawful act.

4.17 In general, there are often other reasons for the differential treatment. It could be an employee's performance and/or work attitude along with his or her disability. At times, the person's disability may only have a relatively minor role in the decision which gives rise to the unlawful act. The law makes it clear that unlawful discrimination is established if an employee's disability is shown to be a factor in the decision. Therefore, employers are encouraged to deal with genuine performance issues timely and even-handedly to avoid misunderstanding and possible infringement of the DDO.

Motive and intention not relevant¹¹

4.18 It is not necessary to show that an employer has intended to commit an act of discrimination. It can be an unintended result of a decision or an action.

S 3

This provision only applies to the definition of direct discrimination.

¹¹ See *R v Birmingham City Council ex parte Equal Opportunities Commission* [1989] IRLR 173 HL

Sometimes, it could even be a well intended gesture¹² on the employer's part that the treatment is done in the interest of the employee with a disability.

Employee C has a mobility disability. With a good intention to avoid travel inconvenience to C, the employer exempted him from all overseas duties and training without consulting C. C, on the other hand, considered such arrangement would negatively impact upon his career development. The decision of the employer, although out of good intention, is likely to amount to disability discrimination.

Comparator in relevant circumstances and how comparison is made

4.19 Direct discrimination requires a comparison between the aggrieved person and another person who does not have a disability or the same disability, in the same or not materially different circumstances. This means that there must be a sufficient degree of similarity or common features to form the basis of an appropriate comparison.

S 6 (a)

S 8

4.20 Affording accommodation to address the needs of persons with disabilities is not a less favourable treatment against those without disabilities. However, treating a person with one particular disability more favourably than another person with another disability could be unlawful when justifiable reason is lacking.

Employee D has mental illness and needs regular treatments at the psychiatric clinic. Employee E has hypertension and also needs regular medical checkups. Both employees take up half a day for the medical appointments for their respective disabilities. The employer, being more sympathetic

¹² See *James v Eastleigh Borough Council* [1990] IRLR 288 HL

toward D's disability, grants D a full day of sick leave on the days of his medical appointments. E, on the other hand, is strictly requested to report duty immediately after his medical appointments. D and E are persons with different disabilities in like situations where they both require only half a day to attend medical attention. Treating E in a more stringent manner than D would likely amount to disability discrimination against E.

- 4.21 If there is no real person to whom the complainant could compare himself or herself, then an objective test would be applied to ascertain whether on the basis of all the information available, a hypothetical person without a disability or with a different disability would be otherwise treated differently. In Employee B's case under paragraph 4.15 above, the comparator should be an actual (if available) or a hypothetical employee not having migraine who similarly has poor performance.

See paragraph 4.15 above

Siu Kai Yuen v Maria College [2005] 2 HKLRD 775

Mr. Siu worked for the school for over 14 years as a teacher. He was dismissed while on sick leave for about two and a half months. The school asserted that his dismissal was on the ground of his absence rather than his disability. The court compared Mr. Siu's situation with two hypothetical comparators in similar circumstances, i.e. teachers without disabilities having to take leave for similar length of time: a teacher on maternity leave and a teacher on jury duty. The school confirmed that they would nevertheless retain the teacher who has taken maternity leave and the teacher who has been on leave for jury duty. Comparing Mr. Siu's situation with the two hypothetical comparators, the court ruled that it was but for Mr. Siu's disability, he would not have been dismissed.

This is a significant case because it demonstrates how direct and indirect discrimination is determined. The part on indirect discrimination will be discussed later in this chapter.

“Less favourable treatment” – concept of detriment

4.22 One of the crucial components of the definition of direct discrimination is that of “less favourable treatment”. The term “less favourable treatment” entails a detriment suffered by the employee with a disability. In establishing detriment, it is not necessary to show financial loss. Items such as injury to feeling, training and career opportunities could also qualify as detriment in discrimination claims. Whether a treatment is detrimental to the person affected depends on an objective assessment of the relevant circumstances on a case by case basis.

4.23 One needs to bear in mind that subjective reasoning on the part of employer for the differential treatment may not be a defence nor relevant if it is objectively detrimental to the person affected.¹³

See paragraph 4.18 above for discussion on motive and intention

D, a sales supervisor in a retail group, sprained her ankle at work a couple of times in the span of three years. She was transferred to work in the general office of the company as a supervisor to three office attendants. The employer claimed that the transfer was for D’s well being in the long run as she seemed to be prone to accidents; the more sedentary environment in the office as opposed to the shop outlets could reduce her chances of future injuries. Although D’s basic salary remained the same in the new office position, she would be deprived of the additional commissions for sales of goods in the shop outlet. Moreover, D did not consider administrative work her area of expertise and did not appreciate the involuntary change of career path. In this case, D would seem to have suffered a detriment arising from the transfer on

¹³ *Ibid.*, see also *Haines v Leves* (1987) 8 NSWLR 442 at 471

account of her injury.

Indirect Discrimination

- 4.24 Indirect discrimination occurs where a condition or requirement is applied or imposed which has the effect of impacting adversely more on persons with disabilities in general or persons with a particular type of disability than others and it cannot be justified as genuinely necessary. The concept is complex in the sense that it requires a detailed examination of the circumstances of a situation to uncover the underlying facts in order to fulfill the different components of indirect discrimination. S 6(b)
- 4.25 Emanating from Section 6(b) of the DDO, indirect discrimination means 1) imposing the **same requirement or condition** which is applicable to everyone else, 2) where the **proportion of persons with disabilities** who can comply is considerably smaller than persons without disabilities, 3) which requirement or condition concerned **cannot be objectively justified**, and 4) as a result the person with disability suffers a **detriment**. S 6(b)
S 6(b)(i)
S 6(b)(ii)
S 6(b)(iii)

Company A required all employees not to be regularly absent from work for operational reasons. Employee E had a chronic illness and had taken sick leave for an extended period of time. The employer decided to terminate E's employment because E could not meet the company's operational needs. The company claimed that their operational needs required all employees "not to be regularly absent from work" and they would dismiss any employee who could not meet this requirement. The uniform requirement applying to all employees was the condition "not to be regularly absent from work". It is likely that persons on valid extended period of sick

See Chapter 6 for more discussion on sick leave issues

See paragraphs 4.28 & 4.29 below for discussion on justifiability of

leave would encounter difficulty in satisfying such attendance requirement. The onus would then be on the employer to justify the imposition of such a requirement.

imposing a requirement

Same “requirement or condition”

4.26 The initial step in the analysis of an indirect discrimination claim is the identification of the “requirement” or “condition” which is applicable to all. It also requires a determination that the requirement or condition cannot be complied with by the person with disability in the relevant situation. These are factual matters which need to be established.

Proportion of people who can comply

4.27 Establishing the proportion of people who can comply may require complex statistical or other technical information if a comprehensive analysis is to be undertaken. The consideration would be relatively less complicated where the comparison between the proportion of persons with disabilities who cannot comply with the requirement and the proportion of people who can is obvious. For instance, it would not be difficult to demonstrate that persons who have serious illness require taking longer sick leave and that it is proportionally more difficult for them to comply with a full attendance requirement. A common sense approach should be adopted in determining proportionality, and whether the comparison between pools of persons in a particular situation would make natural sense¹⁴.

S 6(b)(i)

Whether the requirement or condition is justifiable

¹⁴ See *Allonby v Accrington & Rossendale College* [2001] IRLR 364 CA and *Rutherford v Secretary of State for trade and Industry* (No. 2) [2004] IRLR 892 CA

4.28 A balancing exercise of reasonableness weighing the following factors is essential in determining the justifiability of imposing a requirement or condition¹⁵: S 6(b)(ii)

4.28.1 Effect on the person with a disability or group of persons with the particular disability;

4.28.2 Effect on the employer's operations including the resources of the business and administrative efficiency;

4.28.3 Reasonableness of the alternative arrangements that could be provided to the person with a disability.

4.29 In this process, all the circumstances must be taken into account. The consideration of reasonableness is not as stringent as one of necessity, but stricter than that of convenience. The criterion is an objective one, which requires the court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other.¹⁶ The onus is on the employer to prove justification in imposing a particular requirement or condition.

Siu Kai Yuen v Maria College [2005] 2 HKLRD 775

Mr. Siu was dismissed while on sick leave for cancer treatment. The school claimed that Mr. Siu's absence from work breached the fundamental terms and conditions of his contract of service namely that leave and absence cannot be more than 10% of total number of classes to be taught by Mr. Siu in the month of leave taken. The school claimed that the contract terms and conditions, universally applicable to all teaching staff, were justified. The court held that the dismissal was discriminatory because the

¹⁵ See *Waters v Public Transport Commission* (1992) 173 CLR 349 at 378-9

¹⁶ *Ibid.*, at 365

service conditions were *unjustified* when balanced between the “discriminatory effect” on the group of persons with Mr. Siu’s disability and “reasonable needs” of those applying the conditions.

Employers should also bear in mind that the terms or conditions in a contract that provide for the doing of an act which amounts to unlawful discrimination are void and therefore unenforceable and outside the remit of contract law.

S 83

Chapter 5: Inherent Requirement, Reasonableness of Accommodation, and Unjustifiable Hardship

5.1 Some disabilities are so serious making the persons having them genuinely incapable of taking up employment. Most disabilities, however, could be overcome with workplace adjustments and reasonable accommodation by the employer and the employer is encouraged to make the necessary adjustment and accommodation unless there is unjustifiable hardship on his part in doing so.

5.2 Section 12(2) of the DDO sets out that it is not unlawful for an employer to discriminate against an employee or an applicant with a disability if his or her disability makes the person unable to carry out the inherent requirements of the job. However, before an employer could avail themselves of such defence, they would need to demonstrate that there is unjustifiable hardship on their part to provide accommodation to a person with a disability.

5.3 To determine whether this defence is available in a situation, the employer needs to 1) find out what the inherent requirements of the job in question are, 2) determine whether the relevant employee with a disability could carry out the inherent requirements with reasonable accommodation by way of services or facilities, and 3) consider whether providing such accommodation would impose an unjustifiable hardship on the employer. This chapter will go through the notions of inherent requirement, unjustifiable hardship and reasonable accommodation and discuss the intertwined relationships amongst them.

Inherent Requirement

- 5.4 The DDO recognises that in some situations, a person because of his or her disability would not be able to carry out the inherent requirement(s) of the job even with reasonable accommodation. It would be unrealistic to expect an employer to recruit or continue employing a person in a job for which requirements he or she cannot fulfill. S12(2)
- 5.5 In order to determine whether a refusal to offer employment or to dismiss a person with a disability from employment is unlawful, the following matters should be considered:
- 5.5.1 **All relevant factors** (such as past training or qualifications of the job applicant, performance of the employee concerned) that is reasonable to take into account; S 12 (2)(a) - (c)
See paragraphs 5.6-5.8 below
- 5.5.2 Whether the applicant or the employee with a disability would be able to carry out the **inherent requirements** of the job; S 12 (2) (a)-(c)(i)
See paragraphs 5.9 – 5.15 and 5.19-5.20 below
- 5.5.3 Whether the **accommodation** required would create unjustifiable hardship for the employer. S 12 (2) (a)-(c)(ii)
See paragraphs 5.16 -5.18 below

Capacity of the person in relation to the job

- Consideration of all relevant factors

- 5.6 Identification of the capacity or ability of a person to do the job duties must be based on an objective standard and not on a general impression of the person with a disability or any commonly held perception of disabilities.
- 5.7 Factors to be taken into account when an employer or potential employer assesses the capability of a person

with disability to perform in a particular employment include:

- 5.7.1 The person's past training, qualifications and experience relevant to the particular employment; S 12 (2)(a)
- 5.7.2 If the person is already employed, his/her performance as an employee; and S 12 (2)(b)
- 5.7.3 All other relevant factors that it is reasonable to take into account. S 12 (2)(c)

5.8 "All other relevant factors" could cover a wide range of situations, depending on the person's disability, its effect and the duties to be performed. However broad it might be, the consideration of such should not depart from the common sense approach an employer would adopt when making decisions as to who should get the job. These relevant factors would be present for any person with or without a disability, such as new equipment and a new environment which requires time for all new employees to adapt. Previous experience and qualifications and demonstrable capacity to learn and adapt must form part of this consideration as well.

"Inherent requirement" of a job

- 5.9 In order to justify a decision not to employ a person with a disability or the dismissal of an employee with a disability, the employer would be required 1) to identify the inherent requirements of the relevant job and 2) to show the inability of the person with a disability to perform those inherent requirements and 3) that the incapability could not be rectified by reasonable provision of services and facilities to the employee in question¹⁷. S 12 (2)(c)(i)

¹⁷ See *M v Secretary for Justice* DCEO 8/2004 at 265 (i) and (vii)

- 5.10 “When considering whether the requirements of the job are inherent, it is the requirements of that particular employment which must be considered, not the requirements of some different employments modified to meet the needs of the [employee] with a disability”¹⁸ in question. Consideration should be “by reference not only to the terms of the employment contract, but also by reference to the function which the employee performs as part of his [or her] undertaking.”¹⁹
- 5.11 In identifying the inherent requirements of a job, one must look at the characteristic or requirement of that job as opposed to those requirements that are peripheral.²⁰ In other words, they are the core requirements that are **essential** or **intrinsic** to a particular employment. One practical method that helps to identify the requirements would be to ask the question as to whether the position could essentially be the same if that requirement were to be dispensed with.²¹
- 5.12 Inherent requirements exceed the physical ability to carry out the physical tasks encompassed by the particular employment. It is expected in most employment situations that an employee will frequently involve an interaction with other employees, or with outsiders. If an employee although having performed all the assigned tasks, is unable to maintain a smooth working relationship with fellow workers or with the general public, he or she would be considered to be unable to carry out an inherent requirement of his or her job. In some occupations, such as positions involving customer services, emotional instability or behavioural

¹⁸ *Ibid.*, at 265 (iii)

¹⁹ *Ibid.*

²⁰ *Ibid.*, at 265 (iv)

²¹ *Ibid.*, at 265 (v)

problem producing significant rudeness to others might be a genuine cause for concern.

- 5.13 Inherent requirements also exceed what is expected to be normally done by the employee and may include what will have to be done in the foreseeable circumstances. For example, a fisherman not being able to cope with a tangled trawling net may argue that the net should not normally get tangled. This person may be unable to carry out an inherent requirement of employment on a trawler nevertheless, because putting him or her in such particular employment might put lives and properties at risk.²²

***K and Others v Secretary for Justice* [2000] 3 HKLRD 777**

Three applicants applied for operational positions at different disciplinary forces. Their applications were initially successful but they were refused employment after medical examination revealed that one of each of their parents had schizophrenia. Relying on S 12(2)(i) of the DDO, the government rescinded the employment offer and claimed that schizophrenia is a genetically influenced mental disorder and children of persons with schizophrenia are at a greater lifetime risk of developing the disorder than the general population. Due to the nature of the employment and the duties of the respective disciplinary departments (i.e. inherent requirements), the consequences of the risk would be disastrous, such as committing homicide or causing serious bodily harm to colleagues or members of the public. It was also asserted that the risk itself could be increased by the particularly high stress level of the employment.

