DISABILITY DISCRIMINATION ORDINANCE

Code of Practice on Employment (2011)

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1. Government Notice No. 2159 of 2011; and
2. Resolution of the Legislative Council passed on 1 June 2011 and published in the Gazette on 3 June 2011 (Government Notice No. 3470 of 2011)

Foreword

The right to equality and non-discrimination in employment is a fundamental human right. To be able to work without discrimination is pertinent to persons with disabilities' full and effective participation in the society.

On the basis of our enforcement experience accumulated for more than a decade, the Equal Opportunities Commission has now revised the *Code of Practice on Employment under the Disability Discrimination Ordinance* to provide more detailed explanation on the key legal concepts in the Disability Discrimination Ordinance (DDO), with abundant case illustrations to help readers understand its practical application.

We hope that the Code will serve as a useful tool and reference for employees and employers alike, enriching understanding of each other's rights and responsibilities under the DDO.

Lam Woon-kwong
Chairperson, Equal Opportunities Commission

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Chapter One

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, the Disability Discrimination Ordinance (DDO), the Family Status Discrimination Ordinance and the Race Discrimination Ordinance. 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. Non-compliance with the Code may not result in automatic legal consequence, but 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 implement the DDO in the workplace. It also helps employees to understand their rights and responsibilities under the DDO.

S 65 (12)

[1] See *Teva (UK) Ltd. v Goubatchev* [2009] UKEAT 0490_08_2704

1.6 The Code should be read as a whole with reference to the DDO and is intended to protect persons with disabilities from discrimination and harassment in employment. It should 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. Each chapter of the Code should be viewed as part of an overall explanation of the provisions in the DDO on employment.

1.7 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 requirements under the DDO and the possible legal implication(s) of particular issues or situations.

Examples in the Code

1.8 Examples are given in boxes for illustrative purpose only. They are meant to facilitate easy understanding of the principles and concepts in the legislation. Some of the examples are based on cases which have been decided by the local courts or those in jurisdictions under the commonwealth system. Others have been adapted from enquiries and complaints received by the EOC.

1.9 Examples derived from decided cases, complaints and enquiries have been modified to demonstrate to readers how the DDO may be applied under particular circumstances. Readers should be mindful that each case bears its own uniqueness and refrain from sole and direct application of any example to a particular situation. Where readers intend to rely on the decided cases cited in this Code, they should refer to the respective court judgments. In an actual court case, it will be for the court to decide whether precedent cases are applicable.

1.10 Examples should be read in conjunction with the explanation in the main text.

1.11 All examples bear no implications to any particular disability or gender.

Chapter Two

2 Application of the DDO in Employment

2.1 This chapter outlines the spectrum of employment relationships that are construed broadly under the DDO as having the employer-employee relationships. It also gives an overview of what constitutes unlawful discrimination and harassment in the employment context.

The scope of employment under the DDO

S 11 (2) & 22 (2)

2.2 The DDO stipulates that it is unlawful for an employer to discriminate against or harass an employee on account of his/her disability in the course of the employee's employment with the employer.

S 2 (1)

2.3 The DDO defines "employment" as employment under a contract of service or an apprenticeship or a contract personally to execute any work or labour. In this sense, employment would include working full-time, part-time or on any kind of contract, be it permanent or temporary, oral or written. Protection begins from the pre-employment stage applicable to job applicants and extends to post employment on discriminatory acts encountered during the course of employment.

S 11 (1) & (2)

2.4 Persons in the following situations in the field of employment or work are also covered in Part III and IV of the DDO:

S 13 2.4.1 Contract workers

S 15 2.4.2 Partners in firms

S 16 2.4.3 Trade union members

2.4.4	Persons seeking authorization or qualification from an authority or body to engage in a profession	S 17
2.4.5	Persons undergoing vocational training	S 18
2.4.6	Persons seeking employment through services of employment agencies	S 19
2.4.7	Commission agents	S 20
2.4.8	Barristers	S 33

Working wholly or mainly outside Hong Kong

2.5 For the purpose of DDO, every employment at an establishment registered in Hong Kong is treated as employment, unless the employee does his/her work wholly or mainly outside Hong Kong. S 14 (1)

> 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.

2.6 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 time[2] in Hong Kong than outside Hong Kong in the whole period[3] of his/her employment.

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

S 14 (2)(a)

2.7.1 Persons who work on a ship registered in Hong Kong; or

S 14 (2)(b)

2.7.2 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.

Flight Attendant C spends his working time mostly 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 he be dismissed on the ground of having a disability.

"In the course of employment"

2.8 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

[2] See *Carver v Saudi Arabian Airlines* [1999] ICR 991
[3] See *Saggar v Ministry of Defence* [2005] IRLR 618

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. Whether an incident happens in the course of employment depends on the facts and circumstances of each individual case. The key is the essential nexus between the subject incident and the employment.

Office Attendant D who has mild intellectual disability was insulted by her co-worker who called her "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 person's employment.

Other employment related matters

Commission agents

2.9 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, services or facilities, including opportunities for promotion, transfer or training or by terminating the engagement or by subjecting the commission agent to any other detriment.

S 20

See paragraphs 10.13-10.16 in Chapter 10 for "liability of a principal"

Contract workers

2.10 A contract worker is a person employed by a contractor or sub-contractor to do work for a principal. Although

S 13 (1)

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.

2.11 Provided that there is an unbroken chain of contracts between the individual employee and the end user of his/her services, that end-user is a principal and the individual is a contract worker.

> A shopping mall engages a property management company for the overall maintenance of the mall. The management company then hires a cleaning company for a temporary cleaning assignment at the mall. The cleaning company deploys their employees to perform the cleaning job. In this case, the "contract workers" are the cleaning workers and the "principal" is the shopping mall.

2.12 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.

Employment agencies

S 2 2.13 Employment agencies provide services to assist people to find employment or to supply employers with workers.

S 19 They are also covered under the DDO and it is unlawful

for an agency to discriminate in the provision of their services on the ground of a person's disability.

2.14 It is unlawful for an employment agency to discriminate against a person with a disability:

2.14.1 In the terms on which it offers to provide any of its services, e.g. an employment agency asks a person with speech impairment to return in a couple of weeks' time without exploring any other options of communication when others who do not have speech impairment are provided instant service; S 19 (1)(a)

2.14.2 By refusing or deliberately omitting to provide any of its services, e.g. an employment agency refuses to allow a person with a mobility impairment to register with the agency as it says that it does not have any posts which would be "suitable" ; or S 19 (1)(b)

2.14.3 In the way it provides any of its services, e.g. an advisor of an employment agency spoke to a person with Dyslexia in a dismissive and condescending tone that the various jobs the person is interested in would be too difficult for the person to handle. S 19 (1)(c)

2.15 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 S 48

the unlawful act(s) of disability discrimination committed by these agencies through their principal and agent relationship.

S 44 & 45

See also paragraph 10.4 in Chapter 10

2.16 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 49 (1)

S 49 (3)

Chapter Three

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. The CRPD also affirms the right of persons with disabilities to work on an equal basis with others.[5]

3.2 Recognising the progression in disability rights, in particular the diversity of persons with disabilities[6], 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)

[4] Preamble (e) of the Convention on the Rights of Persons with Disabilities
[5] Article 27 of the Convention on the Rights of Persons with Disabilities
[6] Preamble (i) of the Convention on the Rights of Persons with Disabilities

S 2 (1) 3.3.2 Total or partial loss of a part of the person's body;

S 2 (1) 3.3.3 The presence in the body of organism causing / capable of causing disease or illness;

S 2 (1) 3.3.4 The malfunction, malformation or disfigurement of a part of the person's body;

S 2 (1) 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) 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.

Persons who do not have a disability currently

3.4 Disability can include not only an existing disability but also:

S 2 (1) 3.4.1 **Past disability** - a disability that existed in the past;

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.

