

Legislative Council Panel on Manpower

Special meeting on 4 February 2022

Submission from the Equal Opportunities Commission

Purpose

This paper aims to provide views of the Equal Opportunities Commission (“EOC”) on the obligations and the rights of the employers and employees under the Coronavirus Disease 2019 (COVID-19) epidemic, from the perspective of the Disability Discrimination Ordinance and the Race Discrimination Ordinance.

Protection under the Discrimination Laws

2. The EOC is a statutory body responsible for implementing four anti-discrimination ordinances in Hong Kong, including the Disability Discrimination Ordinance (“DDO”), the Race Discrimination Ordinance (“RDO”), the Sex Discrimination Ordinance and the Family Status Discrimination Ordinance. While all four ordinances render unlawful certain discriminatory acts in the field of employment, the provisions of DDO and RDO are considered to be most relevant to the discussion of obligations and the rights of the employers and employees under the current COVID-19 epidemic situation in Hong Kong.

3. The COVID-19 falls within the definition of disability under the DDO, which includes the presence of organisms causing or capable of causing disease or illness in the body. “Disability” includes a disability that (i) presently

exists, (ii) previously existed but no longer exists, (iii) may exist in the future and also (iv) a disability that is imputed to a person (i.e. a mistaken perception that a person has a disability). However, according to section 61 of the DDO, the discriminatory act against an employee with a disability will not be rendered unlawful if: (i) the disability is an infectious disease listed under the Prevention and Control of Disease Ordinance (e.g. COVID-19); AND (ii) the discriminatory act is reasonably necessary to protect public health.

4. Under the DDO, it is unlawful for an employer to discriminate an employee on the grounds of that employee's disability. If the employer treats that employee with a disability less favourably than he treats another employee without a disability, such differential treatment on the basis of one's disability is considered to be direct discrimination under the DDO. That is to say, if an employer dismissed an employee who was living in a building where cases of infection were found, for fear that the latter may be infected with COVID-19, such termination of employment may be considered to be direct discrimination on the grounds of imputed disability of the employee, unless the employer could justify that such act is reasonably necessary to protect public health.

5. The DDO also renders unlawful less favourable treatment on the grounds of a disability of an associate of an employee. An "associate" includes the person's spouse, relative, carer, a person who is living with the person on a domestic basis, or who is in a business, sporting or recreational relationship with the person. In other words, if an employer dismissed an employee because the employee's family member has been diagnosed with a disease, such dismissal may also be regarded as direct discrimination under the DDO.

6. The DDO also protects employees from indirect discrimination. If an employer applies a requirement or condition equally to all the employees, with or without a disability alike, but such seemingly neutral requirement has a

disproportionate adverse impact on employees with a disability(ies), and the employer cannot justify the detrimental treatment in the relevant circumstances, then the application of such requirement or condition is rendered to be indirect discrimination. In assessing whether a measure is justifiable, employers should bear in mind that even a measure bears a legitimate purpose, such as preventing the spread of an infectious disease, the measure itself should be relevant to the stated purpose and proportional.

7. For instance, a company required all employees not to be regularly absent from work for operational reasons. After an employee had taken sick leave for an extended period of time, the employer decided to terminate that employee's employment for failing to meet the company's requirement of "not being regularly absent from work". The uniform requirement is likely that persons on valid extended period of sick 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. If unjustified, such dismissal may constitute indirect discrimination under the DDO.

8. The following hypothetical example also illustrates what may constitute indirect discrimination under the current pandemic. An employee was dismissed by the employer when he was undergoing compulsory quarantine for being a close contact of a locally acquired case tested positive for COVID-19. The employer claimed that the employment was terminated as the employee failed to meet the company requirement of not being regularly absent from work. The uniform requirement is likely that persons subject to compulsory quarantine would encounter difficulty in satisfying such attendance requirement. Although the employee undergoing quarantine is not yet infected with any infectious disease, the reason for his compulsory quarantine is for the Government to find out through testing if he, as a close contact, has any infection. Hence, there is a possibility that this employee may be regarded as a person with a disability that

may exist in the future. Provided that the employee undergoing quarantine could be treated as a person with a disability that satisfies the definition of “disability” under the law, the onus would then be on the employer to justify the imposition of such a requirement is reasonably necessary to protect public health.

9. During this COVID-19 epidemic, not only disability discrimination may arise, stigmatization against members of certain ethnic minority groups also came up from time to time. If an employer, without reasonable grounds, assumes that employees of a certain race have contracted COVID-19 and consequently subjects them to less favourable treatment, such as banning them from going to work, it may not be a “reasonably necessary” act for the purpose of protecting public health, and may contravene both the RDO and DDO.

EOC Calls on All Employers to Avoid Discriminating against Employees Based on their Race or Disability

10. In this long battle against the epidemic, mutual understanding and reasonable accommodation between employers and employees are crucial for us to win the final wars in pandemic times and for the economy to recover for everyone’s benefits.

11. The EOC call on the employers to avoid discriminating against employees based on their disability or race. Instead of discriminatory acts resulting in no gains for both employers and employees, the EOC advocates for more understanding from employers and flexible work arrangements to be considered when their employees have infected with COVID-19 or faced quarantine.

12. In this round of outbreaks, hamster owners, flight attendants, and the Pakistani community have become targets of blame. Members of the South Asian community have expressed their concerns to the EOC that the widespread coverage of a virus transmission chain starting with a Pakistani woman might lead to a backlash against the entire community. The EOC stressed that it is counter-productive to associate an entire ethnic group or profession with the virus, which will only deepen prejudice and polarise society.

13. Last but not least, if anyone believes he/she has been subjected to discrimination, harassment, or vilification under Hong Kong's anti-discrimination ordinances, he/she is encouraged to make an enquiry or complaint with the EOC.

Equal Opportunities Commission
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