²² *Commonwealth v HR&EO Commission* (1998) 152 ALR 182 at 10

The court agreed that the ability to safeguard public safety is an inherent requirement of any public office, i.e. the employment in question, as the jobs involved the protection of members of the public and their property. Then the court went on to consider whether the applicants' disabilities (i.e. being an associate of someone who had schizophrenia) would prevent them from performing the inherent requirement of carrying out the employment without endangering the public. The court found, after considering medical evidence from both sides, that the degree of risk of the applicants' disabilities, i.e. genetic liability to develop the disease their parent suffered, when weighed against the possible consequences, was insignificant and the possible consequence if that risk were to occur was unlikely to pose a real threat to anyone. In other words, the applicants were able to carry out the inherent requirement of the employment in question and therefore they had been discriminated against by the government in refusing them employment.

- 5.14 Inherent requirements of a particular job may in appropriate circumstances involve considerations as to the physical environment in which the particular work is to be performed and as to health and safety considerations in relation to the employee, fellow employees and others. The identification of those requirements is a matter of objective fact to be determined in all circumstances of a particular case.²³

Cosma v Qantas Airways Ltd. [2002] FCA 640

Mr. Cosma was employed by the airline company as a porter in the ramp services and he injured himself in the course of his work. After a long period of sick leave, Mr. Cosma was assigned some clerical and other light duties for a period of time as part of

²³ See *Commonwealth v HR&EO Commission* (1998) 152 ALR 182 at 217

a rehabilitation programme. Unfortunately, the arrangement had not enabled Mr. Cosma in resuming his original duties as a porter and his employment was subsequently terminated. The Court found that Mr. Cosma was unable, by reason of his disability, to carry out the inherent requirements of his job as being a porter and thus the dismissal was not unlawful.

- 5.15 The law “does not impose an obligation on an employer to alter the nature of the particular employment or its inherent requirements so as to accommodate the employee with a disability.”²⁴ Accommodation is to be done by provision of assistance in the form of **services** or **facilities** external to the particular employment which nature remains the same.²⁵

Unjustifiable Hardship

- 5.16 In determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including:
- S 4 (a) & S 12 (2) (c) (ii)
- 5.16.1 The reasonableness of any accommodation sought;
 - 5.16.2 The nature of the benefit or detriment likely to accrue or be suffered by any persons concerned;
 - 5.16.3 The effect on the employee with a disability if accommodation could not be provided; and
 - 5.16.4 The financial circumstances and the estimated amount of expenditure required for providing accommodation by the employer claiming unjustifiable hardship.

²⁴ See *M v Secretary for Justice* DCEO 8/2004 supra at 265 (ii)

²⁵ *Ibid.*, at 265 (vii) and see also *Silvano Cosma v Qantas Airways Ltd* [2002] FCA 640, per Heerey J

- 5.17 This requires a structured balancing act of potentially competing interests to be undertaken. The cost–benefit assessment will vary depending on the size and financial resources of the employer claiming recourse to the unjustifiable hardship exemption.
- 5.18 For example, a small company may find it too costly, if not impossible to reshuffle the duties of staff to enable an employee with chronic illness to attend very frequent medical treatment, but a large organisation may find it affordable. The burden of proof is on the employer to make out the defence of unjustifiable hardship. Employers cannot simply point to market or customer service requirements nor to industrial practices, though these may be considered one of the relevant factors to be taken into account.

E was the sole marketing staff working in a small company. He hurt his spine and was confined to bed for 6 months. The prospect of him resuming duty was unknown. The employer dismissed E claiming that the business had been running a continuous loss since his sick leave and they could not afford to employ a temporary staff to take up E's duties during his prolonged absence.

E argued that his marketing duty could be taken up by the boss during his absence as it had always been like this in the past. However, the employer could show that the company was running at a loss prior to and during E's injury-related sick leave. Moreover, the boss was the only staff working in the company and he had fully stretched his capacity by working long hours without promising result.

The defence of unjustifiable hardship is likely to apply in this circumstance taking into account of the size of

the company, the business turnover and the poor business forecast together with dim prospect of E's resumption of normal duty after prolonged sick leave.

It would be a different consideration if the size of the company is large with multiple marketing staff sustaining lucrative profits. With such substantial operations, it is reasonable to expect the employer to attempt more measures to allow time for an employee to rehabilitate before resorting to dismissal.

Reasonable Accommodation

- 5.19 Although there is no legal obligation on an employer to provide accommodation in order for the employee with a disability to fulfill the inherent requirement(s) of a job, the court would tend to look into whether services or facilities have been considered or reasonably afforded to the employee with a disability before an employer could successfully avail itself of the defence of inability to perform inherent requirement and / or unjustifiable hardship. S 12 (2)(c)(ii)
- 5.20 The services or facilities requirement for an employee with a disability will vary depending on the disability and the effect the disability has on the person. A visually impaired person may require extra equipment such as a magnifier, audio device or computer equipment to assist him/her to perform his/her job duties costing an employer a limited amount of money for provision of such facilities. On the other hand, a person using a wheelchair may require access to the premises or a part of the premises to be altered and these could cost substantially more. In determining hardship on the employer's part, the court would have to consider all

aspects in the particular circumstances of individual cases. In fact, altering the access to premises could positively benefit others with mobility restrictions, not only wheelchair users, but parents with prams, delivery workers or anyone who finds stairs difficult to use. Moreover, the cost may also be shared by other occupants of the premises.

Chapter 6: Managing Recruitment

- 6.1 The purpose of recruitment selection is to find the most suitable person for the job. However, people come with different background and attributes and it is often not easy to identify who is best suited to the job on first encounter. It is not uncommon and at times subconsciously on the part of the recruiting personnel judging candidates upon first impression in employment selections. This tends to hinder the employer from recognising the true value and merit of a candidate. In situations where the decision is guided by stereotypical assumptions of persons with disabilities, it could lead to unlawful disability discrimination.
- 6.2 The legal formulae of disability discrimination and harassment have been discussed in the previous chapters. This chapter marks the beginning of a series of good management guidelines on various human resources issues: recruitment (this chapter), workplace absence (Chapter 7) and other stages of employment, including promotion, transfer and dismissal (Chapter 8). These guidelines serve to illustrate how the law is applied in different employment situations and provide practical guidance on the proper implementation of the law in the workplace.

Consistent Selection Criteria

- 6.3 Consistent Selection Criteria (CSC) is a set of objective considerations that is applied consistently to applicants or employees irrespective of any personal attributes they possess, including disability. It helps to facilitate unbiased assessment of all candidates on their individual merits and capabilities to carry out a

job.

6.4 The principle of CSC is not limited to application in recruitment. It is applicable in all stages of employment, including promotion, transfer, training, dismissal or redundancy, whenever selection process is involved. They also apply to setting the terms and conditions of employment. Adopting the principle of CSC helps ensure compliance with the legal requirement, and thus reducing the risk of costly litigation and negative publicity.

Recruitment in general

6.5 In relation to recruitment, the DDO states that it is unlawful for an employer to discriminate against a job applicant with a disability:

S 11 (1)

6.5.1 In the arrangement made for determining who should be offered employment;

S 11 (1) (a)

6.5.2 In the terms on which the person with a disability is offered employment; and

S 11 (1) (b)

6.5.3 By refusing to offer, or deliberately omitting to offer the person with a disability employment.

S 11 (1) (c)

6.6 It would be unlawful for an employer not to hire a person on the ground of his or her disability, unless:

6.6.1 There is information showing that because of the candidate's disability he or she is incapable of performing the inherent requirement(s) of the job and that providing accommodations to assist the person in fulfilling those requirements would incur unjustifiable hardship on the part of the employer; or

S 12 (2)

See also Chapter 5 for explanation of "inherent requirement"

6.6.2 Absence of a disability is a Genuine Occupational Qualification of the job.

S 12

Explained at paragraph 6.11 below

6.7 All personnel involved in making decisions at any stage of the recruitment process should understand the relevant provisions in the DDO concerning recruitment and the principle of CSC. Under the DDO, an employer is not obliged to employ a person with a disability if that person is found not able to perform the inherent requirement(s) of the job. However, the employer should consider reasonable accommodation before making such decision. They should at all times refrain from making arbitrary decisions based on stereotypical perception of disability in general or in relation to a particular type of disability. They should also be aware that statutory exceptions are not automatically available and the onus is on the employer to justify their applications.

See Chapter 5 for the notions of “Inherent requirements”, “reasonable accommodations” and “unjustifiable hardship”

Analysing the nature of a job

6.8 Inherent requirements are job-related factors that are essential and intrinsic to the position. These may include a range of specifications which an employer considers fundamental to meet the objectives of a particular job, such as education, experience, knowledge, and skills. In other words, a requirement is fundamental and intrinsic that when it is taken out or disregarded, the job cannot be accomplished. Employer should make sure that the process in which these requirements are determined is objective, reasonable and without bias. The focus of the consideration should always remain on the job itself rather than the job holder.

See paragraphs 5.11 – 5.14 in Chapter 5 for “inherent requirement”

6.9 Inherent requirements are likely to include skills and abilities, knowledge, experience and behavioural attributes. All should be unambiguously and specifically defined affirming their essential nature to the job. Blanket requirements or exclusions relating to health or disability should be avoided.

Qualifications should only be requested where there is a genuine need and there is no other way to meet the criteria. For example, a driving licence is deemed necessary for the post of chauffeur.

- 6.10 The criteria an employer set as inherent requirements must be objectively justifiable as they may put persons with disabilities at a less favourable position when compared to another candidate. Do not be too specific about how a task should be done but focus on what the outcome needs to be.

An employer stipulates that employees must be 'active and energetic' when the job itself is a sedentary one. This requirement appears to be irrelevant and may potentially be discriminatory as it could exclude persons whose disabilities result in mobility difficulties.

Genuine Occupational Qualification

- 6.11 The absence of disability as Genuine Occupational Qualification (GOQ) is an exception under the DDO. Moreover, unlike the determination of inherent requirements where the employers may have flexibility in making relevant decisions on their own, GOQ in relation to disability has a rigidly defined parameter confined to the following two situations:

S. 12

- 6.11.1 The essential nature of the job requires a person without a disability for reasons of physiology or authenticity in dramatic performance or other entertainment;

S. 12(3)(a)

For a leading role in a dramatic performance of the autobiography of an Olympic gold medalist, the requirement of the job holder to be someone who does not have mobility disability may constitute a

GOQ. The employer could likely be able to reasonably justify that there is a genuine necessity for such particular cast requirement in order to attain visual artistic and dramatic effective of the performance.

Where in a broadcast drama of the same story, it would not likely be considered reasonable for an employer to claim GOQ for the justification of rejecting the voice performance of a person who has mobility disability.

- 6.11.2 The nature or location of the establishment is such that the employee has to live in premises provided by the employer but the available premises do not have facilities for persons with the disability in question. S 12(3)(b)

It is nevertheless required that the employer should first consider whether alterations to the premises could be made to render them suitable for the person with a disability before the employer could claim this defence. The employer should carry out such alterations and offer the job to the person with a disability unless the alterations would impose an **unjustifiable hardship** on the employer.

Interpretation of unjustifiable hardship here is the same as how it is considered along with the concepts of inherent requirement and reasonable accommodation. See Chapter 5 for detailed discussion

On the other hand, where the prospective employee offers to make the alterations and undertake to restore the premises to the original condition upon leaving employment, the employer would not likely be able to claim GOQ on the ground that no suitable premises are available.

S12(5)

Accessible application process

- 6.12 It is important that employers take particular care to ensure that they do not discriminate against persons

with disabilities in the way that applications are dealt with.

6.13 Employment application forms should be reviewed to ensure that they can be made available in alternative formats. Required formats will depend on individual needs, preferences and access to technology, including large print, audio format, email, Braille, etc.

6.14 Forms should be well designed, with clear print, strong typeface and layout that give enough space for completion. Avoid using colors and design features that may reduce readability affecting the applicant with visual impairment.

6.15 Employers should ensure that the required format for applications would not discourage or prevent persons with disabilities from applying. Without valid justification, a stipulation that application would only be considered if made in handwriting could amount to discrimination against a person who is unable to write legibly due to a particular disability, and therefore, the applicant should be allowed to type an application or complete a form electronically. Alternative format applications should ask for the same information as standard format applications.

6.16 Application forms that request for unnecessary information that may put a person with a disability at a disadvantage, resulting in the person being discouraged from applying or deprived of an interview opportunity could easily lead to allegation of unlawful discrimination. For instance, questions about health conditions should be avoided unless these are essential or at least specifically relevant to the job, and in that event, they should be specified in the job specification.

S 42

- 6.17 A standard question in the application form asking applicants whether they require any special provision or facility at the interview is to be encouraged. This has the effect of demonstrating the employer's commitment to the principle of equal opportunity and helps them to prepare for such reasonable accommodation as is needed for the particular applicant. However, it is important to make sure that this information is not used to screen out certain applicants or as part of the selection process, unless not having a disability is a GOQ of the job.

Shortlisting

- 6.18 It is also important that all applications are compared against the criteria specified in the requirements shown on the job description in a consistent manner, irrespective of how and in what format the applications are submitted. Identify applicants who have shown that they can meet these criteria, taking account of reasonable accommodation. In some situations, further information is required from the applicant before a decision can be made and such information could normally be better obtained by further communication with the applicant. Excluding an applicant with a disability from the shortlisting on account of that disability is likely to be discriminatory.

Arranging interviews

- 6.19 All application forms and letters of invitation to interview should ask candidates if they have any specific reasonable needs that require special arrangements, e.g. whether sign interpretation or information in accessible formats is required. This can assist the employer to determine whether accommodation(s) could be afforded.

S 42

6.20 Accommodation which an employer may have to arrange for candidates with disabilities is intended to be individualised and may mostly likely involve making reasonable adjustments 1) to overcome barriers associated with the physical layout of the company premises or 2) to ensure applicants with disabilities are not disadvantaged.

6.21 Applicants with disabilities have the responsibility to inform prospective employers of their special needs to enable arrangements to be made in a timely manner. Employers should communicate with the applicant on such special needs to ensure that accommodation is provided in a sensitive manner. The purpose of obtaining such information should be made known to the candidate to avoid misunderstanding. There may be occasions that the employer is not aware of any requirement for accommodation and it only becomes apparent when the interview takes place. In such situations, the employer should still make allowances and adjustments as circumstances permit and as reasonably as they can.