3.4.2 **Future disability** - a disability that may exist in the future[7]; S 2 (1)

An employee who had recovered from psychiatric disorder was dismissed because the employer thought that her disability would relapse in the future. The employer could be liable for disability discrimination.

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

An employer came to know about an employee's sexual orientation and falsely assumed that the person was HIV positive. Based on this false assumption, the employee was dismissed. The dismissal could amount to unlawful discrimination on the ground of imputed disability.

Associates

3.5 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)

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

3.5.2 A person who is living with the person with a disability on a genuine domestic basis; S 2 (1)

[7] In *K & Others v Secretary for Justice* [2000] 3 HKC 796, the court held that future disability means "…a future disability predicated by a past disability and the risk it refers to is the possibility of recurrence of the past disability, not the risk of acquiring any disability." In addition, the EOC takes the view that the relevant provision may, in appropriate cases, be applicable to situations other than recurrence of past disability, e.g. a person with high blood glucose level is taken as someone who will acquire diabetes in the future.

S 2 (1) 3.5.3 A relative of the person with a disability;

S 2 (1) 3.5.4 A carer of the person; and

S 2 (1) 3.5.5 A person who is in a business, sporting or recreational relationship with the person with a disability.

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

Chapter Four

4 Discrimination under the DDO

Overview

Disability discrimination

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.

S 6 (a)

See paragraphs 4.12-4.22 below

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, F, a candidate with mobility disability, was refused an opportunity to have an interview. F has therefore been discriminated against on the ground of her disability by being deprived of a chance to an interview.

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

S 6 (b)

See paragraphs 4.23-4.28 below

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 lacking the physical fitness because of particular disabilities would

more likely to be screened out. This would give rise to indirect discrimination unless the requirement was imposed with justifiable cause.

Disability harassment and vilification

S 2 (6)
See paragraphs 9.3-9.9 in Chapter 9

4.3 **Disability harassment** is an unwelcome conduct towards an employee in relation to his/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.

S 46
See paragraphs 9.10-9.13 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.

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 present[8]. Therefore, openly making insulting remarks concerning a colleague's disability in a meeting could amount to disability vilification.

[8] There has yet been a 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

Discrimination by way of victimisation

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/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 with proceedings brought by another person against the employer; S 7 (1)(b)

4.6.3 Do anything under or by reference to the DDO in relation to the employer; S 7 (1)(c)

4.6.4 Make allegation of disability discrimination against the employer. S 7 (1)(d)

G, an employee with a disability, was refused promotion at work. He lodged a complaint of discrimination with the EOC. Colleague H provided information to the EOC as a witness and was dismissed because of his action. It is likely that H's dismissal would amount to victimisation, regardless of whether H 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) not made in good faith. S 7 (2)

J was a substandard performer and had received numerous performance warnings. After receiving another warning from his employer, J 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 by his supervisor in accordance with the company policy. Fearing that he might be dismissed, J tried to pre-empt action against him by his employer and lodged a false complaint of disability discrimination against his supervisor. In view of J's deteriorating performance, the employer terminated his employment. J alleged that he was victimised for having made a complaint against his supervisor. Given the facts of this case, J's allegation of victimisation is unlikely to prevail.

Special measures

S 50 4.8 The DDO, like the other anti-discrimination ordinances, contains 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.

4.9 Special measures should be reasonably intended to ensure that persons with disabilities have equal opportunities with other people. In considering whether a measure comes within the provisions of special measures, relevant factors include the following:[9]

4.9.1 Whether there is an existing inequality of resources and opportunities to be redressed, or whether the beneficiary of the measure has some special need to be addressed;

[9] See *EOC v Director of Education* [2001] 2 HKLRD 690

4.9.2 Whether it is connected to the aim of redressing the inequality or special need;

4.9.3 Whether it is proportional to the inequality or special need;

4.10 The need for special measures must be assessed from time to time, in order to ensure that the special measures do 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 DDO 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 disabilities 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 the DDO if on the ground of that other person's disability he treats that other person 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

See paragraph 10.7 in Chapter 10 for the meaning of "employment" under the DDO

without the same disability in comparable circumstances on the ground of the former's disability. 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).

"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/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. The existence of a person's disability would not by itself establish a case of disability discrimination.[10] More information would be needed to substantiate causal linkage.

"But-for" Test[11]

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/her disability? Compare the following two scenarios:

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

[11] 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 K has recovered from depression. The supervisor doubted Employee K's ability to handle the stress and workload in a more senior position and therefore did not recommend her for promotion despite her good appraisal ratings in the past years.

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

Employee L who suffered from migraine headache had a record of repeated tardiness and neglect of duties. He has been warned numerous times of his poor performance both verbally and in writing. The employer finally dismissed him after no improvement was shown on his part. Would Employee L have been dismissed ***but for*** his disability? It appears that L was dismissed because of his substandard performance. His disability was part of the background information irrelevant to his 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 is one of the reasons amongst others, whether or not it is the dominant or a substantial reason for doing the unlawful act. Genuine performance issues should be dealt with in a fair and clear manner so as to avoid misunderstanding.

S 3

This provision only applies to the definition of "direct discrimination"

Motive and intention not relevant[12]

4.17 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. Sometimes, it could even be a well intended gesture[13] on the employer's part that the treatment is done in the interest of the employee with a disability.

> Employee M has a mobility disability. With a good intention to avoid travel inconvenience to M, the employer exempted her from all overseas duties and training without consulting M. M, on the other hand, considered that such arrangement would negatively impact her career development. The decision of the employer, although out of good intention, is likely to amount to disability discrimination. The situation could have been avoided if the employer had consulted the employee with a disability on how the employee viewed overseas duties to ascertain whether the employee preferred to be exempted from these duties before forming the decision.

Comparator in relevant circumstances and how comparison is made

S 8

4.18 Direct discrimination requires a comparison between the aggrieved person and another person who does not

S 6 (a)

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.

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

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

The purpose is to ascertain whether the disability in question is the ground on which the aggrieved person is discriminated.

4.19 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 N has mental illness and needs regular treatments at the psychiatric clinic. Employee O 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, without any information about the two employees' different medical conditions, subjectively feels more sympathetic toward N's disability and grants N a full day of sick leave on the days of his medical appointments. O, on the other hand, is strictly required to report duty immediately after his medical appointments. N and O are persons with different disabilities in like situations where they both require only half a day to attend medical attention. Treating O in a more stringent manner than N without knowing more about their individual needs would likely amount to disability discrimination against O.

4.20 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 L's case

See paragraph 4.15 above

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.

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

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.

"Less favourable treatment" – concept of detriment

4.21 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.

4.22 One needs to bear in mind that subjective reasoning on the part of employer for the differential treatment may neither be a defence nor be relevant if it is objectively detrimental to the person affected.[14]

See paragraph 4.17 above for discussion on "motive" and "intention"

P, 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 P'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 P'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, P did not consider administrative work her area of expertise and did not appreciate the involuntary change of career path. In this case, P would seem to have suffered a detriment arising from the transfer on account of her injury.

Indirect Discrimination

4.23 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)

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

S 6 (b)

S 6 (b)(i)

S 6 (b)(ii)

S 6 (b)(iii)

4.24 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**.

See Chapter 7 for more discussion on workplace absence issues

Company Q required all employees not to be regularly absent from work for operational reasons. Employee R had a chronic illness and had taken sick leave for an extended period of time. The employer decided to terminate R's employment because R 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 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.

See paragraphs 4.27 & 4.28 below for discussion on "justifiability" of imposing a requirement

Same "requirement or condition"

4.25 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 a disability in the relevant situation. These are factual matters which need to be established.

Proportion of people who can comply

4.26 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 sense[15]. S 6 (b)(i)

Whether the requirement or condition is justifiable

4.27 A balancing exercise of reasonableness weighing the following factors is relevant in determining the justifiability of imposing a requirement or condition[16]: S 6 (b)(ii)

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

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

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

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[15] 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

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

4.28 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.[17] 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 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.

