

To: Subcommittee on Revised Code of Practice on Employment (the “Code”) under the Disability Discrimination Ordinance (“DDO”)

Comments and queries from NWS Transport Services Limited and its subsidiaries

Relevant Section of the Code	Provision	Comments and queries
2.10 2.11	A contract worker is a person employed by a contractor or sub-contractor to do work for a principal. It would be advisable for an employer to make sure that their contractors, in turn, the sub-contractors are aware of the requirements and obligations under the DDO	What about a natural person directly hired by a principal (instead of via a contractor or sub-contractor) to do work for a principal pursuant to a contract for service. Is he/she construed as a contract worker under the DDO?
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	If an employee is under the influence of drugs, a drug addict or is an alcoholic and suffered disorder, will this be considered as a disability under the DDO?
3.4.2 3.4.3	Future disability and imputed disability	If an employer knows that an employee driver is alcoholic and though the employee can perform his job as a driver properly if he is not taking alcohol, the employee is being dismissed because his employer fears that he will be influenced by alcohol while driving and thus endangering the passengers, will the employer contravene the DDO?
4.14	Direct discrimination requires a causal linkage between	What if the cause of B's substandard performance was due to B's

4.15	<p>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.</p> <p>"But-for-Test" – It appears that B was dismissed because of her substandard performance. Her disability was part of the background information irrelevant to her dismissal</p>	<p>migraine headache? Will there be a causal linkage between the dismissal and B's disability?</p>
4.19	<p>Affording accommodation to address the needs of persons with disabilities is not a less favorable treatment against those without disability</p>	<p><u>Scenario 1</u></p> <p>Staff A is suffering from back-pain and thus cannot be seated for too long. Staff B has no disability. Both A & B are of the same position and earning the same amount of salary. In order to accommodate such disability, the employer allows staff A to work 5 hours a day whilst staff B has to work 8 hours a day. It is obvious that staff B has been treated less favorably. How can an employer address this problem?</p> <p><u>Scenario 2</u></p> <p>If a company is holding an interview for selecting the best employee and emphasized that punctuality is important and late-comers will not be entertained due to the large number of candidates to be interviewed and rescheduling is not permissible due to numerous constraints. However, staff A (who suffered from migraine) and staff B (without disability) were both late. Staff C who organized the interview told both</p>

		<p>of them that they would not be considered due to their lateness. Staff A then urged staff C to give her a chance as her lateness was due to her migraine. Staff C then rescheduled the interview time of the subsequent interviewees such that Staff A could get a chance to be interviewed. Staff B and other interviewees are being treated less favourably as accommodation was only given to Staff A who has a disability.</p> <p>What if Staff C told Staff A firmly that her request would not be allowed since it would be unfair to staff B. Staff A felt offended and complained being discriminated due to her disability. Can staff A's case be established?</p> <p><u>Scenario 3</u></p> <p>Staff B is an accounts clerk and is working in an open office. He has repugnant odor due to disability and despite using medication, the odor is still very strong. All other staff complained that they are not able to work under such odor. If the employer requests all other staff to put on face masks in order to accommodate such situation, this is obviously a less favorable treatment to the other staff without a disability.</p> <p>Further, what if some other staff members have nasal illness that cannot put on face masks for a long period of time. As such, in</p>
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4.27.2	Effect on the employer's operations including the resources of the business and administrative efficiency	If a company has only 2 staff and staff A is suffering from chronic illness and has to take time off during office hours regularly (say 2 hours a day) to have injection and consultation. Staff B is fully loaded and cannot take up the works of Staff A. In order to accommodate staff A's disability needs, the employer has to engage a part time worker to take up those works which staff A cannot complete. Due to limited resources, can the employer request staff A to reduce his/her wages to compensate for the wages paid to the part time staff but without contravening the DDO?
4.27.3	Reasonableness of the alternative arrangements that could be provided to the person with a disability	
5.1	Most disabilities could be overcome with workplace adjustments and reasonable accommodation by the employer	A is an applicant with chronic illness and needs to visit the doctor daily. The potential employer is willing to make reasonable accommodation by engaging A as a part time staff but will need to reduce the salary offer to A. Will the employer contravene the DDO in making such accommodation?
5.8	In order to justify a decision not to employ a person with a disability, the employer would be required, inter alia, to show that the incapability could not be rectified by reasonable provision of services and facilities to the employee in question	If the employer intends to hire a driver from 9:00 am to 6:00 pm for each working day at \$10,000 a month and the salary has been posted in the recruitment advertisement. However, Applicant A needs to visit the doctor daily and cannot attend full working hours. If the employer offers the job to applicant A but reduces his/her to \$6,000 per month and