Applicant A had visual impairment and asked that a special digital device which he would bring along be permitted to be installed on the computer at the test venue. The employer could not have bothered and declined the applicant's request claiming that they did not have the resources to cater for such special arrangement. The employer's hasty refusal to provide accommodation without consideration would likely amount to disability discrimination.

Applicant B informed the employer that she had depression and would like her interview to be scheduled on a certain date and time that she

preferred. In view of her health condition and the common symptoms of depression (including insomnia), the employer rescheduled her interview to an afternoon. B failed to turn up and further requested that the interview be rescheduled to a date beyond the timeframe set for the interview board. She submitted no information to explain her health conditions except a medical certificate of the diagnosis of depression. Under these circumstances, it would probably not amount to disability discrimination if the employer refused to further reschedule the interview. It seems that reasonable accommodation had been afforded by rescheduling the first interview. Moreover, there was no information justifying B's failure to turn up on the rescheduled appointment as well as her medical condition to support her request for the second rescheduling.

Tests

- 6.22 The law does not prevent employers from carrying out aptitude or other tests, including psychological tests. However, routine testing of all applicants may result in unjustifiable bias, which may discriminate against individuals with particular disabilities.
- 6.23 Where tests are devised in-house, there may be a need to revise them or the usage of the result to take account of how these might be unfair to individuals with different types of disabilities. Where, for example, psychometric testing is to be undertaken, the employer should ensure that the personnel in charge of carrying out the test are trained and understand how people's different impairments may affect the test results and the requirements of the DDO. Necessary adjustments should be made as appropriate.

- 6.24 Where commercially produced tests or proprietary products are adopted or adjusted, it would be appropriate to seek professional advice in the light of individual circumstances. Accommodation may be reasonable, but this depends on how closely the test is related to the job and what adjustments may have to be made if the applicant were given the job. For example, it may not be reasonable to adjust a test where the nature and form of the test is essential to assess something intrinsic and relevant to the job, such as a typing test for a court stenographer.
- 6.25 Examples of adjustments that may be considered as reasonable accommodation could be:
- 6.25.1 Allowing extra time for candidates with dyslexia to complete a written test;
 - 6.25.2 Letting a reader or scribe help with reading or writing during a test.

Applicant C had restricted manual dexterity due to a disability. In view of the fact that C may be disadvantaged by a written test and being able to write is not essential to the position, the employer gave C an oral test instead.

An employer set a short oral test for the position of telephone operator handling customer complaints. Oral communication is vital to the job and assessing this was the purpose of the test. Applicant E had a serious speech impairment and requested to be given a written test instead. It does not appear to be reasonable to alter the form of assessment in view of the inherent requirements of the job.

Interviewing

- 6.26 Having been informed of the applicant's disability,

interviewers should not discriminate against persons with disabilities based on stereotypical assumptions concerning disabilities. All interviews as well as other selection procedures should be objective and non-biased. Questions asked should only relate to the ability to do the job.

- 6.27 To avoid being affected by stereotypical assumptions, interviewers should always maintain an open mind. Persons with disabilities are equally capable of developing important skills such as problem-solving and negotiation. They often have practical solutions to carry out daily tasks with or without technical aids or personal support. It is therefore very important that persons with disabilities be accorded a fair chance to inform employers about their capabilities and potential during the interview process.

Applicant F was asked in the interview why he had not been working during the whole year of 2005 while the rest of his CV regarding employment history was impressive. F disclosed that he had had depression in 2005 and had to take a year off to recuperate. Fearing that he might have a relapse, the employer declined to employ him even though he appeared to be the most suitable candidate for the job. The interviewers had effectively screened F out because of his previous disability. This would very likely amount to disability discrimination as F's past disability was a reason that he was declined employment by the employer.

- 6.28 Persons with disabilities know their needs better than anyone else. They could assist employers to determine the type or nature of accommodation that is required. The crucial question is not whether the

person with a disability is able to do the job but rather whether he or she would be able to do it with reasonable accommodation.

- 6.29 An employer is obliged to make sure that candidates with disabilities are considered fairly in the selection process. Whilst it may not be the employer's obligation to employ a candidate with a disability if he or she is after all not the most suitable person for the job, the employer must ensure that the person's disability has played no role in the decision of not employing the person.

Medical Test and Health Screening

- 6.30 The DDO does not prohibit employers from asking a person with a disability to undergo a medical examination. Medical information may be used in assessing whether the person is suitable to perform the inherent requirements of the job. However it may give rise to allegations of disability discrimination if a candidate with a disability is asked to undergo medical examination without valid justifications when others are not required to do so. Medical information should only be obtained if it is necessary to ascertain that the person is able to carry out the requirements of the job. S 42
- 6.31 Health screening is more appropriate after the selection process is completed and the person considered best suited to the job has been identified. Health screening at an earlier stage should not be used as a means to screen out candidates with disabilities. It would be good practice that medical test or health screening are only conducted after a conditional job offer has been made.

G applied for a teaching post in a primary school.

See paragraphs
7.19 – 7.25 in

She has completed written tests and interview. The school made a conditional offer to her subject to satisfactory medical examination which was required for registration with the Education Bureau.

G's X-ray indicated scars in her lungs. Without seeking further tests or medical advice, the school withdrew the offer. They assumed that the X-ray suggested that G had tuberculosis and that she was not suitable for classroom teaching as it might pose hazards to students and other staff. In fact, when G sought further medical advice on her own, it was confirmed that she did not contract tuberculosis. She only had a bad cough earlier and was nearly fully recovered.

In such case, the hasty decision of withdrawing the conditional offer would amount to unlawful discrimination. The school should have sought further detailed medical advice and if situation warrants, should provide reasonable accommodation, such as allowing reasonable time for G to recover.

L had undergone corrective Lasik treatment with his eyes and he did not need to wear glasses thereafter. He applied for the post of pilot with a civil aviation company after obtaining a degree in aviation engineering. L had passed the written test, aptitude test and interview. The airline company made a conditional offer subject to satisfactory medical examination for compliance with the international aviation safety standards and requirements, of which having perfect eyesight is one of the conditions.

During the medical examination, L disclosed that he had corrective eye treatment several years ago. The airline company sought further advice from the

ophthalmologist who considered that L's eyesight did not comply with the standards and requirements set out by the international aviation authority. The airline company then withdrew the conditional offer, giving the reason that L could not comply with the inherent requirement of the job.

Since L's eyesight could not meet the required safety standards and no accommodation could be made to assist L to comply with the requirements, withdrawing the offer in such circumstance is unlikely to amount to disability discrimination.

- 6.32 Medical test and health screening should be conducted by medical professionals, taking into account the relevant job requirements. Where necessary, other health specialists may also be consulted if further clarification is warranted. Accordingly, a health screening report that merely states that an applicant is "unfit for work" would be inadequate and require further elaboration.

Infectious Diseases

- 6.33 It is not unlawful to discriminate against a person with a disability if the disability is an infectious disease and the discriminatory act is reasonably necessary to protect public health. This exception does not apply to persons living with AIDS or are HIV positive.
- 6.34 Infectious disease is defined under the DDO as a disease specified in the 1st Schedule to Prevention and Control of Disease Ordinance, Cap 599 or any communicable disease specified by the Director of Health by notice in the Gazette.

S 61(1)

See also paragraphs 7.31 – 7.33 in Chapter 7

S 61(2)

S 61(3)

CAP 599

J was a clerk at a shipping company. Her

employment was terminated by the employer because she had contracted a contagious and serious disease. The employer claimed that her presence at work would be a threat to the health of other colleagues. However contagious and deadly the disease may be, a hasty decision to rid someone of a gainful employment without having considered reasonable accommodating alternatives, such as granting the person leave before full recovery, would likely be unlawful under the DDO.

On the other hand, it would be more reasonable if J was requested to take leave and to submit medical clearance before she could resume duty. Having to go through medical clearance may be less favourable treatment in comparison with others colleagues who did not have such disease or had other disabilities. In such case involving a contagious and life threatening disease, the less favourable treatment would not likely amount to unlawful discrimination given that they are necessary measures to protect public health.

K was initially offered the job as a chef at a hotel but found to have tuberculosis in the course of the health screening. Since tuberculosis is contagious, and the position in question involved food safety, the hotel required K to commence employment only after another health clearance. Although K was unhappy with the delay of his employment, the employer's decision would most likely be accepted as reasonably necessary and justifiable.

- 6.35 In conclusion, the overall goal of recruitment and selection for a position is to attract, identify and select people who are most likely to optimally contribute to the organisation. Recruitment is actually an opportunity for an employee to unleash

his or her potential in a new position or to bring in fresh perspective and skills of an external recruit. The DDO outlaws disability discrimination against applicants in this process. To achieve optimal result of recruitment and to avoid discrimination, an employer must assess all applicants on their merits and be able to recognise differences in people and respecting these differences.

Chapter 7: Managing Disability Related Work Absence

7.1 Sick leave is a statutory entitlement under the employment law. When sick leave is not reasonably and properly afforded, health problems and the spread of illnesses in the workplace could accelerate, and as a result, lowering productivity as well as morale. On the other hand, it is also true that sick leave abuse may occur in some cases, and failure to address them may translate into inefficiency and business loss.

See relevant provisions in the Employment Ordinance (CAP. 57), Employee's Compensation Ordinance (CAP. 282) and the Occupational Safety & Health Ordinance (CAP. 509)

7.2 This chapter explores different issues relating to workplace absenteeism caused by disabilities, including minor illnesses, chronic illness, work injuries, etc. It aims to explain the rights of employees to sick leave as well as the need for employers to administer the taking of sick leave within the remit of the DDO.

7.3 To avoid confusion with provisions from other ordinances, sick leave discussed in this chapter includes paid and unpaid leave. This chapter does not seek to resolve issues under other ordinances that deal with statutory calculation of paid sick leave or those related to employees' compensation. One needs to bear in mind that sometimes a situation considered unlawful under one piece of legislation may not necessarily be rendered unlawful under another. Likewise, a ruling in the Labour Tribunal may not necessarily resolve a disability discrimination complaint.

Granting of sick leave

7.4 Sick leave is not a specific topic covered in the DDO. No provisions within the DDO prescribe specifically an employee's legal entitlement to sick leave and oblige employers to compulsorily offer sick leave. Nevertheless, sick leave is the natural consequence of

some disabilities. This close connection between sick leave and disabilities gives rise to issues that could translate into unlawful discrimination and harassment under the DDO.

- 7.5 When an employee's disability hinders the person's capacity to perform the inherent requirements of his or her job, consideration of reasonable accommodation on the employer's part is warranted. Accommodation should be provided to enable employees with disabilities, be it temporary (such as having a flu), long term (more serious illnesses or injuries) or permanent (whether existing or acquired in the course of or during employment), to perform the inherent requirements of their jobs, so long as they are reasonable and justifiable. Accommodations, apart from additional facilities or services to enable an employee with a disability to perform the inherent requirements of a job, could take the form of sick leave afforded for recovery of illnesses and injuries.
- 7.6 It is important to note that the DDO is not concerned with the cause of the disability, making no distinction between a work injury or injury caused outside the employment, an illness as a result of occupational hazard or a disease contracted generally.

See Chapter 5

See paragraphs 3.3 – 3.7 in Chapter 3 for definition of disability

B was one of three clerks in a trading company. She sprained her ankle during a leisure hiking trip and required three days of sick leave and had to walk on clutches for a month. B's employer dismissed her claiming that they feared her use of clutches around the small office would cause further injury to herself and at the same time the employer was not prepared to grant frequent leave for her rehabilitation treatment, citing disruption to business operations. The employer took the view that the dismissal was not an unlawful act under the DDO because the injury was not sustained at

work.

In this case, the dismissal is likely to be unlawful under the DDO because 1) the cause of B's disability is not relevant, 2) the employer has not considered any reasonable accommodation, and 3) even if accommodation had been considered, the employer was not able to show unjustifiable hardship.

C was injured at work and sustained serious and permanent disability which rendered him unable to continue with his job. As a result, his employment was terminated. C was compensated fully for his injury by the employer but he still perceived his termination as unlawful because he was injured in the course of his employment. C's feeling of injustice toward the causation of his disability was understandable. Nevertheless, the termination of employment was not likely to be considered unlawful under the DDO because C was unable to perform the inherent requirements of the job.

Employers' right to administer sick leave

- 7.7 Employers have the right as well as responsibility to administer sick leave in the workplace, both in order to minimise disruption to work and to manage attendance. This also assists employers to encourage and promote work-life-balance working practices and to implement programmes to reduce absence in general.
- 7.8 The administration of sick leave should be clearly explained in the organisation's sick leave policies. Sick leave policies should be formulated based upon a concern for the well-being of employees and effective operation of the workforce, including a commitment to deal fairly and sensitively. Proper policies help employees to understand their right to take sick leave

and also their shared responsibility for positive management of sick leave in the workplace.

Trends and patterns in taking sick leave

- 58
- 7.9 Where the underlying cause of absences, whether or not frequent, is known (for example a specific condition that fluctuates in its effects), granting sick leave is reasonable and legitimate. Difficulty arises when there is no obvious explanation for repeated absences. Situation as such triggers a warning that there is either an underlying condition or cause than it appears or that the employee is malingering.
- 7.10 Where an employer suspects sick leave abuse by an employee, the former may not be liable for discrimination or harassment under the DDO for taking certain action deemed necessary, so long as the action taken by the employer can be reasonably attributed to suspected sick leave abuse and is not executed on the ground of disability. It would also qualify as a defence to a claim of discrimination if the employer's action could be justified on demonstrable grounds, for example, where the pattern of sick leave might justify a requirement that the employee should see a nominated doctor.

Employee E had a pattern of taking 3-4 days of sick leave each month, usually on a Monday or Friday or immediately before or after a public holiday. The sickness varied from "upper respiratory infection", to "gastric flu", to "common cold." Her employer suspected sick leave abuse and informed E that the company would in future only accept certificates issued by a doctor nominated by the employer.

Under the wide definition of disability in the DDO, it is likely that E could still be considered as a person with

a disability. However, there may not be unlawful discrimination if circumstances suggest that E received the treatment because, having regard to the pattern of sick leave for a certain period of time, the employer reasonably suspected sick leave abuse.

***Ip Kai Sang v Federal Elite Limited* [2008] 2 HKLRD 563**

Mr. Ip was a waiter employed by the restaurant under an 18-month contract starting from July 2004. The appraisal report dated January 2005 showed that his performance was satisfactory. In May 2005, Mr. Ip injured his right wrist and was granted nine days of sick leave by the doctor. His sick leave was documented by two sick leave certificates for five and four days consecutively.

When Mr. Ip returned to the restaurant to turn in his first sick leave certificate, the manager of the restaurant was dismayed and told him that the restaurant was short of staff and asked him if he really needed to take such a long sick leave.