S 83 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.

[17] *Ibid*., at 365

Chapter Five

5 Inherent Requirement, Reasonable Accommodation and Unjustifiable Hardship

5.1 Some disabilities are so serious making the persons having them genuinely incapable of carrying out the inherent requirement(s) of the jobs concerned. 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 This chapter will go through the notions of inherent requirement, unjustifiable hardship and reasonable accommodation and discuss the intertwined relationships amongst them.

Inherent Requirement

5.3 The DDO recognises that in some situations, a person because of his/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 /she cannot fulfill.

S 12 (2)

5.4 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:

5.4.1 **All relevant factors** (including past training, qualifications and relevant experience of the job applicant, performance of the employee

S 12 (2)(a)-(c)

See paragraphs 5.5-5.7 below

concerned) that it is reasonable to take into account;

S 12 (2)(a)-(c)(i)

See paragraphs 5.8-5.14 and 5.18-5.21below

5.4.2 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)(ii)

See paragraphs 5.15-5.17 below

5.4.3 Whether the **accommodation** required would create unjustifiable hardship for the employer.

Capacity of the person in relation to the job- Consideration of all relevant factors

5.5 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.

5.6 Factors to be taken into account when an employer or potential employer assesses the capability of a person with a disability to perform in a particular employment include:

S 12 (2)(a)

5.6.1 The person's past training, qualifications and experience relevant to the particular employment;

S 12 (2)(b)

5.6.2 If the person is already employed, his/her performance as an employee; and

S 12 (2)(c)

5.6.3 All other relevant factors that it is reasonable to take into account.

5.7 "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

5.8 In order to justify a decision not to employ a person with a disability or not to continue employing 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 question[18]. S 12 (2)(c)(i)

5.9 "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"[19] 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."[20]

5.10 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.[21]

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[18] See *M v Secretary for Justice* DCEO 8/2004 at 265 (i) and (vii)
[19] *Ibid*., at 265 (iii)
[20] *Ibid*.
[21] *Ibid*., at 265 (iv)

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.[22]

5.11 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/ she would be considered to be unable to carry out an inherent requirement of his/her job. In some occupations, such as positions involving customer services, emotional instability or behavioural problem producing significant rudeness to others might be a genuine cause for concern. Nevertheless, the standard for good communication varies among different positions; employers should not apply a uniform standard in assessing employees' performance.

5.12 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

[22] *Ibid*., at 265 (v)

nevertheless, because putting him/her in such particular employment might put lives and properties at risk.[23]

***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)(c)(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.

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

[23] See *Commonwealth v HR&EO Commission* (1998) 152 ALR 182 at 10

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 there was discrimination by the government in refusing them employment.

5.13 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.[24]

***Cosma v Qantas Airways Ltd.* [2002] FCAFC 425**

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 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

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

out the inherent requirements of his job as being a porter and thus the dismissal was not unlawful.

5.14 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."[25] Accommodation can be done by provision of assistance in the form of services or facilities to help the employee to do the job.

Unjustifiable Hardship

5.15 In determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including: S 4 & S 12 (2)(c)(ii)

5.15.1 The reasonableness of any accommodation sought; S 4 (a)

5.15.2 The nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; S 4 (b)

5.15.3 The effect on the employee with a disability if accommodation could not be provided; and S 4 (c)

5.15.4 The financial circumstances and the estimated amount of expenditure required for providing accommodation by the employer claiming unjustifiable hardship. S 4 (d)

5.16 This requires a structured balancing act of potentially competing interests. The cost–benefit assessment will vary depending on the size and financial resources of the employer claiming recourse to the unjustifiable hardship exemption.

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

5.17 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 or to industrial practices, though these may be considered as one of the relevant factors to be taken into account.

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

S argued that her marketing duty could be taken up by the boss during her 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 S's injury-related sick leave. Moreover, the boss was the only other 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 the size of the company, the business turnover and the poor business forecast together with dim prospect of S's resumption of normal duty after prolonged sick leave.

It would be a different consideration if the size of the company is large, with sufficient resources to cover

the absence. In these circumstances, 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

5.18 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 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 the inherent requirement and / or unjustifiable hardship. S 12 (2)(c)(ii)

5.19 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. The types of services or facilities to be provided or adjustments to be made could include:

5.19.1 Modifications to work premises to ensure that work areas and facilities are accessible and can met the special needs of employees with disabilities;

5.19.2 Change to job design, work schedules or other work practices to enable qualified individuals with disabilities to perform the essential functions of that position, such as job-sharing and flexi-hours;

5.19.3 Provision and modification of equipment to enable ease of use by employees with disabilities; and

5.19.4 Provision of training and other assistance.

See paragraphs 11.5-11.10 in Chapter 11

5.20 Employers are encouraged to consult employees with disabilities and professional advice in order to gain a better understanding of the practical measures that can be taken to accommodate employees with disabilities.

5.21 In determining hardship on the employer's part, the court would have to consider all aspects in the particular circumstances of individual cases. For example, while costly alteration to premises' access to accommodate an employee in wheelchair may seem unreasonable, its benefits to other users/occupants and hence the potential for cost sharing by others could well be taken into account.

Chapter Six

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 not uncommon on the part of the recruiting personnel to judge candidates upon crude impression in employment selections. In situations where the selection is guided by stereotypical assumptions of persons with disabilities, it could lead to unlawful disability discrimination.

6.2 The legal meanings of disability discrimination and harassment have been discussed in the previous chapters. This chapter marks the beginning of a series of practical 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 at all stages of employment, including promotion, transfer, training, dismissal or

redundancy, whenever selection process is involved. It also applies to the setting of 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

S 11 (1)

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)(a)

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

S 11 (1)(b)

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

S 11 (1)(c)

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

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

S 12 (2)

See also Chapter 5 for explanation of "inherent requirement"

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

S 12

Explained at paragraph 6.11 below

6.6.2 Absence of a disability is a genuine occupational qualification of the job.

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 providing reasonable accommodation before making such decision. Employers should at all time 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. Employers 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 5.8-5.14 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 to reflect the essential nature of the job. Blanket requirements or exclusions relating to health or disability

should be avoided. Occupational qualifications should only be requested where there is a genuine need and there is no other way to meet the criteria. For example, regardless of a person's disability, a driving licence is deemed a pre-requisite for the post of chauffeur.

6.10 The criteria an employer sets as inherent requirements must be objectively justifiable as they may put persons with disabilities at a less favourable position when compared to another candidate. The focus should be placed on relevant attributes and skills which are required to do the job.

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 who have mobility difficulties.

Genuine Occupational Qualification

S 12 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 (3)(a) 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;

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 effect 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 undertakes 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.

S 12 (5)

Advertising

See principle of "Consistent Selection Criteria" in paragraphs 6.3 and 6.4 above

6.12 Employers should ensure that the contents of advertisements are based on CSC. They should advertise for jobs on the basis of CSC in order to encourage applications from suitable candidates regardless of whether they have a disability.

6.13 Requests for photographs and copies of ID cards at the application stage should be avoided as this may indicate an intention to discriminate on the ground of disability, although asking for ID numbers would be acceptable. However, requests for photographs and copies of ID card at the interview stage can be made for identification purposes.

6.14 Where jobs are traditionally held by employees who do not have a disability and absence of a disability is not a GOQ, employers can consider including statements such as the post is equally open to persons with disabilities. This will effectively send out a clear message that applicants with a disability are welcome.

Accessible application process

6.15 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.

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

6.17 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.

6.18 Employers should ensure that the required format for applications would not discourage or prevent persons with disabilities from applying. Without valid justifications, a stipulation that an 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.