		<p>intends to use the remaining \$4,000 per month to hire a part time driver to take up the remaining hours, will this be construed as reasonable accommodation and will the employer contravene the DDO by offering a lower salary to A with a disability?</p> <p>Alternatively, if the employer decides not to hire Applicant A because the employer finds it very difficult to hire a part time driver to complement the hours that Applicant A will be absent from work as Applicant A's medical visit hours are not regular, will the employer contravene the DDO?</p>
5.17	Unjustifiable Hardship - A large organization may find it affordable to reshuffle the duties of staff to enable an employee with chronic disease to attend very frequent medical treatment. It would be a different consideration if the size of the company is large with multiple 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.	To what extent is the amount of resources spent in accommodating the disabled staff as compared with the financial standing of an organization that can constitute unjustifiable hardship? Does it impose an obligation of the employer of a large organization to hire additional staff to fill the work duties of the staff with disability or mere reshuffling of duties, if possible, suffice? In reshuffling work, shifting the work of a staff with disability to a staff without disability is inevitable. What if the other staff without a disability finds it not acceptable to take up the work after the reshuffling or there is difficulty in hiring a part time staff, can this be a defense for the employer?
7.36	The employer has no duty to ask some other staff to do the work of the employee with a disability.	If additional staff is to be hired in order to take up the work of the disabled staff or in reshuffling of work duties, the other staff without a

		disability has to take up additional work, how does this reconcile with the court's ruling that the employer has no duty to ask some other staff to do the work of the employee with a disability?
5.18	Reasonable accommodation – the court would consider 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	What kind of reasonable accommodation is expected from an employer to afford disabled staff to make frequent visits to doctors or absent from work on a regular basis?
6.20	A more general question in the application form asking applicants whether they require any special provision or facility at the interview is to be encouraged.	s. 42 of the DDO only makes it unlawful if an employer requests or requires an applicant to provide, in connection with or for the purposes of the interview, information (whether by completing a form or otherwise) that persons who do not have a disability would not, in circumstances that are the same or are not materially different, be requested or required to provide. If the applicant has special needs, it will be more practicable for the applicant to make the request for special arrangements on his/her own volition rather than requiring the employer to include the same in the application form to see if the applicant has any special needs.
6.26	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	As the definition of “disability” is so broad, it will not be reasonably practicable for an employer to cater for each type of disability and make adjustments to tests accordingly.

	different types of disabilities.	
7.13	Whether the frequent treatment schedule of the employee can be arranged outside working hours	An employee with chronic disease claims that if he/she visits the clinic outside working hours, the waiting time will be much longer and thus he insists to go during working hours. In such case does the employer have to make alternative arrangements to cater for the absence of this employee or can the employer dismiss the employee due to his frequent absence from work without contravening the DDO?
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	Without specific guidance on the principle in determining the reasonable time length of absence from work that an employer should grant to the employee before resorting to dismissal, the employer will always need to spend ample time in responding to the EOC' enquiries if employees raised complaints to EOC.
7.35	There should be appropriate recommendations from appropriate medical practitioner suggesting specifically which type of activities at work should be avoided, what alternative employers should consider and an estimated period where the employee should be on light duties	Will the employer contravene the DDO if it asks the staff to obtain recommendations from medical practitioner at the costs of the staff? Will an employer contravene the DDO if it reduces the salary of the staff being assigned to be on light duty such that the employer can manage to employ a part time to take up the original job duties of the staff with disability?
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	We trust there is a typo error - "employers" should be "employees" Due to privacy reason, an employer is not allowed to disclose the nature