Mr. Ip returned to work upon completion of his sick leave and informed the manager that he had not fully recovered and was required to wear a wristbrace as recommended by the doctor. He would not be able to carry heavy load and needed to slow down his work. The restaurant dismissed him on the very day. No explanation was given for the dismissal.

Although the restaurant claimed that Mr. Ip's dismissal was due to unsatisfactory performance prior to his sick leave, the court was not convinced as the restaurant could not produce any records of oral or written warnings given to Mr. Ip. The court viewed that if

performance was an issue, Mr. Ip should have been dismissed earlier, but not after the sick leave.

On the other hand, the court found no evidence to show that Mr. Ip was feigning his wrist injury or that he was malingering and accepted that his wrist injury had rendered him unsuitable to return to work for nine days. The court drew an inference from the circumstantial evidence and found that the restaurant had decided to dismiss Mr. Ip because he had not fully recovered and would take some time before he could return to full working capacity.

- 7.11 There are situations where an employee may not be aware that there is an underlying impairment, for example with early onset of diabetes or mental illness. It is suggested that where a high frequency of absences has become apparent, before coming to the conclusion that the employee is malingering, a meeting should be arranged to identify the reason. This is not only to avoid breaching of the DDO, but also to positively enable the employer to manage the taking of sick leave timely and efficiently.

Employee F had been with the company for over ten years with outstanding performance ratings from different supervisors. He was found by the human resources department that he had been taking half-day sick leave every week for the past two months, all in the mornings.

The human resources officer found the situation unusual and decided to talk to F to find out what had gone wrong. The human resources officer was very upfront about the pattern of sick leave taken by F and asked F for an explanation. It turned out that F had been having trouble with sleeping and was advised by the doctor that he might be having anxiety disorder.

He was reluctant to seek further medical assistance because he worried about being labeled as a mental patient.

The human resources officer reiterated the company's equal opportunities policy to F and convinced him the importance of seeking appropriate and timely treatment. Eventually, with doctor's advice, the company was able to work out a flexible working schedule covering the six-month estimated recovery period for F.

Reasonable length of absence

7.12 Lengthy absence from work by an employee may cause difficulties to an employer's operations in varying degrees, including additional workload for other employees, inability to plan ahead and manage, additional work in general, etc. Whilst the DDO does not require an employer to retain in employment indefinitely an employee with a disability who is constantly absent from work, the employer should ensure that the termination of employment complies with the DDO.

7.13 Employers could impose conditions or requirements for the attendance of employees, on the basis that they are **justifiable** for operational reasons. If an employee acquires a disability and needs regular treatment, it would be discriminatory for the employer to penalise the employee for taking repeated or extended sick leave.

See paragraphs 4.14 – 4.19 in Chapter 4 for indirect discrimination

Employee G had a chronic illness and was required to take regular days off for medical treatment. The employer decided to terminate G's employment on the basis of operational needs. The employer claimed that operational needs required employees to meet a

certain attendance level as stipulated by the employer, regardless of a person's disability or other reasons.

Assuming existence of adverse impact on G because he could not comply with such requirement or conditions, the question would be whether the condition or requirement is justifiable in the circumstance. (For example, whether the nature of business or nature of the particular post of the employee requires regular attendance in the office or flexible hour is equally efficient; whether the frequent treatment schedule of the employee can be arranged outside working hours.) This will depend on individual circumstance in each case. Generally, consideration should be taken on the impact G's absence had on the operation of the company, the impact of G's absence on G himself as well as his colleagues and also the reasonableness of allowing regular absence in this particular instance.

- 7.14 It takes a balancing exercise to determine the justifiability of a condition or requirement. There should be thorough consideration of all relevant factors including the effect of the disability on the individual, effect on the employer's operations, the resources of the business, administrative efficiency and the reasonableness of the alternative arrangements that could be provided to the person with a disability.

See paragraphs 4.18 – 4.19 in Chapter 4 for the determination of justifiability of a condition or requirement

***Siu Kai Yuen v Maria College* [2005] 2 HKLRD 775**

Mr. Siu worked for the school for over 14 years. Despite having hired a substitute teacher for the entire school term, the school dismissed Mr. Siu while he was on sick leave for cancer treatment, including surgery. The school claimed Mr. Siu's absence from work breached the terms and conditions of his contract of service. The contract stated that leave and absence cannot be more than 10% of total number of classes in the month of leave. The school claimed that this

condition was justified because the rights of students.

The Court held that Mr. Siu's dismissal was discriminatory because the service condition in question was unjustified when balanced between the discriminatory effect on Mr. Siu's group of persons (persons having diagnosed of cancer who need to receive critical surgery and treatments) and reasonable needs of the school applying the condition, especially that a substitute teacher had been employed to take over Mr. Siu's duties for a whole school year.

Kwok Wing Sun v Global Metal & Plastic Factory (Law Yung Kai) [2008] 5 HKLRD 340

Mr. Kwok is a person with multiple disabilities. He had a genetic heart disease and the condition had been surgically corrected since young age. He also had kidney failure and received a transplant. He has to receive treatment in two separate hospitals periodically. The medical checkups are at about six to nine months intervals, which are not too frequent. Doctors have certified that Mr. Kwok's disabilities would not affect his driving ability and work as a driver.

Mr. Kwok has over twenty years of driving experience, having only served two employers. He was hired by Mr. Law to be the driver of one of his cars serving mainly Mrs. Law and their two young sons. After having successfully passed the three-month probation, Mrs. Law came to know about Mr. Kwok's disabilities and became very displeased. She granted his first sick leave request to attend medical checkup and became very annoyed when he requested for sick leave to attend another medical checkup two months after. Mr. Kwok was also required to produce medical reports that certified his disabilities having no adverse effect on his driving, which he did.

Mr. Kwok was eventually dismissed. Mr. Kwok alleged disability discrimination. His employer, on the other hand, claimed health and safety reasons and unsatisfactory driving manner. The court after having considered Mr. Kwok's past record of having worked with only two employers in his entire driving career and almost unblemished driving record, ruled in Mr. Kwok's favour. The court was satisfied that the attitude of his employer changed drastically after knowing about his disabilities and that it was on the ground of Mr. Kwok's disabilities that he was dismissed.

7.15 There is no empirical rule on the length of sick leave. However employers should take into account the statutory entitlement of employees in respect of sick leave under the general employment legislation.

7.16 The critical question is whether sick leave has been reasonably allowed in the particular circumstance without causing unjustifiable hardship on the employer. Unduly long sick leave is likely to cause hardship, but each case should be considered according to its own circumstances. Whilst a three-month absence from work could give rise to hardship on a modest business, it could be regarded as affordable to a more substantial enterprise.

Sick leave certificates

7.17 A sick leave certificate is issued by a medical practitioner that specifies the diagnosis of an illness or a disability and recommends time to be taken off work for recovery. It is not unlawful for an employer to request appropriate sick leave certification before an employee can claim his or her sick leave entitlement, as long as it is in accordance with the organisation's sick leave policy.

N's job required her to travel frequently to the Mainland. One time, she had become ill during a business trip and was prescribed one week of bed rest. N, while on the Mainland, arranged for the relevant medical certificate to be faxed to her employer and asked for relevant sick leave. Her employer, however, requested her immediate return to Hong Kong for medical treatment. N refused and was seriously warned by her employer for absent from duty. Knowing that N's parents were residing on the Mainland, the employer opined that she was seeking for extended stay to be with her family. Without verifying the medical certificate N had produced, the employer issued a warning letter to her.

Without seeking further verification of the medical certificate nor ascertaining N's disability, the issuing of warning letter to N would likely to be considered unreasonable and harsh.

- 7.18 Employers should not just disregard overseas medical certificates provided by employees. If there are concerns about the authenticity and / or validity of an overseas medical certificate, an employer should make reasonable and appropriate enquiries for verification. It is an administrative decision how medical certificates are verified irrespective of their origins.

Medical examinations and reports

- 7.19 There may be circumstances where an employer is unsure about whether difficulties experienced by individual employees are related to a disability, for example, where these manifest themselves as frequent sick leave or as lowered productivity. It would be appropriate for the employer to consider whether the situation could be overcome or managed with reasonable accommodation. One way of doing this is

to ask the employee in question whether he or she would be willing to obtain a medical report from a medical adviser to enable consideration be given to the provision of accommodation.

7.20 Sometimes obtaining a medical report may not be agreeable to an employee. Many people may not realise that they have a disability or significant health condition. For example, the symptom may not be obvious or the process may be gradual as in the case of progressive hearing loss. It is difficult to adjust to the onset of a disability and, in some instances, people would rather hope that the difficulties will just go away. Another reason an employee may be reluctant to disclose a disability is because he/she is concerned that it will lead to discrimination by the employer. This is particularly true for conditions that attract high level of prejudice and social stigma such as HIV, epilepsy or mental illness.

7.21 Employers should explain to employees who are reluctant or refuse to provide information or to obtain a medical report that the purpose of obtaining medical report is to enable proper consideration of reasonable accommodation to be rendered and not to discriminate against the employee for having a disability. In the absence of sufficient medical information, an employer would have to resort to making decision based on the available information which may not be beneficial towards the employee with a disability.

Q was a telephone operator in the customer services department of a company. She had been late coming to work for more than one hour repeatedly at the frequency of three to four days a week for about two months. It was essential that telephone operators in the department were on duty during office hours to answer customer enquiries and complaints. Q's

tardiness had caused impact on the operation of the department as well as customer service pledge. When queried about her tardiness, Q explained that she experienced stomach cramps almost everyday she left home for work. She said that she had sought treatment from various clinics but was only given pain killers which she found ineffective and considered hazardous to her health in the long run. She submitted medical certificates indicating that she had “stomach cramps” from time to time.

The company suggested that Q should seek further and more thorough examination from a doctor of her choice on the company’s insurer’s list of panel doctors or any of the public hospitals. They suspected Q might be suffering from a more serious condition prompted by stress. To assist Q to carry out her duty as a telephone operator, the company would need more information with professional advice. Q refused to seek any medical attention as suggested by the company and continued to be frequently late for work. Her tardiness went on for another two months and the company finally terminated her employment on the ground of her repeated tardiness, claiming that she was unable to perform the inherent requirement of her job as a telephone operator.

This situation would not likely amount to disability discrimination. Without further and proper medical information and advice regarding her condition to enable accommodation to be considered, it was reasonable for the company to terminate Q’s employment due to her inability to perform her job as a telephone operator.

Obtaining medical reports

7.22 Generally, the employer may require a sick leave

application to be accompanied by a medical certificate stating the employee's illness and recommending a period of absence. In certain circumstances where the situation so warrants, a further medical report may be necessary. It is not unlawful for an employer to request such additional medical report as long as the intended purpose is both necessary and justifiable, such as to help them to determine whether the employee's disability would prevent him or her from performing the inherent requirements of the job and to consider the provision of accommodation where possible.

S 42(3)

7.23 The quality of the medical advice obtained will depend on the medical practitioner's understanding of the particular job in relation to the individual employee. The medical practitioner would need to be provided with a detailed description of the duties of the employee with a disability so that the information provided is of practical assistance, such as:

- 7.23.1 Job description;
- 7.23.2 Person specification;
- 7.23.3 Working hours and flexible arrangements where appropriate;
- 7.23.4 Physical requirements of the job, including strength and stamina;
- 7.23.5 Intellectual and emotional demands, such as stress factors;
- 7.23.6 Employer's expectation, including key outputs for the job;
- 7.23.7 Updated record of the person's sickness absences.

7.24 It would also be helpful if a pro-forma is provided to the medical practitioner to make sure that the report addresses the employer's key areas of concern. Questions may include:

- 7.24.1 What is the person's health condition in relation to the requirements of the job?
 - 7.24.2 Is there any reason to believe that this condition could change over time?
 - 7.24.3 Whether there is any suggested accommodation that could be considered which would enable the person to continue working in that job?
 - 7.24.4 Is there any underlying medical condition which could render such accommodation ineffective in certain situations?
 - 7.24.5 Could medical intervention, change of medication or specialist rehabilitation help the person to work to his or her full potential?
 - 7.24.6 If the person is unable to work now, is this likely to change in the foreseeable future?
- 7.25 The role of the medical practitioner is to assess risks, make recommendations and provide relevant advice in relation to the employee and the specific job. The decision as to whether or not to retain an employee with a disability is ultimately a management and not a medical decision.

See also paragraphs
11.8 - 11.11 in
Chapter 11

Health and safety considerations

- 7.26 It is an implied inherent requirement that employees should be able to work in a manner that does not pose a risk to the health and safety to fellow employees. Employees should also possess and exercise reasonable care and skills in carrying out the employment.
- 7.27 Employers have the duty to ensure, as far as is reasonably practicable, the health, safety and welfare of all employees at work, including those having disabilities. A genuine concern about the health and safety of every employee in the organisation is

necessary. However, it is impossible and impracticable to remove all conceivable risks. It is rather that risk should be properly appreciated, understood and managed. If the effects of an employee's disability may affect health and safety, it would be sensible to have a risk assessment carried out by a suitably qualified person. This person must have ample knowledge of the liability placed on employers under the DDO.

Pilot H developed a heart condition and the airline company asked him to undertake a risk and health medical assessment in accordance with the relevant requirements under the aviation regulations. This requirement to ascertain the physical fitness of H seems reasonable under the DDO.

J was a person with a learning disability. She had worked in a shop for many years, stocking shelves without any problem. When a new manager was appointed, he insisted that a risk assessment was carried out on J only but not for all other staff working in a similar position. This action would appear to be uncalled for; it was but for the J's disability, she was subjected to the extra assessment. It is therefore likely to be considered as unlawful disability discrimination.

7.28 Criteria for considering whether a person's disability could pose a real risk to the safety or health of others include:²⁶

- 7.28.1 The degree of risk;
- 7.28.2 Consequences of the risk being realised;
- 7.28.3 Employer's legal obligations to other employees and others;
- 7.28.4 The function which the employee performs as

²⁶ *K & Others v Secretary for Justice* [2000] 3 HKC 796

part of the business operations;
7.28.5 The organisation of the employer's business.

7.29 People tend to think of disability as a liability in the context of health and safety in the workplace. In fact, where reasonable accommodation has been provided for employees with disabilities, these may also have the effect of improving health and safety for everyone in the workplace and sometimes for customers as well – for example, access ramp, disabled toilets which facilitate usage by elderly people and nursing parents.

7.30 Health and safety measures should be used to underpin a best practice approach to disabilities and long-term health conditions, not to justify discrimination. Stereotypical assumptions about the health and safety implications of disability and health conditions should be avoided, both in general terms and in relation to particular disabilities and conditions.