6.19 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, in particular those that contain the listing out of specific disabilities in a form, should be avoided unless it is essential or specifically relevant to the job, and in that event, reasons for requiring the information should be specified in the job specification. S 42

6.20 A general question in the application form asking applicants whether they require any special provision or facility at the interview is admissible. This not only gives the option to an applicant whether to declare a disability for accommodation, it also demonstrates the employer's

commitment to the principle of equal opportunity and helps the employer to prepare for such reasonable accommodation as is needed for the particular applicant. Irrespective of the inclusion or not of such a question in the application form, it remains an applicant's right to choose not to disclose his/her disability. Nevertheless, in the absence of such information, the employer cannot be expected to provide reasonable accommodation even when there is the need during the interview. Employers should make sure that information about an applicant's disability is not used to screen out the applicant or as part of the selection process, unless not having a disability is a GOQ of the job.

Shortlisting

6.21 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. Employers should identify applicants who have shown that they can meet these criteria, taking into account the provision 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 his/her disability is likely to be discriminatory.

Arranging interviews

S 42 (3) 6.22 All application forms and letters of invitation to interview may 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.

6.23 Accommodation which an employer may have to arrange for candidates with disabilities is intended to be individualised and may most 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.

6.24 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 applicants 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 the circumstances permit and as they reasonably can.

Applicant T has visual impairment and has 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 U 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. U 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 has been afforded by rescheduling the first interview. Moreover, there was no information justifying U's failure to turn up at the rescheduled appointment to support her request for the second rescheduling.

Tests

6.25 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.

6.26 Where tests are devised in-house, there may be a need to revise them taking into account the test results might have adverse implications on 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 is trained, understand how people's different impairments may affect the test results and is aware of

the requirements of the DDO. Necessary adjustments should be made as appropriate.

6.27 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. Whether accommodation is reasonable will depend 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 in assessing something intrinsic and relevant to the job, such as a typing test for a court stenographer.

6.28 Examples of adjustments that may be considered as reasonable accommodation are:

6.28.1 Allowing extra time for candidates with dyslexia to complete a written test;

6.28.2 Letting a reader or scriber help with reading or writing during a test.

Applicant V has restricted manual dexterity due to a disability. In view of the fact that V might be disadvantaged by a written test and since the ability to write is not essential to the position, the employer gave V 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 ability was the purpose of the test. Applicant W had a serious speech impairment and requested to be

given a written test instead. It does not appear to be reasonable to expect the employer to alter the form of assessment in view of the inherent requirements of the job.

Interviewing

6.29 Having been informed of the applicant's disability, interviewers should not discriminate against the applicant 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.

6.30 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 X was asked at the interview why he did not work during the whole year of 2005 while the rest of his CV regarding employment history was impressive. X 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 screened X out because of his previous disability. This would very likely

amount to disability discrimination as X's past disability was a reason that he was declined employment by the employer.

6.31 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/she would be able to do it with reasonable accommodation.

6.32 An employer is obliged to make sure that candidates with disabilities are considered fairly in the selection process and that the decision not to employ these candidates is not based on their disabilities per se.

Medical Test and Health Screening

6.33 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 inherent requirements of the job or would required accommodation to do such. S 42

6.34 Health screening is more appropriate after the selection process is completed and the person considered best suited for 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.

See paragraphs 7.22-7.25 in Chapter 7 on obtaining medical reports

Y applied for a teaching post in a primary school. She completed the written tests and had an interview. The school made a conditional offer to her subject to satisfactory medical examination which was required for registration with the Education Bureau.

Y'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 result suggested that Y had tuberculosis and that she was not suitable for classroom teaching as it might pose hazards to students and other staff. In fact, when Y 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 on the way to full recovery.

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

Z applied for the post of pilot with a civil aviation company after obtaining a degree in aviation engineering. Z 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 passing certain eyesight testing is one of the conditions.

During the medical examination, Z failed the color vision test and was found not being able to meet the standards and requirements set out by the international aviation authority. The airline company then withdrew the conditional offer, giving the reason that Z could not comply with the inherent requirement of the job.

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

6.35 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 crude health screening report that merely states that an applicant is "unfit for work" would not be adequate and would require further elaboration on medical ground.

6.36 In respect of pre-employment medical examinations required by an employer, the employer should also ensure that:

6.36.1 The medical information is relevant to the particular duties and responsibilities of the job;

6.36.2 Where the applicant is not hired or offered the job after the medical examination reveals a disability, the decision not to employ is based on the person's inability to perform the inherent requirements of the job; and

6.36.3 No reasonable accommodation was available to enable the applicant to perform the inherent requirements of the job, or that accommodation would impose an unjustifiable hardship.

Infectious Diseases

S 61 (1)

See also paragraphs 7.32-7.34 in Chapter 7

6.37 It is not unlawful to discontinue employing/not to employ 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 HIV as the virus is not regarded as easily communicable.

S 61 (2)

S 61 (3)

6.38 Infectious disease is defined under the DDO as:

S 61 (3)(a)

6.38.1 A disease (or a disease caused by an infectious agent) within the meaning of the Prevention and Control of Disease Ordinance (Cap 599); or

CAP 599

S 61 (3)(b)

6.38.2 Any communicable disease specified by the Director of Health by notice in the Gazette.

A was a clerk with 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 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 A was requested to take leave and to submit medical

clearance before she could resume duty. Having to go through medical clearance may be regarded as less favourable treatment in comparison with other colleagues who do not have such disease or other disabilities. In such a case involving a contagious and life threatening disease, the less favourable treatment would not likely amount to unlawful discrimination given that it is necessary to protect public health.

B 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 a contagious disease, and the position in question involved food safety, the hotel required B to commence employment only after another health clearance. Although B was unhappy with the delay of his employment, the employer's decision would most likely be accepted as reasonably necessary and justifiable.

6.39 The goal of recruitment and selection for a position is to attract, identify and select people who are most likely to contribute to the organisation. The DDO outlaws disability discrimination against applicants in this process. To achieve optimal result and to avoid discrimination, an employer should assess all applicants on their genuine and overall merits and be able to recognise and appreciate the value of diversity.

Chapter Seven

7 Managing Disability Related Workplace Absence

7.1 Disability related absence is often required by employees in order to recuperate from illnesses and disabilities. Employers should accommodate such need when it arises. This goes beyond mere legal obligations. It enables the staff's wellbeing and safety to be looked after. When disability related absence is not reasonably and properly afforded, health problems could proliferate to lower productivity and morale.

7.2 On the other hand, staff absence has impact on operation and it is legitimate for employers to properly manage absence. Sick leave abuse may also occur in some cases. Failure to address them may translate into inefficiency and business loss. As such, the need for employers to administer disability related absence should be duly recognised as well.

7.3 This chapter explores different issues relating to workplace absence caused by disabilities and how the DDO may apply. Sick leave is a statutory entitlement under the employment law. This chapter does not seek to resolve issues under other ordinances that deal with statutory entitlement to 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.

See relevant provisions in the Employment Ordinance (CAP 57) and Employee's Compensation Ordinance (CAP 282)

Absence and disability

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 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/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. Accommodation, 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.

See Chapter 5

See paragraphs 3.3 & 3.4 in Chapter 3 for definition of "disability"

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. However, due care should be exercised when dealing with work injury situations to ensure that an employee is not deprived of his/her entitlements under the Employment Ordinance and/or the Employees' Compensation Ordinance.

For handling of work injuries, see the relevant provisions in the Employment Ordinance (CAP 57) & the Employees' Compensation Ordinance (CAP 282) and *A Concise Guide to Employees' Compensation Ordinance* and *A Concise Guide to Employment Ordinance published* by the Labour Department

C 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. She had to walk on clutches for a month. C'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 C's disability is not a relevant factor under the DDO, 2) the employer has not considered the provision of any reasonable accommodation, and 3) even if accommodation had been considered and subsequently not offered, the employer was not able to show unjustifiable hardship in the provision of accommodation.

D was injured at work and sustained serious and permanent disability which rendered him unable to continue with his job. No practical accommodation could be provided and as a result, his employment was terminated. D 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 employment. D'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 D 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.