	especially so where the other <u>employers</u> are not aware of the precise nature of the absence and believe that the person was merely skiving.	of absence of an employee with disability to other employees. Please exemplify how to make other employees aware of the precise nature of the absence of the employee with disability.
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	Please exemplify how an employer should deal with the sentiments of the employees as sentiments are very personal and have no right or wrong, it is very difficult to judge the sentiments of employees.
8.5	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 level of each job according to its job size and value to the organization	<p>If a large group has 2 subsidiaries (A & B) both in the same kind of business operation. Will this EPEW and EPEV principle be applied to subsidiary A and subsidiary B on an independent basis or will EPEW and EPEV be applied to the large group as a whole.</p> <p>If a company grants attendance bonus to those staff being able to attend full working hours in a month, will this be construed as indirect discrimination under the DDO? If so, does it mean that the company has to cancel such attendance bonus? In furtherance of this point, does it mean that any bonus scheme associated with punctuality and attendance</p>

		will constitute indirect discrimination as the chances of a person, with disability and who takes sick leave very frequently, in complying with the employer's requirement of high attendance will definitely be much lower than those without disability. On the other hand, if an employee (e.g. a bus driver) who has higher attendance contributes more to his/her employer than those who take sick leave frequently. Based on EPEV, the one without disability will be rewarded a higher pay but will the employer contravene the DDO?
8.12	In the case of an allegation against discriminatory practice in 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.	If good attendance record (e.g. without being late for work or absent from work) or punctuality is one of the selection criteria, will it constitute indirect discrimination under the DDO? If so, does it mean that any selection criteria associated with attendance or punctuality should be avoided?
8.15	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 <u>summary</u> and constructive dismissal... non-renewal of employment contract etc.	Staff A, who is a bus driver, is taking sick leave due to his skin problem and his employment contract is due to expire during his sick leave period. His employment contract is not renewed because his past performance is not up to the employer's standard e.g. there were customer complaints against him and he had a few minor accidents during the contract period. Staff A however claims that his contract is not renewed because of his disability. How does the EOC deal with such cases?

		For summary dismissal, the relevant employee (whether with or without disability) must have contravened s. 9 of the Employment Ordinance. In this respect, please exemplify in what circumstances will an employer contravene the DDO by summarily dismissing an employee with disability.
9.4/9.5 9.7	Disability harassment is an unwelcome conduct on account of a person's disability where a reasonable person having regard to the circumstances would have anticipated that the person being harassed would be offended, humiliated or intimidated by that conduct. to the recipient. Unwelcome means that the behaviour is not solicited, invited, incited or reciprocated by the aggrieved person. Whether an act of disability harassment is unwelcome remains a subjective perspective of the person making the complaint.	Staff A has a deformed left arm since birth. Staff B recently changed his name to "Nemo" as he is a fan and likes the character very much. Staff A considered that Staff B deliberately changed his name to tease her. Besides, whenever other colleagues called Staff B Nemo, Staff A felt being harassed and offended. Can Staff A's case be established? Does the employer have to ask Staff B to change his name?
9.9	The second limb of the definition of harassment is 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 behavior offensive, humiliating and intimidating. Eventually it is for the court to consider	It will be time consuming and costly to go to court in deciding whether an act amounts to disability harassment. For the case in 9.7 above, after investigation, the employer does not consider that Staff B deliberately changed his name to harass Staff A. However, Staff A thought otherwise. Based on the Code, it appears that

	all circumstances and all factors of the case and to make decision on whether a behavior amounts to disability harassment.	the matter has to be taken to court and the employer who is vicariously liable will be made a party. This will be unfair for the employer to go to court from time to time due to unreasonable claims of harassment by employees with disability.
9.11	Vilification may occur in a workplace setting such as in a company convention or staff annual dinner.	The Code only mentioned about discrimination and harassment in relation to vicarious liability. Is an employer vicariously liable for the vilification or serious vilification of an employee in the workplace?
10.1	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.	