K is a school bus driver by profession. He has heart disease and was dismissed by the school bus company claiming that it was common sense to assume that a person with a heart condition would not be fit to drive a school bus. It also stated that the risk was too high and consequence too serious for the company to keep K. K disagreed and underwent a thorough medical checkup for his fitness to perform the job. Medical report indicated that K's condition was minor and had been corrected by surgery, i.e. him having heart disease would not affect his ability to drive. The school bus company's decision to dismiss K before obtaining proper medical assessment would likely constitute disability discrimination.

7.31 An employer should not assume that they could rely upon statutory health and safety obligations as a reason not to allow an injured employee to return to

work. If there are reasonable concerns about an employee's ability to perform duties safely, an employer should obtain supporting medical information from relevant professional. In the above scenario, the school bus company would not have dismissed K and contravened the DDO should they have obtained a medical report on his condition and properly considered it, weighing all factors in the circumstance, including risk, K's rights as a person with a disability and passengers' as well as K's rights to proper safety.

Infectious Diseases

7.32 It is not unlawful to discriminate against an employee with a disability if the disability is an infectious disease and the discriminatory act is reasonably necessary to protect public health.

S 61(1)

See paragraphs 6.34 - 6.35 in Chapter 6 for the definition of "infectious diseases" under the DDO

7.33 When dealing with infectious disease, an employer needs to consider the nature and duration of risk the infectious disease would cause to the organisation's operations, the possibility of transmission including the severity of the consequence of transmission and the function which the person infected performs. Blanket application of this exception without due consideration of the above criteria could result in unlawful acts.

During the SARS epidemic employees who had been exposed to the virus were required by the employer to produce proof of medical clearance issued by the Department of Health upon resumption of duty.

This requirement, although imposed on staff who had contracted SARS in particular causing them at least the hassle to obtain a certification from the Health Department, would not likely to be discriminatory because it appears to have been imposed for

safeguarding public health.

During the SARS epidemic, L, a clerk of a trading company, was dismissed due to the fact that she had contracted the disease. Her employer feared that L could bring the virus to work and spread it to everyone at work. The employer held public health was the reason of her dismissal.

In this case, dismissing L without further ado does not appear to be a reasonably necessary act to protect public health and therefore would still amount to unlawful discrimination. As people do recover from SARS, a reasonable measure here would be allowing an appropriate period of time for recovery.

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7.34 In managing infectious disease in the workplace, employers should:

- 7.34.1 Seek medical opinion;
- 7.34.2 Make reference to government practices;
- 7.34.3 Provide reasonable accommodation;
- 7.34.4 Set up proper guidelines;
- 7.34.5 Handle individual cases with care and respect
- 7.34.6 Conduct consultation when necessary with staff to achieve consensus and support;
- 7.34.7 Review policies and guidelines regularly to check their effectiveness and validity.

Restricted duties and light work

7.35 Sometimes an employee may be able to resume partial duty upon recovery of an illness, injury or condition. There should be appropriate recommendations from appropriate medical practitioner suggesting specifically which type of activities at work should be avoided, what alternatives employers should consider and an estimated period where the employee should be on

light duties. Employers should ascertain proper recommendations are given and in situations where recommendations are unclear or lacking, seek further medical advice and information. Reasonable accommodation should be considered and provided where it would not impose unjustifiable hardship on the employer.

- 7.36 It is also the responsibility of the employee requiring light duties to provide ample information about his/her condition for their employer to consider the provision of accommodation and to ensure smooth back to work adaptation.

Chauffeur M had developed back pain. His doctor stated in the medical report that the reason for his back pain was unknown. Although there was moderate improvement after physiotherapy, complete recovery was not in sight nor could time for recovery be estimated. The doctor merely recommended light duties without specifications or other details. The company therefore arranged for M to work in the office to take up minor clerical jobs. M while agreeing that driving duties should be suspended, refused to take up clerical jobs asserting that he was not trained to perform office work. The company sought to seek further information from the doctor as to what kind of work would suit M, but was objected to by M claiming that his medical record and condition were protected by his privacy rights. After letting M idle in the office for several months with no further information on M's recovery, the company terminated his employment.

To determine lawfulness of M's dismissal, one should first ask the question whether M's employment has been terminated on the ground of his disability, i.e. back pain. In this case, it is unequivocal that the dismissal was the consequence of M's condition.

Then one needs to check if M could carry out the inherent requirements of the particular employment, i.e. chauffeuring with accommodation in terms of provision of services or facilities which would not impose an unjustifiable hardship on the company. Driving is clearly an inherent requirement of the job of a chauffeur and M's back pain appears to prevent him from performing such task.

See Chapter 5 on "inherent requirement" of a job as a defence

The DDO does not require an employer to alter the nature of the particular employment or its inherent requirements in order to accommodate the employee's disability, and the company is not obliged to consider alternative postings on a permanent basis (as opposed to arranging light work in the interim.) The employer has no duty to ask some other staffs to do the work of the employee with a disability.²⁷ It seems that M's dismissal under the circumstance would not be unlawful.

Workplace absence and disability harassment

Managing resentful colleagues

7.37 It is not uncommon for other employees covering for a member of staff who has been absent for some time to become resentful and indicate their dismay. This is especially so where the other employers are not aware of the precise nature of the absence and believe that the person was merely "skiving."

7.38 These sentiments, if not properly managed and dealt with, could result in conduct toward the employee with a disability, such as:

7.38.1 Having low expectation and not trusting the employee with a disability with any

²⁷ See *M v Secretary for Justice* DCEO 8/2004 supra at para 265 vii

meaningful work;

- 7.38.2 Only assigning menial tasks to the employee with a disability;
- 7.38.3 Isolating or ostracising the employee with a disability;
- 7.38.4 Making unreasonable demands and then claiming the person is not up to the requirements of the job;
- 7.38.5 Overemphasising difficulties which the employee with a disability experiences and trying to show that these difficulties only arise because the person has a disability and is no longer fit for work.

7.39 Treating a fellow colleague badly because the person has been on sick leave may constitute disability harassment. It is essential that the employer deals with these sentiments as soon as they become apparent. Efforts should be made so that employees understand and are aware of their rights not to be discriminated or harassed if they acquire a disability and their responsibility not to discriminate or harass other colleagues with disabilities. Disability harassment is not only an employer's liability; individuals who have committed the act are themselves personally liable under the DDO.

See paragraphs 9.3 – 9.9 in Chapter 9 for the meaning of disability harassment

S 2(6)

Sensitivity issue

7.40 On the other hand, employers are concerned that enquires or actions taken to obtain information about employees' disabilities for consideration of accommodation might be construed as putting undue pressure on the person with a disability in question. Misunderstandings of this kind could lead to allegations of discrimination and harassment.

7.41 Employees need to understand that it is the right and

responsibility of employers to monitor absence from work because of its effect on the operations of the organisation. This would include absence due to disabilities. Should a person be off sick for a period of time, it is normal for the employer to make contact in order to:

- 7.41.1 Ascertain the employee's current health condition and whether there is anything the employer could do to help;
- 7.41.2 Update the employee on developments at work and arrangement regarding the employee's job duties;
- 7.41.3 Discuss possible return date and any reasonable accommodation which might be required upon resumption of duty;
- 7.41.4 Agree on a time to make further contacts.

Employee O had been off sick for over two weeks with flu. Sick leave certificates issued by different doctors were submitted, indicating flu, cold, URI and abdominal pain. The HR manager telephoned O, in accordance with the company's policy to enquire about his health, and suggested a more thorough medical check-up and estimation of when he might return to work. O, although not knowing when he would return to work, refused to seek further diagnosis of his health condition. He insisted that he was entitled to sick leave and should not be disturbed at all during that period. The next week when the HR manager called again, O refused to discuss his medical condition with her and alleged that she had intruded into his privacy. He alleged disability harassment because he felt intimidated by the two phone calls made by the HR manager.

It appears that the HR manager was merely performing her duty according to a standard policy. Moreover,

two calls within three weeks would likely be considered reasonable. Unless there is information indicating impropriety on the part of the manager in the two telephone conversations, it is not likely that the allegations would substantiate.

Employee P was on a four-week extended sick leave due to pneumonia. He was granted sick leave by the same doctor at weekly intervals. The HR manager began calling him daily beginning the second week asking him to recover quickly. She repeatedly told him that he sounded fine on the phone and suggested that he should at least work from home. P refused and told the manager about the doctor's advice that it normally takes a person three to four weeks to recover from pneumonia. The HR manager indicated to him that at this present time of economic downturn, it would be unwise for P to put his career at stake. P felt pressured and aggrieved.

P's situation would likely constitute unlawful disability harassment as the HR manager's behaviour stemmed from P having a disability that prompted an extended sick leave. What she had done would amount to an unwelcome act in the eyes of a reasonable person.

- 7.42 Difficulties are more likely to arise where there is no consistent procedure applicable to every employee in the organisation. In this case, it is easy for the absent employees to feel that they are being targeted when the employer's real intention is to be supportive and to facilitate an early return to work.
- 7.43 It is recommended that a consistent and reasonable sick leave policy be put in place so that employees are well aware of the applicable procedures and reduce the chances of misunderstanding.

7.44 The need for work attendance by staff to ensure customer service and efficiency is understandable. On the other hand employees also need an equitable sick leave program to safeguard health and overall performance. Employers should maintain a balance between work demands expected of the employees and an equitable and safe working environment which is made available to the work force as a whole.

Chapter 8: Managing Promotion, Transfer and Dismissal

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- 8.1 Under the DDO, it is unlawful for an employer to discriminate against an employee with a disability:
- 8.1.1 In the terms of employment afforded to him/her; S 11(2)(b)
 - 8.1.2 In the way they afford him/her access to opportunities for promotion, transfer or training, or to any other benefits, services or facilities; S 11(2)(a)
 - 8.1.3 By refusing or deliberately omitting to afford him/her access to those opportunities; S 11(2)(a)
 - 8.1.4 By dismissing him/her. S 11(2)(c)
- 8.2 This chapter deals with some aspects in employment, including terms of employment, promotion, transfer, and other benefits and, finally termination of employment.

Terms of employment

- 8.3 Terms of employment are arrangements and conditions set out in an employment contract. They are offered 1) initially to a job applicant selected to take up an employment with the organisation and 2) to an existing employee upon the person's promotion or transfer to a new post within the organisation. Terms of employment mainly involve (but not limited to) the following:
- 8.3.1 Salary and benefits;
 - 8.3.2 Duties performed;
 - 8.3.3 Performance requirements;
 - 8.3.4 Conduct and attendance requirements;
 - 8.3.5 Supervisory and management arrangements.
- 8.4 Employers have the responsibility to ensure that S 11(2)(b)

employees with a particular disability are not disadvantaged by any of the terms offered to them when comparing with employees without a disability or with other disabilities in comparable circumstances. They should also be mindful that generally applied condition may cause indirect discrimination to persons with disabilities. Moreover, a discriminatory term or condition is voided by virtue of Section 83 of the DDO.

See *Siu Kai Yuen* in paragraphs 4.16-20 in Chapter 4

S 83

Equal pay for equal work and equal pay for work of equal value

8.5 Salary is often paid in the form of a pay package. It S11(2)

includes cash and other components of pay, such as basic salary, bonus, overtime payment, leave, medical benefit, MPF contribution, etc. Employers should maintain the principles of equal pay for equal work (EPEW) and equal pay for work of equal value (EPEV) between employees with a disability and employees who do not have a disability or with different disabilities, and determine the pay level of each job according to its job size and value to the organisation.

Also see the “Guide to Employers on Equal Pay between Men & Women under the Sex Discrimination Ordinance” and its four supplementary guidebooks published by the EOC for more information on EPEV and related issues

Promotion and transfer (access to opportunity and other benefits)

8.6 A ***promotion*** involves movement from one position to S 11(2)(a)

a more senior or a different position with a higher salary; whereas a ***transfer*** usually refers to a lateral movement from one position to another within the same salary range.

Other benefits includes, training, access to services and facilities, etc.

8.7 Promotions usually result in salary increase; losing a promotion opportunity entails a less favourable treatment in terms of pay package. Transfer, although generally means moving to a different position without change of salary, missing a transfer opportunity may result intangible losses, ranging from access to a broader and more desirable career path,

better and further promotion opportunities to injury to feelings. Deprivation of career development and the more subtle injury to feelings could all be regarded as **detriment** under the DDO.

- 8.8 Discrimination occurs if an employee with a disability is not given equal consideration for promotion or transfer because of stereotypical assumptions based on his or her disability. The following are examples of direct and indirect disability discrimination in offering promotion/transfer opportunity:

S 6

Employee A had worked as an accounting assistant for five years. In the last year, she had taken higher than average sick leave for lower back pain. All her sick leaves were supported by medical certificates. A had been rated as “effective” in all past five years in her performance appraisals. Her supervisor nonetheless believed that she should improve her health before she could be considered for promotion and eventually she was not considered in the promotion exercise this year.

Barring A the opportunity for promotion consequential to her disability would amount to direct disability discrimination.

See Chapter 7 for more discussion on sick leave management

Employee B had worked as an accountant in a company for 5 years with well recognised performance. She was recommended for the coming promotion which would take effect at the end of the year. Unfortunately, B had a car accident in August and had sustained injuries which required three weeks of hospitalisation and followed by physiotherapy sessions twice a week for a period of about two months for full recovery.

It was the company’s policy that staff who had been

absent from duties for more than three weeks within the current year would not be considered for promotion. As such, B was considered not eligible for promotion despite her outstanding performance. In the absence of justification for the attendance requirement for promotion, the above case may amount to indirect discrimination because B, being a person with disability, is unable to comply with the attendance requirement and is therefore excluded from promotion.

- 8.9 In the case of promotion or transfer, an employee with a disability needs to show that the selection process is discriminatory. It is not necessary for the person to show that he or she would otherwise be selected. Whether the person would otherwise have been selected is only pertinent to considering quantum after the complaint has been established.

Good practices for promotion (or transfer) consideration

- 8.10 Like in a recruitment exercise, Consistent Selection Criteria should be used to minimise stereotyping, ensure objective selection and most importantly to identify the best suitable person for the position. Candidates should be selected by comparing their abilities, qualities and potential against the promotion criteria. Records of promotion should be kept for at least twelve months²⁸. Employers should also review promotion and career development patterns to ensure traditionally required qualifications are still justifiable requirements for the job to be done.
- 8.11 It would be more appropriate to have one selection panel for the entire process to ensure consistency.

See paragraphs 6.3 – 6.4 in Chapter 6 for detailed discussion on Consistent Selection Criteria

²⁸ The timeframe for lodging a complaint with the EOC is 12 months (S 80(4)(c)) and the timeframe for bring a civil claim to the District Court is 24 months (S 82)

Considerations should be given to issues relating to the panel composition, panel members' knowledge of equal opportunities issues and related laws. Vacancies should be published to all eligible employees in such a way that they do not restrict applications to employees without disabilities. The objectives and essential activities of the job and the criteria essential to meet those objectives should be carefully determined to make sure that they are free of discrimination, whether direct or indirect.