7.8 The administration of sick leave should be clearly explained in the organisation's sick leave policies. Sick leave policies should be 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

7.9 Where the underlying cause of absences, whether or not the cause results in frequent absences, is known (for example a specific condition that fluctuates in its effects), granting sick leave is necessary and legitimate. Difficulty arises when there is no obvious reason for repeated absences. Situation as such triggers a warning that there is either an underlying condition or cause other than it appears or that the employee may be 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. Nevertheless, an employer should still make

For sick leave wages entitlement, see the relevant provisions in the Employment Ordinance (CAP 57) and *A Concise Guide to Employment Ordinance* published by the Labour Department

sure that the employee in question is not deprived of his/her statutory entitlement under the Employment Ordinance relating to sick leave wages.

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", "gastric flu", to "common cold." The employer suspected sick leave abuse and directed E to consult a designated doctor to ascertain whether E's condition needed accommodation at work.

Under the wide definition of disability stipulated 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 E is required to seek designated medical advice because, having regard to the pattern of sick leave over 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. His sick leave was documented by two sick leave certificates for five and four days consecutively.

When Mr. Ip returned to the restaurant to produce his first sick leave certificate, the manager was dismayed and told him that the restaurant was short of staff and asked him if he really needed to take such a long period of 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 was not able to produce any records of oral or written warnings given to Mr. Ip. The court took the view 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, an interview 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 has been with the company for over ten years with outstanding performance ratings from different supervisors. The human resources department found that he took 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 medical 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. Before considering the dismissal of 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, provided that they are genuinely **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 just for taking repeated or extended sick leave.

See paragraphs 4.23-4.28 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 the attendance requirement has an adverse impact on G because she could not comply with such requirement or conditions, the question is 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 whether flexible hour is equally efficient and whether the frequent treatment schedule of the employee can be arranged outside working hours.) Answer to the question will depend on the circumstances of each case. Generally, factors that need to be taken into consideration include the impact G's absence has on the operation of the company, on G's work as well as that of her colleagues'. The reasonableness of allowing regular absence in the particular instance is also a relevant consideration.

See paragraphs 4.27-4.28 in Chapter 4 for the determination of justifiability of a condition or requirement

7.14 It takes a reasonable balance 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.

***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 that 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 the total number of classes in the month of leave. The school claimed that this condition was justified because of 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 the 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 but the condition was surgically corrected at a 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 intervals of about six to nine months, 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 and has only served two employers. He was hired by Mr. Law to drive 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 but became very annoyed when he requested for sick leave to attend another medical checkup two months later. Mr. Kwok was also required to produce medical reports to certify that his disabilities have no adverse effect on his driving. Mr. Kwok complied with the request.

Mr. Kwok was eventually dismissed. He alleged disability discrimination. His employer, on the other hand, claimed safety reasons and unsatisfactory driving manner to be the grounds of dismissal. The court after having considered Mr. Kwok's past record of having worked with only two employers in his entire driving career and his 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. Each case should be considered according to its own circumstances.

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/her sick leave entitlement, as long as it is in accordance with the organisation's sick leave policy.

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

Without seeking further verification of the medical certificate nor ascertaining H's disability, the employer's conduct of issuing the warning letter to H would likely to be considered as unlawful discrimination.

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.

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 those circumstances manifest themselves as frequent sick leave or as lower 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/she would be willing to obtain a medical report from a medical adviser to enable consideration be given to the provision of accommodation. S 42

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.

J was a telephone operator in the customer services department of a company. She was late coming to work for more than one hour 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. J's tardiness had adverse impact on the operation of the department as well as the customer service pledge. When queried about her tardiness, J explained that she experienced stomach cramps almost everyday she had 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 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 J should seek further and more thorough examination from a doctor who is on the company's insurer's list of panel doctors or any of

the public hospitals. They suspected that J might be suffering from a more serious condition prompted by stress. To assist J to carry out her duty as a telephone operator, the company would need more information based on professional advice. J 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 unlikely 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 J'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/her from performing the inherent requirements of the job and to consider the provision of accommodation where possible. Employers should also bear in mind that medical information of an individual

S 42 (3)

See relevant provisions in the Personal Data (Privacy) Ordinance (CAP 486) and the *Code of Practice on Human Resources Management published* by the Office of the Privacy Commissioner for Personal Data

is sensitive personal data. Such information should only be obtained to assist in the determination of a person's capability to perform the inherent requirement(s) and/or the consideration of accommodation.

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/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 decision and not a medical one.

See also paragraphs 11.7-11.10 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 K developed a heart condition and the airline company asked him to undertake a risk and health assessment in accordance with the relevant requirements under the aviation regulations. This requirement to ascertain the physical fitness of K is reasonable under the DDO.

L was a person with a learning disability. She has worked in a shop for many years, stocking shelves without any problem. When a new manager was appointed, he insisted that a risk assessment be carried out on L only but not on all other staff working in a similar position. This action would appear to be uncalled for; it was but for the L's disability that 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;

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

7.28.3 Employer's legal obligations to other employees and others;

7.28.4 The function which the employee performs as 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.

M 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. The company also stated that it was too high the risk and too serious the consequence to keep M. M disagreed and underwent a thorough medical checkup for his fitness to perform the job. Medical report indicated that M's condition was minor and had been corrected by surgery, i.e. his heart disease would

not affect his ability to drive. The school bus company's decision to dismiss M before obtaining proper medical assessment is likely to 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. In the above scenario, the school bus company might not have dismissed M and contravened the DDO should they have obtained a medical report on his condition and properly considered it.

Infectious Diseases

S 61 (1)

See paragraphs 6.37-6.38 in Chapter 6 for the definition of "infectious diseases" under the DDO

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.

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 and thereby causing them at least the hassle to obtain a certification from the Health Department, would not likely be discriminatory because it appears to have been imposed for safeguarding public health.

During the SARS epidemic, N, a clerk of a trading company, was dismissed due to the fact that she had contracted the disease. Her employer feared that N would spread the disease at work. The employer held that public health was the reason for her dismissal.

In this case, dismissing N 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 to allow an appropriate period of time for recovery.

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 with which the employee should be on light duties. Employers should ensure that 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 seeking 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 O 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 O to work in the office to take up minor clerical jobs. O 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 O, but was objected to by O claiming that his medical record and condition were protected by his privacy rights. After letting O idle in the office for several months with no further information on O's recovery, the company terminated his employment.

To determine the lawfulness of O's dismissal, one should first ask whether O'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 O's condition. Then one needs to check if O 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 O's back pain appears to prevent him from performing such task.

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 O's dismissal under the circumstances would not be unlawful.

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

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

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

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 resentful 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 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 Over emphasising 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.

S 2 (6)

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

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 to ensure 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.

Sensitivity issue

7.40 On the other hand, employers are concerned that enquiries 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 because of sickness 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 P has 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 P, in accordance with the company's policy to enquire about her health, suggesting a more thorough medical check-up and an estimation of when she might return to work. P, although not knowing when she would return to work, refused to seek further diagnosis of her health condition. She insisted that she was entitled to sick leave and should not be disturbed at all during that period. The next week when the HR manager called again, P refused to discuss her medical condition with him and alleged that he had intruded into her privacy. She also alleged disability harassment because she felt intimidated by the two phone calls made by the HR manager.

It appears that the HR manager was merely performing his duty according to a standard policy. Unless there is information indicating impropriety on the part of the manager in the two telephone conversations, it is not likely that the allegations could be substantiated.

Employee Q 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. The manager repeatedly told him that he sounded fine on the phone and suggested that he should at least work from home. Q 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 that time of economic downturn, it would be unwise for Q to put his career at stake. Q felt pressured and aggrieved.

The HR manager's conduct would likely constitute unlawful disability harassment as it was based on Q's disability and sick leave. What she did would amount to 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 even 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 Eight

8 Managing Promotion, Transfer and Dismissal

8.1 Under the DDO, it is unlawful for an employer to discriminate against an employee with a disability:

S 11 (2)(b)

8.1.1 In the terms of employment afforded to him/her;

S 11 (2)(a)

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)(c)

8.1.4 By dismissing him/her or subjecting him/her to any other detriment.

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 organization, 2) to an existing employee upon the person's promotion or transfer to a new post within the organization, and 3) in the course of employment without involving a promotion or post-transfer. 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 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 conditions should not cause indirect discrimination to persons with disabilities. Moreover, a discriminatory term or condition is void by virtue of Section 83 of the DDO and cannot be enforced against the employee concerned.

S 11 (2)(b)

See *Siu Kai Yuen* in paragraph 4.28 in Chapter 4

S 83

Equal pay for equal work (EPEW) and equal pay for work of equal value (EPEV)

8.5 Pay should be determined on the basis of established job value. Employers should apply consistent criteria when developing and implementing good practices on EPEW and EPEV. Salary is often paid in the form of a pay package. It 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 EPEW and EPEV between employees with a disability and employees who do not have a disability or with different disabilities. Nevertheless, the salary of individual employees may still be differentiated by objective factors, such as capability, performance, experiences, etc. In accordance with Schedule 2 of the Minimum Wage Ordinance (CAP 608), persons with disabilities whose productivity may be impaired by their disabilities will have the right to choose to have their productivity assessed to determine whether

S 11 (2)

For details, 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

CAP 608

they should be remunerated at not lower than the statutory minimum wage level or at a rate commensurate with their productivity.

Employee insurance benefits

S 11 (2)(b)

8.6 Employee insurance benefits are a form of employment "salary and benefits". Thus, an employer should not discriminate against an employee with a disability in offering the employee insurance-related benefits, or by refusing him/her any such benefits. Employers should explain the availability of group insurance services to the employees and propose employees with particular disabilities to the insurer for coverage under a group policy. Employers are advised to consider coverage for employees with disabilities so long as it does not incur an unjustifiable hardship on the employers in affording the relevant premium if any.

S 11 (2)(b)

8.7 Discrimination by employers in providing insurance-related benefits is discrimination in employment terms under S 11(2)(b).

S 26

S 52

8.8 S 26 of the DDO makes it unlawful for an insurer to discriminate against a person with a disability on the ground of the person's disability. S 52 provides a defence where there are reasonable actuarial or other data justifying not affording such benefits to persons with disabilities.

Promotion and transfer (access to opportunity and other benefits)

S 11 (2)(a)
Other benefits includes, training, access to services and facilities, etc.

8.9 A promotion involves movement from one position to 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.

8.10 Promotions usually result in salary increase; losing a promotion opportunity entails a less favourable treatment in terms of pay package. Although transfer generally means moving to a different position without change of salary, missing a transfer opportunity may result in 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 injury to feelings could be regarded as **detriment** under the DDO.

8.11 Discrimination occurs if an employee with a disability is not given equal consideration for promotion or transfer because of stereotypical assumptions based on his/her disability. The following are examples of direct and indirect disability discrimination in offering promotion/ transfer opportunity: S 6

Employee R has worked as an accounting assistant for five years. In the last year, she took more sick leaves than usual for lower back pain. All her sick leaves were supported by medical certificates. R was rated as "effective" in her past five years' performance appraisals. Her supervisor nonetheless believed that she should improve her health before she could be considered for promotion that year. Eventually she was not considered for promotion.

Barring R the opportunity for promotion upon her disability would amount to direct disability discrimination.

See Chapter 7 for more discussion on managing disability related workplace absence

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

It was the company's policy that staff who were absent from duties for more than three weeks within the current year would not be considered for promotion. As such, S was considered not eligible for promotion despite his outstanding performance. In the absence of justification for the attendance requirement for promotion, the company's conduct may amount to indirect discrimination because S, being a person with disability, is unable to comply with the attendance requirement and is therefore excluded from promotion.

8.12 In the case of an allegation against discriminatory practice in promotion or transfer, an employee with a disability only needs to show that the selection process is discriminatory. It is not necessary for the person to show that he/she would otherwise be selected.

Good practices for promotion (or transfer) considerations

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

8.13 As in a recruitment exercise, Consistent Selection Criteria should be used to minimise stereotyping, to 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 twenty-four months.[28] Employers should also review promotion and career development patterns to ensure traditionally required qualifications are still justifiable requirements for the job.

8.14 It would be more appropriate to have one selection panel for the entire process to ensure consistency. 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)

8.15 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", as used in this Code, applies to different ways to terminate an employment, with or without pay, including summary and constructive dismissal, redundancy, compulsory early and medical retirement, discontinuation and non-renewal of employment contract, etc.

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

See also paragraphs 4.12-4.22 in Chapter 4

[28] The usual timeframe for lodging a complaint with the EOC is 12 months (S 80(4)(c)) and the usual timeframe for bringing a civil claim to the District Court is 24 months (S 82). The period between the date a complaint was lodged with the EOC and the date the complaint was disposed of would be disregarded for the purpose of determining the 24-month timeframe (S 82(2A)).

8.16 It may amount to discrimination if dismissal of an employee is based on a stereotypical assumption that the employee's disability prevents him/her from performing of the inherent requirements of the job.

S 12 (2)
See also paragraphs 5.4-5.14 in Chapter 5 for more on "inherent requirement"

8.17 It is not unlawful under the DDO to dismiss an employee who cannot perform the inherent requirements of the job. However, employers are strongly advised to consider the provision of accommodation unless there is unjustifiable hardship. Dismissal should always be the last resort.

8.18 Where operational changes (such as restructuring or 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 are selected for redundancy because of their disabilities 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 illness, medical condition or injury. The communication should be properly documented to minimize confusion should there be a subsequent dispute.

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

See also paragraphs 4.23-4.28 in Chapter 4

8.19 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 justifiable and which people with that disability are less able to comply with than other employees.

Employer T has a kidney disease that requires regular medical treatments outside office hours. The medical treatments prevented her from performing overtime work. When the company made redundancy decisions, T was placed on the top of the list for not being able to work overtime in the office, and therefore made redundant. The redundancy decision seemed to have been made by applying the condition that all staff be required to perform overtime work. T with her disability was unable to comply with such requirement. Without justification for adopting such requirement, the company would likely be found to have indirectly discriminated against T.

Casual worker U 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 was provided to the employer to show that U's failure to turn up for work on time was caused by his alleged disability and that no advance notice was given of the intended late arrival for work.

U would have difficulty substantiating his case. It appears that the less favourable treatments complained of were based on his attendance rather than his claimed disability. As regards to indirect discrimination, the requirement for reliable and punctual attendance for shift duties seems to be reasonable in the circumstances.

Guidelines on performance appraisal free of bias

8.20 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 accommodating 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.

8.21 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:

8.21.1 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.

8.21.2 Where there are changes to the objectives, proper records should be kept with reason(s) provided.

8.21.3 Assessment/evaluation system should be clear about what is being measured and understood by employees (e.g. numerical, textual, behavior-oriented, etc).

8.21.4 Consistency should be maintained in measuring performance from employee to employee.

8.21.5 All comments in an appraisal should be supported by facts. They should be made impartially without bias.

8.21.6 In case of poor or marginal performance, employers should act early to allow the employee in question the opportunity to improve and correct his/her performance. This would also avoid 'end-of-year' surprises.

8.21.7 Performance of all employees should be objectively documented on a regular basis, including discussions with staff and agreed actions.

Chapter Nine

9 Disability Harassment and Vilification

9.1 Harassment and vilification are unlawful acts which are assessed under separate sets of criteria under the DDO. Similar to discrimination, 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 act in public where the offender displays his/her prejudice or stereotypical assumption towards a person with a disability or to a broader group of individuals with the same or similar disability. Such act would have an adverse effect on the community.