Dismissal (including any other forms of termination of employment)

- 8.12 As previously discussed, it is direct discrimination for an employer to dismiss an employee with a disability because of the person's disability. The term "dismissal" applies to different ways to terminate an employment, including summary and constructive dismissal, redundancy, compulsory early and medical retirement, discontinuation and non-renewal of employment contract, etc.
- 8.13 It may amount to discrimination if an employee is dismissed based on a stereotypical assumption that his or her disability prevents him/her from performing of the inherent requirements of the job.
- 8.14 It is not unlawful to dismiss an employee who cannot perform the inherent requirements of the job, for example, dismissing an employee who, because of illness or accident, is unable to return to his or her full previous duties. Employers are strongly advised to consider the provision of accommodation unless there is unjustifiable hardship. Dismissal should always be the last resort.
- 8.15 Where operational changes (such as restructuring or

S 6(a) & 11(2)(c)

See also paragraphs 4.12-4.23 in Chapter 4

S 12(2)

See also paragraphs 5.4 – 5.15 in Chapter 5 for more on "inherent requirement"

relocation) are being contemplated, especially where redundancy may occur, due consideration should be given as to the impact of such changes on all employees – including those who are on long term sick leave. It may amount to unlawful discrimination if employees with disabilities are selected for redundancy ahead of other employees. When consulting with employees about significant operational changes, care must be taken not to exclude them from that process just because they are absent from work due to an illness, medical condition or injury.

- 8.16 Unlawful discrimination also takes place indirectly when an employee with a disability is dismissed for non-compliance with a condition or requirement which is not reasonable and which people with that disability are less able to comply with than other employees. However, it would not be unlawful discrimination if dismissal is for non-compliance with a condition or requirement found to be reasonable.

S 6(b) & 11(2)(c)

See also paragraphs
4.24-4.29 in Chapter
4

Employer E has a kidney disease that requires regular medical treatments outside office hour. This had prevented her from performing overtime work. When the company made redundancy decision, E was placed on the top of the list for not being able to work overtime in the office, and therefore made redundant. In E's case, the redundancy decision seemed to have been made based on a requirement to perform overtime work on all staff. E with her disability was unable to comply with such requirement. Without justification on adopting such requirement, the company would likely be founded for indirect discrimination against E.

Casual worker D of a packing company complained

that he had been discriminated against when he was not offered further shifts by his employer after failing to attend a number of shifts on time or at all due to illness. No medical certificate of diagnosed disability had been provided to the employer to show that D's failing to turn up for work on time was caused by his alleged disability and that no advance notice had been given of intended late arrival for work.

D would have difficulty substantiating a case. It appears that the less favourable treatments complained of were based on attendance rather than his claimed disability. Moreover, regarding indirect discrimination, the requirement for reliable attendance for shift duties would be reasonable in the circumstances.

Guidelines on performance appraisal free of bias

- 8.17 There are no fixed and prescribed rules on how an appraisal system should be formulated or what items are to be included in an appraisal report. Employers have the right and flexibility to set up appraisal systems that are relevant and essential to their business nature and operations. Factually and accurately indicating an employee's disability or a particular period of absence at work due to a disability is not in itself unlawful. At times it could help and remind the employer to allow different or extra consideration on the output and performance of an employee. However, where an employee's disability or sick leave record is used against the person's interest in the appraisal and the employer could not provide legitimate justification for bringing the disability into context, it could amount to disability discrimination.
- 8.18 As performance appraisal impacts on opportunity

for promotion, transfer and dismissal, the following matters may be taken into account to ensure that the appraisal will be objective and free of bias:

- 8.18.1 Performance plans, including objectives and tasks to be accomplished should be agreed with employees at the beginning of appraisal period in order to avoid confusion and misunderstanding.
- 8.18.2 Where there are changes to the objectives, proper records should be kept with reason(s) provided.
- 8.18.3 Assessment/evaluation system should be clear about what is being measured and understood by employees (e.g. numerical, textual, behavior-oriented, etc).
- 8.18.4 Consistency should be maintained in measuring performance from employee to employee.
- 8.18.5 All comments in an appraisal should be supported by facts. They should be made impartially without bias.
- 8.18.6 In case of poor or marginal performance, employers should act early to allow the employee in question the opportunity to improve and correct his or her performance. This would also avoid 'end-of-year' surprises.
- 8.18.7 Performance of all employees should be objectively documented on a regular basis, including discussions with staff and agreed actions going forward.

Chapter 9: Disability Harassment and Vilification

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9.1 Harassment and vilification are unlawful acts which are assessed under different sets of criteria under the DDO. Similar to discrimination in general, an act of harassment is directed to an individual but, different from other forms of discrimination, it is not necessary to compare the treatment received by the person who is harassed with the treatment received by another person. In the case of vilification, it may be described as an activity in public where the offender extends his or her prejudice or stereotypical assumption of a person with a disability to a broader group of individuals with the same or similar disability which act would have an adverse effect on the community.

9.2 This chapter outlines (with examples) the definitions of disability harassment, vilification and serious vilification.

Disability Harassment

9.3 Under the DDO, it is unlawful for an employer or an employee to harass another employee in relation to his or her disability or the disability of an associate. S 22

9.4 Disability harassment is an **unwelcome conduct on account of a person's disability** where a **reasonable person**, having regard to all the circumstances would have anticipated that the person with a disability would be offended, humiliated or intimidated by that conduct. S 2(6)

Determining unwelcome conduct

9.5 In order for a behaviour to constitute harassment, it

must first be unwelcome to the recipient. Unwelcome means that the behaviour is not solicited, invited, incited or reciprocated by the aggrieved person.

9.6 Unwelcome conduct on account of a person's disability could be:

- 9.6.1 Unwanted action involving bodily contact;
- 9.6.2 Abuse, whether verbal or written, such as notes, email or graffiti;
- 9.6.3 Threats;
- 9.6.4 Demeaning comments or behaviour;
- 9.6.5 Unnecessary intrusive personal inquiries in relation to a person's disability;
- 9.6.6 Comments or behaviour because of a person's disability which are based on stereotypical assumptions about the person's capabilities or need for assistance.

Employee A who had a deformed left arm since birth was named "Nemo" by his colleagues at work. Although those who called him this nickname stated that it was only a joke and they meant well by making reference to a fictional cartoon character (a fish which has a deformed fin), it still could amount to disability harassment as A was nicknamed on account of his disability. Even when the name was depicted from a famous fable character, a reasonable person having regarded the circumstances of the matter would have no difficulty finding the behaviour offensive to A.

9.7 It is not necessary for a person to object or protest to the offending party in order to make the behaviour unacceptable and establish the "unwelcomeness" of the case. People react differently to an unwelcome act; how they react depends on what the situation is

and the many circumstantial factors surrounding it. Most people find it easier to speak up in a situation where further conflict is less likely to occur and when everybody is on equal ground, whereas when the offender holds a senior or higher position in the office, they may choose to remain silent. Whether an act of disability harassment is unwelcomed remains a subjective perspective of the person making the complaint.

Supervisor B repeatedly asked C, an employee with intellectual disability, why she was so “slow” and whether a “rocket booster” was needed to boost up her IQ. B, having been complained against, claimed that he was only trying to communicate with C on her intellectual level and to find out her needs in order to provide her with appropriate accommodations. He claimed that she was not offended by his comments because she did not object to his comments.

The conduct of the supervisor could constitute disability harassment because a reasonable person would have found his behaviour in such circumstances offensive to the employee in question. The fact that C made a complaint is an indication that B’s behavior was unwelcomed.

- 9.8 Actions taken by an employer that are reasonably intended for a legitimate work related purpose (such as to determine an employee’s ability to perform the inherent requirements of the job or to determine the need for and nature of reasonable accommodation which may be required) are not likely to be unlawful. However, the manner, by which such actions are carried out, should be appropriate and not give rise to feeling of offence, humiliation or intimidation.

D, a delivery worker who had developed back pain,

See also paragraphs 6.21, 6.30 – 6.32 in Chapter 6, paragraphs 7.22 – 7.25 in Chapter 7 and paragraphs 11.8 – 11.11 for making enquiries on a person’s disability

claimed that he was unable to carry weight and also refused to drive. D's employer requested that he underwent further medical examination about his fitness to work. D at first refused but eventually went at the employer's insistence. He then disputed the contents of the medical report. D eventually lodged a complaint of disability harassment alleging that the employer's conduct of subjecting him to further medical checkup, with which report he disputed, was an unwelcome act of harassment on account of his back pain.

See paragraphs 7.22 – 7.25 in Chapter 7 for more information on obtaining medical report

D would not likely to have a successful case because the employer's request to ascertain his condition would appear to be reasonable in the circumstances. An employee has the responsibility to provide the employer with sufficient information about his or her disability to assist the employer in considering adjustment or accommodation.

See Chapter 5 for more explanation on "inherent requirement" and "reasonable accommodation"

"Reasonable Person" test

9.9 The second limb of the definition of harassment is, on the other hand, an objective "reasonable person" test. It means taking an objective view of the incident as to whether a reasonable person in similar or like circumstances would find the behaviour offensive, humiliating or intimidating. Eventually, it is for the court to consider all circumstances and all factors of the case and to make decision on whether a behaviour amounts to disability harassment.²⁹

***Ma Bik Yung v Ko Chuen* [1999] 2 HKLRD 263**

Ms Ma became a wheelchair user after an operation for a spine tumour. At the time of the incident, she

Though this is not an employment case, it is of significant importance because it demonstrates the

²⁹ See *San v Dirluck Pty Ltd & Anor* [2005] FMCA 750 (9 June 2005) at para 32-34 and *Ray Chen v Taramus Rus* DCEO2/99 at para 63-65

wanted to take a taxi to a clinic with her sister, who suffered from schizophrenia, to attend a medical appointment. Mr. Ko had parked his taxi in front of a bus stop waiting for hire. Ms Ma attempted to hail it but received no response. They then went up to Mr. Ko's taxi and knocked on the passenger door several times before Mr. Ko finally opened the door. However he remained in his driver's seat and did not help Ms Ma to get into the taxi. Ms Ma managed to get into the taxi by herself, leaving her wheelchair outside it.

When she asked the driver to load the wheelchair into the car boot, he refused, saying, "Who do you think you are, my responsibility is to drive and I have no responsibility to your wheelchair!" He said Ms Ma's sister could help but she was obviously too sick to help. The taxi driver then said that if her sister could not help, it was her business, not his, and she could get out of his taxi. Ms Ma managed to obtain assistance from a passer-by who loaded the wheelchair into the boot.

During the journey, the taxi driver scolded Ms Ma and amongst other things said, "Do you think not being able to walk and in a wheelchair is everything! I too had an operation on my leg".

On arrival at the clinic, the taxi driver sat with his arms crossed and did not respond to Ms Ma's plea for help to unload the wheelchair and did not ask any passers-by to help. Ms Ma was by then in tears. Her sister, who was easily excitable, was agitated and was trembling. Ms Ma tried to calm her down and waited inside the taxi until someone passed by to whom she explained what had happened. The passer-by then asked the taxi driver to go and help unload the wheelchair.

various types of conduct that could amount to disability harassment. The court, after looking at the incident and all the circumstances revolving around it, ruled that it was disability harassment throughout, including verbal remarks, gestures and overall demeanor of the respondent. See EOC leaflet on Guideline for Taxi Services

When Ms Ma asked why the fare was higher than usual, the taxi driver replied, "Who do you think you are, do you think being in a wheelchair is everything and you do not have to pay? You look at the meter! Do you think because you have an illness is everything?"

The court ruled that the taxi driver's conduct throughout the entire incident constituted disability harassment.

Vilification

- 9.10 Disability vilification means any activity in public to incite hatred towards, serious contempt for, or severe ridicule of a person or persons with disabilities. It is irrelevant whether any person is actually incited by the vilification. An example of vilification would be:

S 46(1)

S 46 (1A)

A group of residents of a private housing estate were not happy with having a clinic in their vicinity that also treats patients with AIDS and those who are HIV positive. They staged a protest and demonstrated at the entrance of the clinic where banners carrying derogatory comments aimed towards AIDS patients were erected and defamatory slogans were chanted.

This is not an employment case but it illustrates vilification and was a subject of a complaint handled by the EOC.

- 9.11 Vilification may occur in a workplace setting such as in a company convention or staff annual dinner. An example of vilification in workplace would be:

The CEO of a company gave a speech on a staff training day where she shared with the audience about how the company had been "putting up with a bunch of free-loaders," referring to staff who had taken sick leave or were currently on sick leave due

to illness or injury. She called upon those who had been “working diligently, shouldering up additional work and duties because of their colleagues’ taking of sick leave” to be patient. “Perseverance and hard work will prevail. True reward will come once those free-loaders are driven out off the system,” the CEO stated passionately.

9.12 Serious vilification occurs when the activity of vilification escalates into possible criminal liability involving: S 47

9.12.1 Threatening physical harm towards person or persons with disabilities;

9.12.2 Threatening physical harm towards premises or properties of person or persons with disabilities;

9.12.3 Inciting others to threaten physical harm towards person or persons with disabilities; or

9.12.4 Inciting others to threaten physical harm towards premises or properties of person or persons with disabilities.

9.13 A person carries out serious vilification commits a criminal offence and upon conviction would be subject to a penalty of a fine at level 6 and to maximum imprisonment of 2 years. S 47 (3)

Chapter 10: Liabilities under the DDO & “Reasonable and Practicable Steps”

10.1 Disability discrimination and harassment are unlawful acts under the DDO. Under the DDO an individual is personally liable for committing discrimination and harassment while an employer could be held vicariously liable for unlawful conduct of their employees. The law also imposes vicarious liability on a principal for discriminatory act done by its agent. Additionally, liability for discriminatory act may also arise in contracting or sub-contracting working relationships where a contract worker is discriminated on account of his or her disability.

S 6, 7 & 22

S 48(1)

S 48(2)

S 13

See paragraph 2.13 – 2.14 in Chapter 2

10.2 This chapter explains the three forms of liability for unlawful disability discrimination. It also lists out the criteria to establish the statutory defence to employer’s vicarious liability – “reasonable and practicable steps”.

S 48(3)

Employee’s liability

10.3 Individual employees, irrespective of levels of employment in the organisation, are personally liable for acts of discrimination and harassment committed by them in the course of their employment. A complaint can be lodged against an individual with the Equal Opportunities Commission for investigation and conciliation. The DDO also allows the aggrieved party to bring a civil law suit against the individual discriminator in court.