9.2 Apart from being unlawful, disability harassment brings negative impact to both employees and employers. It violates a person's dignity and is demoralizing. It lowers a person's confidence and self esteem and eventually affects the person's overall performance. This would ultimately lead to reduction in productivity and the employer would suffer financially. Employees and employers should work together to foster an equitable workplace free of discrimination and harassment.

Disability Harassment

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

S 2 (6) 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 being harassed would be offended, humiliated or intimidated by that conduct.

Determining unwelcome conduct

9.5 In order for a conduct to constitute harassment, it must first be unwelcome to the recipient. Unwelcome means that the conduct 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 conduct;

9.6.5 Unnecessary intrusive personal inquiries in relation to a person's disability;

9.6.6 Comments or conduct because of a person's disability which are based on stereotypical assumptions about the person's capabilities or need for assistance.

Employee V 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 V 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 conduct offensive to V.

9.7 It is not necessary for a person to object to or protest against the offending party in order to make the conduct 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 an equal footing, whereas when the offender holds a senior or higher position in the office, those who have been harassed may choose to remain silent. Whether an act of disability harassment is unwelcomed remains a subjective perspective of the person making the complaint.

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

The conduct of the supervisor would constitute disability harassment because a reasonable person would have found his conduct in such circumstances offensive to the employee in question. The fact that X has made a complaint is an indication that W's conduct 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, in which such actions are carried out should be appropriate and should not give rise to feelings of offence, humiliation or intimidation.

See also paragraphs 6.13-6.14, 6.19-6.20 in Chapter 6, paragraphs 7.22-7.25 in Chapter 7 and paragraphs 11.7-11.10 for making enquiries on a person's disability

Y, a delivery worker who had developed back pain, claimed that he was unable to carry weight and refused to drive. Y's employer requested him to undergo further medical examination in order to assess his fitness to work. Y at first refused but eventually agreed at the employer's insistence. He then disputed the contents of the medical report and lodged a complaint of disability harassment alleging that the employer's conduct of subjecting him to further medical checkup, 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

Y would not likely 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/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 an objective "reasonable person" test. It means whether a reasonable person, taking an objective view of the

incident and having regard to all the circumstances, would find the conduct offensive, humiliating or intimidating. Eventually, it is for the court to decide whether a conduct amounts to disability harassment after taking into account the circumstances and factors of the case. [29]

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

***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 wanted to take a taxi to a clinic with her sister, who suffered from schizophrenia, to attend a medical appointment. Mr. Ko, the taxi driver, parked his taxi in front of a bus stop waiting for hire. Ms Ma attempted to hail it but received no response. Ms Ma and her sister 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 get into the taxi. Ms Ma managed to get into the taxi by herself, leaving her wheelchair outside it.

When Ms Ma asked the driver to load the wheelchair into the car boot, he refused and said, "Who do you think you are, my responsibility is to drive and I have no responsibility to your wheelchair!" He also said Ms Ma's sister could help but the sister was obviously too sick to help. The taxi driver then said that if the sister could not help, it was Ms Ma's 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.

[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

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 agitated, 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.

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 was not happy with having a clinic in the vicinity that also treats persons living with HIV. The residents staged a protest at the entrance of the clinic, erecting banners

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

which carried derogatory comments towards persons living with HIV and chanting defamatory slogans.

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

The CEO of a company gave a speech on a staff training day when she shared with the audience about how the company had been "putting up with a bunch of free-loaders," referring to staff who were previously or 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 of the system," the CEO stated passionately.

Serious vilification

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

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[30] and to maximum imprisonment of 2 years.

S 47 (3)

Employee's responsibility for disability harassment

9.14 Employees have the right to be treated fairly and with respect in the workplace. Likewise, this right conveys the responsibility to treat everyone in the workplace in a way that individual differences are respected.

9.15 Employees are encouraged to speak up when harassment is encountered to let the harasser know that the conduct is inappropriate. Options including filing a complaint with the employer or with the EOC if the harassed person does not feel comfortable to confront the harasser.

See paragraphs 11.23-11.25 in Chapter 11 for internal grievance handling procedures and paragraphs 12.3-12.11 in Chapter 12 for EOC's complaint handling procedures

9.16 Employees should also support colleagues who have been subjected to harassment in ending the situation. They should, with the consent of the harassed person, report the conduct to the employer. Employees also have the responsibility to cooperate in the investigation of a complaint and to keep relevant information confidential.

Employer's and manager's responsibilities

9.17 Employers have the responsibility to maintain the work environment free of harassment. Managers and supervisors have the responsibility to stop harassment. If they become aware of harassment in their respective

See Chapter 10 for different levels of liability for unlawful acts under the DDO

[30] Maximum fine at level 6 is HKD100,000 under Schedule 8 to the Criminal Procedure Ordinance (CAP 221).

work area, or elsewhere in the organization, they must endeavour to stop it, whether or not a complaint has been made.

See "discrimination by way of victimisation" in paragraphs 4.6 & 4.7 of Chapter 4

9.18 Employers and managers should also ensure that employees are not victimised for raising a concern or lodging a complaint against unlawful discrimination and harassment.

Chapter Ten

10 Liabilities under the DDO and "Reasonably 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 the unlawful conduct of their employees. The DDO 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/her disability.

S 6, 7 & 22

S 48 (1)

S 48 (2)

S 13

See paragraphs 2.10-2.12 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 – "reasonably practicable steps".

S 48 (3)

Employee's liability

10.3 Employees, irrespective of their positions 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 employee 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 disability discrimination or harassment;

S 44

S 45

10.4.2 Induces another person to commit an act of disability discrimination or harassment; or

S 49

10.4.3 Knowingly aids another person to commit an act of disability discrimination or harassment.

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 the unlawful act, unless the human resources officer is able to show that he/she ***reasonably relied on a statement*** made by his/her employer, for example, that the relevant act in which he/she took part could be effectively exempted by one of the statutory exceptions such as "Genuine Occupational Qualification".

S 49 (3)(a)&(b)

See paragraph 6.11 in Chapter 6 for explanation of "GOQ"

Employer's liability – Vicarious Liability

S 48 (1)

10.5 By virtue of S 48(1) of the DDO, "Anything 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." This simply means that an employer is liable for the unlawful acts of discrimination or harassment committed by employees in the course of their employment with or without the knowledge or approval of such conduct on the part of the employer.

10.6 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. Moreover, 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.

"In the course of employment"

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 an unlawful discriminatory act is found to have been committed in the course of employment, not only would the individual discriminator become personally liable, but his /her employer could also be held vicariously liable. "In the course of employment" should be given an ordinary, everyday meaning so that it would cover conducts ordinary people would regard as being done in the course of employment.

See also paragraph 2.8 in Chapter 2

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

A 16-year-old boy of mixed race was subjected by fellow employees to grave acts of racial harassment, including verbal and physical abuse. The employer argued that the acts were outside the scope of the employees' employment. The employer submitted that because the acts complained of were so outrageously wrong and they had not authorized any such acts.

The Court however held that it would be wrong to allow racial harassment suffered by the employee in this case to slip through the net of employer responsibility. To do so would seriously undermine the discrimination legislation. In discrimination cases, the words "in the course of employment" should be construed by their ordinary and readily understandable meaning, in the

sense that every layman would understand them and this would cover the wrongful acts in this case.

"Reasonably practicable steps" as a defence to liability

10.8 Since vicarious liability of an employer arises even if the employer has not personally engaged in the act of discrimination and the only connection with the unlawful discrimination is the discriminatory 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 "**reasonably 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)

S 48 (3)

10.9 The DDO provides for the defence of "reasonably practicable steps" without specifying any criteria to accomplish it. Since each case bears its unique circumstances, the requirements for each employer to discharge vicarious liability differ. That said, general principles (commonly generated from case law of other jurisdictions) which may be used in assessing whether the defence is made out by an employer are listed below for reference[31].

See also paragraphs 11.11-11.26 in Chapter 11 for implementation of "reasonable and practicable steps"

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

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

[31] 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.

10.9.3 Introduction and implementation of appropriate grievance procedures;

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

10.10 In general, more efforts may be expected from larger organisations to successfully avail themselves of the defence. However, it is equally important that a workplace for modest businesses where friendly and informal atmosphere often exists should have a clear policy in place that a casual atmosphere does not mean it is open to abuse. Employers should bear in mind that the onus is on them to make out this defence and it is ultimately for the court to decide whether steps taken are adequate after considering the relevant circumstances of each case.

10.11 For a start, employers should consider the following two questions[32]:

10.11.1 What steps were taken?

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

10.12 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 occurred[33].

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

[33] See *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

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"

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 discharged its liability as the employer and had fulfilled the statutory defence, by providing guidelines on sexual harassment and by 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

S 48 (2)

10.13 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.

10.14 Principals incur vicarious liability when agents act with their authority. There is no statutory defence as such but the principal will not be liable if the unlawful act of discrimination committed by the agent is not authorised.

Authority

10.15 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:

10.15.1 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.

10.15.2 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. 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.

10.16 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 Eleven

11 Being an Equal Opportunities Employer

S 48 (1)

S 48 (3)

11.1 The DDO imposes vicarious liability on employers and at the same time provides a statutory defence of "reasonably 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 to implement equal opportunities in the workplace. Taking "reasonably 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".

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 discourage employees from participating fully in the workplace, irrespective of their disabilities. Employees with disabilities should not be seen as a burden to an organisation. Employers are encouraged to make fair assessment about the capability of each employee, whether having a disability or not, and to elicit the best from each of them to strive for business success. The following 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 purpose of providing reasonable accommodation to employees with disabilities.

Avoid stereotypical assumptions about persons with disabilities

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, 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 full and unique contribution to society. Without adequate experiences and educational references, stereotypes lead to prejudice and discrimination.

11.4 Whilst there can be no exhaustive list to eradicate stereotypes, the following are some common pointers to bear in mind:

11.4.1 Do not assume that because a person does not appear to have a disability, he/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 persons living with HIV will lead to HIV infection.

Seek better communications with employees with disabilities

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 on what is required to meet their special needs would enable employers to provide reasonable accommodation while at the same time bringing out the best from these employees and assisting them to develop their potentials.

> 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 employee had designed a software program to suit his own needs. The employer would only have to arrange for the proper installation of the software.

Seek professional advice

11.7 While communicating with and obtaining information from employees with disabilities can help employers to provide accommodation, 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 becomes more prominent.

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

11.9 It is for the employer to decide, from the management point of view, what professional advice should be sought. In case of a serious or prolonged disability, advice from a specialist would likely be needed. 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 an experienced community organisation and/or expert would 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

See paragraphs 7.19-7.25 in Chapter 7 for more discussion on medical examinations

such request, are responsible for assisting employers in the proper determination of accommodation. 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 seek independent advice by appointing independent expert(s).

Equal Opportunities Policy

11.11 The principle of equal opportunities entails observance of the anti-discrimination ordinances, in words and in spirit, in order to avoid taking into account irrelevant considerations based on stereotypical assumptions in making employment decisions. 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 outlined below for reference and employers are encouraged to adopt as appropriate according to their needs, nature of business and scale of operations.

11.13 An EO policy should state clearly the commitment of the employer to maintain a working environment free of discrimination and harassment, provide sufficient information on what kind of conduct would amount to discrimination and harassment and would not be tolerated. Employees have a right to complain should an unlawful act of discrimination or harassment occur.

11.14 Although the contents of an EO policy would vary according to the size and nature of the business, it should be comprehensive enough to provide coverage no less than the legal requirements set forth in the anti-discrimination ordinances. Where an employer's business is specifically governed by the anti-discrimination ordinances (e.g. provision of services to members of the public), the employer should ensure that the EO policy also covers the relevant business.

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 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 reviews/audit processes be established to ensure the effectiveness of the EO policy.

Employee's 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 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, general or topical, specifically relevant to the different 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 areas or levels of responsibilities. For example, general staff should be given a basic training on their rights and responsibilities under the law and the employer's EO policy, while staff handling human resource issues should also be trained to ensure proper compliance with the law and the EO policy when handling all employment related issues, such as recruitment and selection, promotion arrangements, dismissals, etc. Staff who are responsible for handling discrimination or harassment complaints should be given appropriate training to carry out investigation and resolve disputes. Those in the management should be trained to understand their particular obligations in disseminating anti-discrimination information and monitoring conducts of the staff.

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 developments in issues relating to 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 fairly for both the complainant and the respondent.

11.24 The procedures of the mechanism should be made known to all employees in order that they may seek timely help if discrimination or harassment is encountered in the workplace. This is to encourage discrimination disputes being 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 their own law suits.

11.25 Employers should protect employees who have lodged complaints of discrimination or harassment from being victimised.

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 and 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 including receiving, investigating and resolving complaints of discrimination and harassment and proactively providing 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 a similar rank to reward him/her for taking up extra duties. Another small company requests its employees within the middle management grade to take up extra responsibilities voluntarily in implementing EO practices. The employer states clearly to the employees concerned that their shouldering of more responsibilities would be effectively and

positively reflected in their performance appraisals, and thus enhancing their career advancement prospect.

Embracing workplace diversity

11.27 Anti-discrimination legislation imposes both liability and responsibility on employers. When implemented properly it could contribute positively to staff efficiency and productivity. Employers will then be able to make fair decisions based on the merits of the staff.

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 and productive than one which has been recruited under a subjective bias. A diverse workforce may be able to establish new clienteles for the business and help widen the 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 that an employer who believes in equal opportunities recognises 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 Twelve

12 Equal Opportunities Commission

12.1 The EOC is an independent statutory body responsible for the implementation of the DDO in Hong Kong, amongst other anti-discrimination legislation. It regulates public and private organisations, including the Government, to ensure that they comply with the requirements under the anti-discrimination legislation. This chapter outlines how the EOC carries out its role and functions.

Role and functions

S 62 (1)

12.2 Generally, the EOC's role and functions under the DDO are:

S 62 (1)(a) & (c)

12.2.1 To work towards the elimination of disability discrimination, harassment and vilification;

S 62 (1)(b)

12.2.2 To promote equal opportunities between persons with and without disabilities;

S 62 (1)(d)

12.2.3 To encourage persons who have disputes under the DDO to settle their disputes by way of conciliation; and

S 62 (1)(e)

12.2.4 To keep under review the working of the DDO.

Investigation of complaints

12.3 One 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/she has been discriminated against, harassed or vilified on the ground of his/her disability could lodge a

complaint in writing[34] 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 80 (1) S 80 (3)(a) S 80 (3)(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 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)

[34] A complaint is required by law to be lodged in writing (S 80(1)). The EOC however does provide assistance to complainants with different needs to come up with a written complaint. The assistance ranges from filling out a complaint form, to providing written record of a verbal account, to sign language and other languages interpretation, etc.

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

S 80 (3)(b)

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 and before any investigation into the details. If the parties could not at an early stage reach a settlement, then in-depth investigation will continue.

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 When a complaint has been lodged with the EOC but there is no settlement of the matter, the complainant 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)

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 organization with limited resources, the EOC is not able to assist every case but must choose those cases which it considers fit to lend support to.

S 81 (2) 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)(a) 12.15.1 Cases that raise a question of principle;

S 81 (2)(b) 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.

12.16 Apart from the above, the EOC may also take into account other factors, including:

12.16.1 The strength of the evidence;

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 The attitude and behaviour of the parties during the complaint-handling process.

S 81 (3) 12.17 Legal assistance offered by the EOC may include:

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

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. S 82 S 82 (2)(a) S 82 (2A)

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.

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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