S 6, 7, & 22

S 80

S 72

10.4 Personal liability may also be incurred if a person (employee):

10.4.1 Instructs another person to commit an act of

S 44

- disability discrimination or harassment;
- 10.4.2 Induces another person to commit an act of disability discrimination or harassment; or S 45
- 10.4.3 Knowingly aids another person to commit an act of disability discrimination or harassment. S 49

A human resources officer knowingly carried out instructions that resulted in an act of disability discrimination in a recruitment exercise could be liable for aiding the employer in doing of the unlawful act, unless the human resources officer is able to show that he or she ***reasonably relied on a statement*** made by his or her employer, for example, that the relevant act he or she took part in could be effectively exempted by one of the statutory exceptions such as “Genuine Occupational Qualification”.

S 49 (a) & (b)

See paragraph 6.11 in Chapter 6 for explanation of GOQ

Employer’s liability – Vicarious Liability

- 10.5 The purpose of making employers and principals liable is to impose a legal obligation on employers so that they would not condone unlawful discrimination and harassment in the workplace. This would have the effect of encouraging the employer in taking the lead to establish a culture free of discrimination in the workplace. Bearing in mind that employers benefit from the work rendered by their employees, it is reasonable that an employer should be liable if someone’s right has been violated by their employee in the course of employment. S 48

Scope of employment - “in the course of employment”

- 10.6 Generally speaking, an act is done in the course of employment when the person acted in carrying out

See also paragraphs 2.3 – 2.11 in Chapter 2

the work or duties of the job. It also includes acts that may not be agreeable to or approved by the employer but are ***closely connected*** with the employee's day to day work and duty.

Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd
[2002] 1 HKLRD 844

A doorman employed by the hotel seriously injured two pedestrians when he lost control of the hotel limousine he was driving. In the absence of the chauffeur, the doorman was required by the hotel to move the limousine and this sometimes involved driving in the streets. The staff of the hotel developed a practice of ordering food from restaurants elsewhere and one of them would then go to collect it, sometimes persuading the limousine chauffeur to drive the person to pick up the food and back. On the night of the accident, a bell-boy was going out to collect food for the hotel's staff and as the limousine chauffeur had gone off-duty, the doorman drove the bell-boy in the limousine. It was argued that the hotel would never authorise driving the limousine to collect food as the doorman's duty and therefore he had been acting beyond the scope of his employment. The court ruled otherwise, relying on the new test of "close connection" for vicarious liability and held that the scope of employment must be looked at broadly as a whole, not dissecting the employee's task into component activities such as driving, loading, sheeting, etc.

Although this is not a discrimination case, the principle regarding vicarious liability is applicable across all facets of civil law.

- 10.7 The meaning of "in the course of employment" dictates whether an act of discrimination would become unlawful within the scope of employment. Once a discriminatory act is deemed unlawful in the employment field, not only the individual discriminator would become personally liable, his

S 14(4)

See also paragraph 2.11 in Chapter 2

or her employer could also be held vicariously liable. To achieve the policy effect of deterring discrimination by widening the net of responsibility, “in the course of employment” in discrimination cases should be given an ordinary, everyday meaning³⁰ through purposive³¹ interpretation.

10.8 Based on the wide interpretation above, incidents arising in the following situations would normally be considered as occurring in the course of employment when the parties involved are participating in activities closely related to their work:

- 10.8.1 Work related social functions;
- 10.8.2 Working in and outside the workplace;
- 10.8.3 Working within office hours or overtime;
- 10.8.4 Going on a business trip outside Hong Kong.

10.9 By virtue of S 48(1) of the DDO, “[a]nything done by a person in the course of his employment shall be treated... as done by his employer whether or not it was done with the employer’s knowledge or approval.” It simply means that an employer is vicariously liable for the unlawful acts of discrimination or harassment committed by employees in the course of their employment whether with or without knowledge or approval of such behavior on the part of the employer. S 48 (1)

10.10 Since the vicarious liability of an employer arises even if the employer has not engaged in the act of discrimination and the only connection to the unlawful discrimination is the discriminatory

³⁰ *Sidhu v Aerospace Composite Technology* [2002] IRLR 602

³¹ *Jones v Tower Boots Co. Ltd.* [1997] 2 ALL ER 406

conduct of their employees while acting in the course of employment, the DDO provides a statutory defence against the employer's liability. Employers who can prove that they have taken **"reasonable and practicable steps"** in preventing their employees from committing unlawful discrimination or harassment in the workplace or "in the course of employment" are to be exonerated from liability.

S 48 (3)

"Reasonable and practicable steps" as a defence to liability

10.11 The DDO provides for the defence of "reasonable and practicable steps" without specifying any criteria to accomplish it. Since each case bears its unique circumstances, requirement(s) for each employer to discharge vicarious liability differ. That said, general principles (commonly generated from case law of other jurisdictions) which the court would consider in assessing whether an employer could successfully meet the defence are listed in the following to serve as a tool of reference³².

S 48 (3)

See also paragraphs 11.11 – 11.30 in Chapter 11 for implementation of "reasonable and practicable steps"

10.11.1 Introduction and implementation of comprehensive and up-to-date policies on discrimination and harassment;

10.11.2 Provision of appropriate and adequate training to staff at all levels on their rights and responsibilities;

10.11.3 Introduction and implementation of appropriate grievance procedures;

10.11.4 Designation of appropriate personnel capable of dealing with matters arising from discrimination and harassment.

10.12 Generally, more efforts may be expected from

³² This reference is derived from case law of other common law jurisdictions. It is non-exhaustive and should only serve as a tool of reference.

larger organisations to successfully avail themselves of the defence. However, it is equally important that more modest businesses where friendly and informal atmosphere often exists should have at least a clear policy in place that a casual atmosphere is not open to abuse. Employers should bear in mind that the onus is on them to make out this defence and it is ultimately the court's decision as to whether steps taken are adequate after considering relevant circumstances of each case.

10.13 For a start, employers should consider the following two questions³³:

10.13.1 What steps were taken?

10.13.2 Were there any further steps that should have been taken or could have been taken?

10.14 As the emphasis is on prevention of discrimination, actions taken by an employer after the occurrence of an unlawful discrimination would not be sufficient to discharge their responsibility. Employers should have taken precautionary steps before the act occurred³⁴.

Ray Chen v Taramus Rus and IBM (HK) Ltd. DCEO 2/99

A senior IT specialist alleged that his supervisor had sexually harassed him and considered the employer vicariously liable for the acts done by the supervisor. The court touched upon the liability of the employer irrespective of its ruling that the complaint against the supervisor had failed. The court was satisfied that the employer had

This is the first Hong Kong case in equal opportunities context where the court had considered whether the measures taken by an employer are sufficient to qualify reasonable and practicable steps.

³³ *Canniffe v West Riding of Yorkshire Council* [2000] IRLR 555

³⁴ *L Carter v Westcliff Hall Sidmouth Ltd, unreported, Exert IT*, Case No. 31165/90 as cited in *Ray Chen v Taramus Rus and IBM (HK) Ltd. DCEO 2/99*

discharged their liability as the employer of the parties and fulfilled the statutory defence, by providing guidelines on sexual harassment and requiring employees to sign a certificate to declare their knowledge of the contents. Another senior staff member's proactive and prompt action to speak to the complainant was an indication that the employer was ready and prepared to implement the guidelines.

Principal's liability

10.15 Section 48 (2) of the DDO sets out the vicarious liability imposed on principals for unlawful act committed by their agents. Liability ensues (as it is with employers) as long as the agent is acting with the **authority** of the principal. S 48 (2)

10.16 There is no statutory defence for principals in the DDO and principals incur vicarious liability when agents act with their authority. The principal would have to prove to the satisfaction of the court that the unlawful discrimination committed by the agent is not authorised.

Authority

10.17 Authority does not mean that the principal must have authorised the agent to commit the unlawful act. An agent may be said to have authority to act if the principal has expressly or impliedly consented to the act. Once it is established that the agent has authority to act, liability may be incurred if:

10.17.1 The act was specifically instigated authorised or ratified by the principal;

An employer told an employment agent that the

company did not want to employ persons with disabilities and the employment agent refused to hire persons with disabilities accordingly.

10.17.2 The act was within the scope of the agent's authority.

A non-executive chairman of a company (who was not an employee of the company) had authority to hire the chief finance officer and he refused to hire a person with a disability because he considered persons with disabilities troublesome employees. Acting as agent of the company, the Chairman was likely to have committed an act of unlawful discrimination, and thus the company would also be vicariously liable as the principal.

An example of an agent acting outside the scope of his or her authority would be where the employment agent mentioned in the preceding example committed an act of disability harassment to a prospective job holder who had a disability. It would have been too remote for the principal to have control over such personal conduct of an agent.

10.18 The scope of an agent's authority may require an assessment of the relationship between the principal and the aggrieved party and, where necessary, the tripartite relationship between the principal, agent and the aggrieved party. It would be more appropriate for an employer to consult legal practitioners if or when there is doubt.

Chapter 11: Being an Equal Opportunities Employer

11.1 The DDO imposes vicarious liability on employers and at the same time provides a statutory defence of “reasonable and practicable steps” for it. This chapter further explores and identifies the various measures to be taken by employers to avoid vicarious liability and provides practical guidelines for employers who are interested in implementing equal opportunities in the workplace. Taking “reasonable and practicable steps” to prevent workplace disability discrimination and harassment, as described in the last chapter, is not just a reactive response to avoid litigation. It is also a proactive move to embrace workplace diversity and thus acquiring the positive identity as an “Equal Opportunities Employer”.

S 48 (1)

S 48 (3)

11.2 Employees are valuable assets to an organisation and sound human resource management is the key to business success. It would be unwise to exclude disabled employees from participating fully in the workplace. Disabled employees are not burden to an organisation. Employers are encouraged to make fair assessment about the capability of each employee, disabled or otherwise, and to elicit the best from them to strive for business success. The followings are some suggestions of good practices for employers to start with:

11.2.1 Avoid stereotypical assumption about persons with disabilities;

11.2.2 Seek better communication with employees with disabilities; and

11.2.3 Seek professional advice for the purposes of providing reasonable accommodation to employees with disability.

Avoid stereotypical assumptions about persons with disability

11.3 Assigning classifications seem to be a natural and necessary function of the brain. It is a way for people to sort and remember a symbolic representation in order to determine whether and what action(s) is to be taken accordingly. We all notice a person's skin color, sex, disability and other characteristics. Because of convenience, upbringing or coincidental experiences, the stereotyping of individuals very often results in harmful generalisations that deny an individual's unique contribution to society. Without adequate experiences and educational references, stereotypes lead to prejudice and discrimination.

11.4 Whilst there is not any exhaustive list to eradicate stereotypes, the following are some pointers for consideration when encountering persons with disabilities. The following list is to demonstrate some common stereotypes about persons with different types of disabilities:

11.4.1 Do not assume that because a person does not appear to have a disability, he or she is not a person with a disability.

11.4.2 Do not assume that just because the employer does not know of any persons with disabilities working within the organisation that there are none.

11.4.3 Do not assume that most persons with disabilities use wheelchairs.

11.4.4 Do not assume that persons with learning disabilities can only do low end jobs.

11.4.5 Do not assume that a person with a mental disability cannot do a demanding job.

11.4.6 Do not assume that all persons with visual impairment read Braille.

11.4.7 Do not assume that all persons with hearing impairment use sign language.

11.4.8 Do not assume that daily interaction with people living with HIV will lead to HIV infection

Seek better communications with employees with disability

11.5 Listening carefully to employees with disabilities and finding out what they need will help employers make fair employment decisions free of biases. Discussions with employees with disabilities at an early stage also offer a better chance of reaching the best outcome.

11.6 Discussing with employees with disabilities what is required to meet their special needs would enable employers to make accommodations that are reasonably affordable and could be rendered with little inconvenience.

An employer discussed with an employee with visual impairment about the kind of assistance he would need in order to use the office computer. It turned out that the person had designed a software program to suit his own needs. The employer would only have to arrange for their IT staff to work with the person for proper installation of the software.

Seek professional advice

11.7 While communicating with and obtaining information from the employees with disabilities concerned can help employers to provide accommodations, expert advices are at times essential in some particular cases. Expert advice could be especially useful if the employee concerned has newly acquired a disability which the employer has not encountered in the past

or if the effect of an employee's disability become more prominent.

11.8 Apart from medical practitioners and specialists, many community services organisations that provide services to different disability groups are readily available to assist employers to explore options on providing accommodations.

11.9 It is usually a management decision on the employer's part to what extent professional advice should be sought. In case of more serious or prolonged disability, advice from a specialist would likely be requested. Where an employee is recovering from or has permanently acquired a disability that would require modification of office settings, change of work schedule, etc, additional advice from a relevant community organisation could be beneficial.

11.10 Employers and employees are encouraged to work toward a consensus in individual cases on how and from which doctor(s), specialist(s) and/or organisation(s), professional advice is to be sought. Employers have the right to designate a particular medical practitioner and/or organisation for advice because they bear the responsibility to consider whether and to what extent accommodation(s) is to be rendered. Employees with disabilities, albeit having the right to reject or dispute such request, are responsible to assist employers for the proper determination of accommodation(s). In case where professional evidence is disputed in a complaint of discrimination, the court would look into the reasonableness of the manner displayed by both parties in the process of seeking professional advice and may appoint independent expert(s) for advice(s).

See Chapter 7 for more discussion on medical examinations

Equal Opportunities Policy

- 11.11 The principle of equal opportunities entails observance of the anti-discrimination ordinances where irrelevant considerations based on stereotypical assumptions are avoided in any employment decision. It also confers a positive duty on employers to enable everyone, including persons with disabilities to participate and compete in the workplace on a level-playing field.
- 11.12 An Equal Opportunities (EO) policy that promotes an equitable workplace would ensure the effective use and allocation of human resources in the best interest of both the employer and the employees. A sample policy is attached for reference and employers are encouraged to adopt as appropriate according to their needs, nature of business and scale of operations.
- 11.13 It should state clearly the commitment of the employer to maintain a working environment free of discrimination and harassment for their staff, providing sufficient information on acts of discrimination and harassment which would not be tolerated. Employees have a right to complain should unlawful discrimination or harassment occur.
- 11.14 Although the details of an EO policy would vary according to the size and nature of the business, it should be comprehensive enough to provide coverage no lesser than the legal requirements set forth by the anti-discrimination ordinances. Where an employer deals with other fields governed by the anti-discrimination ordinances, such as services to members of the public, the employer should make efforts to ensure that their EO policy covers the relevant field, i.e. provision of

services to customers.

11.15 To ensure the effectiveness of an EO policy, it is recommended that employers involve employees in the development and review of the policy to instill its ownership across the board within the organisation.

11.16 The employer should also appropriately communicate the EO policy to employees at all levels and where reasonably practicable, to job applicants.

11.17 It is also recommended that periodic review/audit processes are established to ensure the effectiveness of the EO policy.

Employees' rights and responsibilities

11.18 Employees have the right to an equitable work environment free of discrimination and harassment. Entitlement to rights entails responsibilities, i.e. while employees enjoy their rights not to be discriminated against or harassed in the workplace, they bear the responsibilities of not infringing the rights of others. After all, individual employees could be personally liable for their own acts of discrimination and harassment. It is therefore important for employees to know their rights and responsibilities.

EO training

11.19 Training is a convenient and effective tool to equip employees with the necessary knowledge they need to know about the provisions in the DDO. It is also a good instrument through which a new or revised EO policy is introduced to all employees within an

organisation.

11.20 Given that no workforce is homogeneous, an employer should make sure that appropriate trainings are afforded to their employees at all ranks and levels across the board, both horizontally and vertically within the corporate structure. Appropriate training confers a variety of trainings, general or topical, specifically relevant to the various categories of employees.

11.21 While a small firm with a simple structure could adequately provide their employees with a general training about the anti-discrimination ordinances and the firm's EO policy; a large company with more complex organisation structure should consider providing training for their employees in accordance with their relevant levels of responsibilities. In other words, general staff are given a more general seminar mainly on their rights and responsibilities under the law and the employer's EO policy. Staff handling human resources issues should be trained to ensure proper compliance with the law and the EO policy when handling all employment related issues, such as recruitment selection and decisions, promotion arrangements, dismissals, etc. Staff who are responsible for handling internal discrimination or harassment complaints should be given appropriate training to carry out investigation and resolving disputes. Those in the management should be trained in the understanding of their particular obligations in disseminating anti-discrimination information and monitoring behaviour.

11.22 Training should be on-going and up-to-date. All new recruits should be made aware of the organisation's EO policy while the existing employees

should be kept abreast of the development and update of the anti-discrimination ordinances.

Grievance handling procedures

11.23 Apart from having an EO policy, an employer should also establish a proper grievance handling mechanism so that investigation of complaints arising from discrimination issues is carried out in accordance with the principles of natural justice.

11.24 The procedures of the mechanism should be made known to all employees in order for them to seek timely help if discrimination or harassment is encountered in the workplace. This is to encourage discrimination disputes to be resolved efficiently and effectively. Employees should nonetheless be made aware of their rights to pursue their complaints of discrimination or harassment with the proper authorities such as lodging complaints with the Equal Opportunities Commission or instituting own law suits.

11.25 There should be an effort on the employers' part to protect employees who have lodged complaints of discrimination or harassment from victimisation.

Person(s) appointed to handle discrimination issues

11.26 For proper and better implementation of the EO policy, including the grievance handling mechanism, employers are encouraged to appoint appropriate personnel in dealing with matters arising from discrimination issues. The designated personnel, be it existing employees holding regular office taking up extra responsibilities of handling discrimination complaints or persons hired by the employer specifically and exclusively for implementation of the

anti-discrimination ordinance, should hold a relatively senior position in the organisation. This not only confers authority on those persons, empowering them to carry out internal investigation but also demonstrates the employer's serious attitude towards eliminating workplace discrimination.

A large multi-national corporation sets up an entire department dedicated to handling EO issues by receiving, investigating and resolving complaints of discrimination and harassment and proactively to provide internal EO training as well as implementation and monitoring the EO policy.

A local company hires an Equal Opportunities Officer directly under the supervision of the Human Resources Director to handle discrimination and harassment complaints.

An SME includes handling discrimination complaints as part of the duties of the Human Resources Manager. The employee in this position receives higher salary than managers of similar rank to reward him or her for taking up extra duties. Another small company requires their employees within middle management grade volunteer taking up extra responsibilities of implementing EO. The employer states clearly to the managers that their incentive to shoulder more responsibilities would be effectively and positively reflected in their performance appraisals, and thus increasing their career advancement prospect.

Embracing workplace diversity

- 11.27 Anti-discrimination laws impose both liability and responsibility on employers. When implemented

properly it could contribute positively to efficiency and productivity by facilitating employment decisions on merit rather than on the basis of prejudice.

11.28 Equality of opportunities is about recognising and getting the right person for the right job. The best employers already know that they need to use the qualifications and skills of all sections of their workforce. They recognise and indeed can demonstrate that a diverse workforce can give them a competitive edge in meeting the demands of a broad customer base. A diverse workforce can be more creative than one which has been recruited under a particular impression. It may be able to establish new clienteles for the business and help in widening the business' market.

11.29 Diversity is also about establishing a good relationship between the employer and the employees. Embracing workplace diversity not only assists in avoiding vicarious liability, but also demonstrates an Equal Opportunities Employer's recognition that equality is not simply about sameness but about celebration of differences, bringing different individuals together where mutual respect and appreciation are fostered. In this way, stereotypes may be dispelled, creating an environment of better understanding of and respect for persons with disabilities and other groups which extends into the broader society.

Chapter 12: Equal Opportunities Commission

12.1 The EOC is a statutory body responsible for the implementation and regulation of the DDO in Hong Kong amongst other anti-discrimination legislation. It is an independent body, publicly funded by the Government. This chapter outlines how the EOC carries out its role and functions.

Role and functions

- | | | |
|--------|---|--------------------|
| 12.2 | Generally, the EOC's role and functions under the DDO are: | S 62 (1) |
| 12.2.1 | To work towards the elimination of disability discrimination, harassment and vilification; | S 62 (1) (a) & (c) |
| 12.2.2 | To promote equal opportunities between persons with and without disabilities; | S 62 (1) (b) |
| 12.2.3 | To encourage persons who have disputes under the DDO to settle their disputes by way of conciliation; and | S 62 (1) (d) |
| 12.2.4 | To keep under review the working of the DDO. | S 62 (1) (e) |

Investigation of complaints

- 12.3 A specific function of the EOC is to deal with complaints of discrimination, harassment and vilification pursuant to its investigation and conciliation powers.
- 12.4 An aggrieved person who has reasonable belief that he or she has been discriminated against, harassed or vilified on the ground of his or her disability could lodge a complaint in writing with

the EOC within 12 months of the occurrence of the incident. Once the EOC receives a complaint in writing alleging that an unlawful act of disability discrimination or harassment has been committed, the EOC will investigate into the matter so as to endeavor conciliation between the parties in dispute.

S 83 (a)

S 83 (b)

12.5 The investigation process is designed to collect information from all the relevant parties to determine whether to proceed to conciliation or to discontinue the investigation. The EOC maintains an independent and impartial role during both the investigation and conciliation process. It does not act for either party of the complaint. Also, it is not the role of the EOC or its case officers to adjudicate a particular complaint. That is the function of the court.

12.6 The EOC may decide not to conduct or to discontinue an investigation for one or more of the following reasons:

12.6.1 The act complained of is not unlawful under the DDO;

S 80 (4) (a)

12.6.2 The aggrieved person does not desire the investigation to be conducted or continued;

S 80 (4) (b)

12.6.3 A period of more than 12 months has elapsed since the alleged act was committed;

S 80 (4) (c)

12.6.4 The EOC determines a complaint should not be a representative complaint; or

S 80 (4) (d)

12.6.5 The complaint is frivolous, vexatious, misconceived or lacking in substance.

S 80 (4) (e)

12.7 A complainant is encouraged to provide as much relevant information as possible to the EOC case officer. The case officer will also seek to obtain

all relevant information from the respondent(s) and relevant witnesses as appropriate.

- 12.8 Information collected in the course of investigation is for the EOC to determine whether to recommend conciliation or to discontinue the investigation pursuant to any of the reasons listed in 12.6 above. The power to discontinue an investigation is exercised with great care, balancing the rights of the complainant and the rights of the respondent. Where the EOC decides not to conduct or to discontinue an investigation, it will notify the complainant with its decision and the reason(s) for that decision.

S 80 (5)

Conciliation of complaints

- 12.9 Once information collected from investigation supports a case to proceed to the conciliation, the case officer would invite the parties to the complaint to a conciliation meeting. The EOC may at any stage of the investigation 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.

S 80 (3) (b)

- 12.10 The purpose of conciliation is to bring the different parties together to look for ways to resolve the dispute. Conciliation looks for common grounds to help resolve the matter to the satisfaction of both parties so as to settle the dispute. As the conciliation process allows for both parties in the dispute to have their say, it is possible for each side to come to a better understanding of the other's position. This can help to eliminate

misunderstanding based on incorrect assumptions or information and to achieve a real change in attitude. All information gathered in the conciliation process is kept confidential and unless with the consent of both parties, is not admissible in court proceedings.

S 80 (6)

- 12.11 Conciliation is completely voluntary. Should the parties reach a settlement, the agreement signed by the parties is a contract and is legally binding. Conciliation settlement can be in the form of an apology, changes of policies and practices, review of work procedures, re-instatement, monetary settlement, etc.

Legal assistance

- 12.12 Under the circumstance where the EOC has recommended for conciliation and conciliation is not successful, complainants can apply to the EOC for legal assistance.

S 81 (1)

- 12.13 The EOC is bound by the DDO to consider all applications for legal assistance but not obliged to grant assistance in every case. All applications for assistance are considered by the Legal and Complaints Committee of the EOC.

S 81 (2)

Criteria for receiving legal assistance

- 12.14 The EOC only considers granting legal assistance to cases covered by the anti-discrimination ordinances. The legislation gives the EOC wide discretion in respect of the types of cases it legally assists. Being a public-funded organisation, the EOC is not able to assist every case but must choose those cases which it considers fit to lend support to.

- 12.15 Under the law, the EOC may have particular regard to the following factors in deciding whether or not to grant legal assistance: S 81 (2)
- 12.15.1 Cases that raise a question of principle; S 81 (2) (a)
 - 12.15.2 Cases that are so complex that it is unreasonable to expect persons to deal with them unaided; S 81 (2) (b)
 - 12.15.3 Cases where it is unreasonable to expect a person to deal with unaided specifically by the EOC because of the person's relative position to the respondent or someone else connected with the case. S 81 (2) (b)
- 12.16 When considering the factors listed in paragraph 12.15 above, the EOC may also take into account of the following:
- 12.16.1 Evidence of the case and whether it has a reasonable chance of success;
 - 12.16.2 Whether the case reflects the EOC's strategic concerns such as a widespread problem indicated through the EOC's complaint handling experience;
 - 12.16.3 Whether the matter was initially referred to the EOC for investigation and conciliation and attempt at conciliation made.
- 12.17 Legal assistance offered by the EOC may include: S 81 (3)
- 12.17.1 giving legal advice about the strengths and weaknesses of the case;
 - 12.17.2 arranging for EOC lawyers to act as legal representatives;
 - 12.17.3 offering assistance as is normally given by a solicitor or counsel; and

12.17.4 arranging for either EOC lawyers or counsel for court appearances if legal proceedings are commenced.

Right to file civil lawsuits

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- 12.18 Legal proceedings under the DDO for claims of disability discrimination and harassment are heard in the District Court. Such proceedings should be brought within two years of the date on which the alleged unlawful act was committed. The time taken to investigate and / or attempt to conciliate a complaint lodged with the EOC is not counted towards this two year time bar.
- 12.19 In cases where the EOC is unable to grant legal assistance or where the aggrieved person so desires, the aggrieved person has the right to institute civil lawsuits against the respondent(s). The aggrieved person may apply to the Legal Aid Department for legal aid or bring legal proceedings himself / herself, with or without his / her own legal representative.
- S 82
S 82 (2)(a)
S 82 (2A)

Sample Policy on Disability Equality

Introduction

[Organisation's name] is committed to making full use of the talents, skills, experience of different people, and to making sure that it is an organisation where they are respected and valued and can achieve their full potential, regardless of whether they are with or without disability.

[Organisation's name] will comply with the Disability Discrimination Ordinance and will follow the recommendations in the Code of Practice issued by the Equal Opportunities Commission under the Ordinance.

Objectives

The objectives of this policy are to ensure that:-

1. No one will be treated less favourably on the ground of his or her disability;
2. No one will, because of his or her disability, suffer a detriment from any requirements or conditions which cannot be justified on non-disability ground;
3. Opportunities for employment, training and career development are equally open to all qualified people regardless of whether they are with or without disability;
4. Everyone is treated with respect and dignity and no one will be subjected to any unwelcome conduct, or to an environment that is hostile or intimidating on the ground of his or her disability;
5. The grievance system is properly administered regardless of his or her disability; and there will be no reprisal against anyone raising concerns or complaints or taking action on discrimination or harassment on the ground of his or her disability.

Implementation

This policy will be a priority for [Organisation's name];

[Position] will have overall responsibility for this policy; and [Position (if different)] will be responsible for the day-to-day operation of this policy;

The policy will be communicated to all staff and job applicants;

Staff at all levels will be consulted about the policy and its implementation;

Staff at all levels will be trained on the policy and their rights and responsibilities;

Opportunities for employment, promotion, transfer and training will be advertised widely, internally and/or externally, and all qualified applicants will be welcomed, regardless of his or her disability;

Selection criteria and performance appraisals will be entirely related to the job or training opportunity;

The effectiveness of this policy will be monitored regularly. Information on the disability of staff and applicants for employment, promotion and training may be collected and analyzed, to monitor the implementation of this policy. Grievances, disciplinary action, performance assessment and termination of employment may also be monitored by types of disabilities. The information will be held in strictest confidence and will only be used to promote equality and prevent discrimination;

Terms and conditions of employment, rules and practices, requirements and conditions will be reviewed in the light of monitoring results with a view to take steps to promote equality and prevent discrimination in consultation with staff.

Harassment on the ground of disability

Every staff will be treated with respect and dignity. All staff have a right to work in an environment that is free from abuse or insults, where

individuals treat each other with respect and value politeness.

Harassment on the ground of disability is unacceptable. Staff must not take part in, or encourage, condone or gossip about cases of harassment or bullying. No one should be subjected to any unwelcome conduct, or to an environment that is hostile or intimidating on the ground of his or her disability. Staff should be supportive of fellow workers who are victims of harassment. Examples of unacceptable conduct include:-

1. Derogatory remarks or insults on the ground of disability; for example, name calling which persons with a particular disability may find offensive or impolite;
2. Display of slogans or other objects offensive to persons with disabilities;
3. Jokes, banter, ridicule or taunts made on the ground of a person's disability;
4. Exclude or marginalize staff with disabilities from office activities;
5. Imposing excessive workloads and unrealistic performance targets on staff on the ground of their disabilities;
6. Unnecessarily picking on individuals on the ground of their disabilities.

Complaints about disability discrimination or harassment will be taken seriously and dealt with effectively and promptly and may result in disciplinary sanctions including dismissal.



平 等 機 會 委 員 會
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