

G.N. 2733

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

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# 1 Introduction

## 1.1 The Race Discrimination Ordinance

1.1.1 The Race Discrimination Ordinance (RDO) was enacted in 2008. Its main objectives include making discrimination, harassment and vilification on the ground of race unlawful; and giving the Equal Opportunities Commission (EOC) the function of eliminating such discrimination, harassment and vilification as well as promoting equality and harmony between people of different races<sup>1</sup>.

1.1.2 Part 3 of the RDO deals with discrimination and harassment on the ground of race in the employment field, which includes employment as well as other occupational relationships and matters<sup>2</sup>, making such discrimination and harassment unlawful. Part 5 of the RDO deals with discriminatory advertisements and other unlawful acts.

## 1.2 Purpose of the Code

1.2.1 This Code of Practice (Code) is issued by the EOC, pursuant to RDO section 63, to give practical guidance on how to prevent discrimination and harassment on the ground of race and other unlawful acts, and to promote racial equality and harmony, in the employment field. The Code is intended to encourage employers, employees and other concerned parties to promote racial equality and harmony in the workplace by adopting good practice, and to help them to understand their respective rights and responsibilities under the RDO so that they will respect, and refrain from infringing, the rights of other people. The Code also helps employees and workers to know what to do if they encounter discrimination and harassment on the ground of race.

1.2.2 The Code should be read in the light of and subject to the RDO. It should be read as a whole and in the spirit of promoting racial equality. It should not be read narrowly or approached in a minimalist way.

## 1.3 Status and application of the Code

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<sup>1</sup> See the long title of the RDO (Cap.602)

<sup>2</sup> See Chapter 3 of the Code (p.11)

1.3.1 The Code is a statutory code that has been laid before the Legislative Council. The Code provides recommendations for good employment procedures and practices. It should be used to promote racial equality and harmony in the workplace. Following good employment procedures and practices will further have the benefit of promoting racial equality and harmony beyond the workplace. For example, where the employment relates to the provision of education or other services and facilities, promotion of racial equality in the workplace will also help to ensure that these services are provided without racial discrimination or harassment. Although the Code is not law, it 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 RDO<sup>3</sup>. If, for example, an employer has followed the Code's recommendations on taking reasonably practicable steps to prevent discrimination and harassment, it may help the employer to show that it has complied with the law.

1.3.2 In line with the RDO's application in the employment field, the Code applies to employment relationships in both private and public sectors, unless the employee does his or her work wholly or mainly outside Hong Kong<sup>4</sup>. It also applies to other occupational relationships and work related matters, such as contract workers, commission agents, partnerships, vocational training and the services of employment agencies<sup>5</sup>.

#### 1.4 Recommendations of good practice and use of illustrations

1.4.1 The Code provides recommendations on good employment procedures and practices<sup>6</sup>. Employers and other concerned parties should follow these recommendations by adopting them appropriately to the scale and structure of their organizations and available resources. Organizations and businesses operating on a small scale with a simple structure may adopt less formal practices, so long as they follow the spirit of practising and promoting racial equality.

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<sup>3</sup> RDO section 63(14)

<sup>4</sup> RDO section 16 and paragraph 3.3 of the Code (p.11)

<sup>5</sup> See Chapter 3 of the Code (p.11)

<sup>6</sup> See Chapter 5 of the Code (p.21)

- 1.4.2 The Code makes use of simple scenarios to illustrate how principles and concepts of the RDO may be applied in the employment field. The application of discrimination law depends very much on the facts of each particular case. The illustrations used in the Code are intended to facilitate a general understanding of the principles of the RDO. They may not embrace all the relevant facts of, and should be not understood as directly applicable to, any specific situation actually encountered by the reader.
- 1.4.3 At the time of issuing the Code, there are no court decisions in Hong Kong applying the RDO. Case law and other materials under other discrimination laws in Hong Kong or elsewhere (such as international common law jurisprudence) may help in understanding how the RDO operates, and relevant references are given in footnotes where appropriate, though differences between legislative provisions and actual circumstances overseas and those in Hong Kong should be noted.
- 1.4.4 While the Code is intended to explain the general principles of the law, it is not a complete and authoritative statement of the law and it should not be taken as a substitute for taking appropriate legal advice in relation to any specific situation. Readers should refer to the relevant RDO provisions and legal advice for the extent of any legal obligation in relation to specific situations.

## 2 Meaning of Race under the RDO

### 2.1 What is meant by race under the RDO

2.1.1 The RDO provides that race means a person's "race", "colour", "descent", "national" or "ethnic origin"<sup>7</sup>. A racial group is a group of persons defined by reference to these characteristics<sup>8</sup>. In this respect, the RDO is in line with the meaning of racial discrimination in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

2.1.2 The RDO further elaborates on the meaning of "descent"<sup>9</sup> by providing that discrimination on the ground of descent means discrimination against members of communities based on forms of social stratification such as a caste system or similar systems of inherited status which nullify or impair their equal enjoyment of human rights.

2.1.3 There is no elaboration in the RDO relating to the meaning of "race", "colour", "national" or "ethnic origin". In applying these terms, the following are useful references:-

(1) ICERD and related documents<sup>10</sup>;

(2) Case law and other materials in other jurisdictions (for example, common law jurisdictions).

2.1.4 The above reference materials indicate that:-

(1) Racism and racial discrimination are the result of social processes that seek to classify people into different groups with the effect of marginalizing some of them in society<sup>11</sup>. In this context, the words "race", "colour", "national" or "ethnic origins" in discrimination laws

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<sup>7</sup> RDO section 8(1)(a)

<sup>8</sup> RDO section 8(1)(d)

<sup>9</sup> RDO section 8(1)(c)

<sup>10</sup> For example, General Recommendation VIII of the Committee on the Elimination of All Forms of Racial Discrimination (a body of independent experts established under the ICERD) states that identification of individuals as being members of particular racial groups should be based on their self-identification if no justification to the contrary exists.

<sup>11</sup> Policy and Guidelines on Racism and Racial Discrimination, paragraph 2.1, Ontario Human Rights Commission, Canada, 2005



have broad popular meanings<sup>12</sup>. They are not mutually exclusive and a person may fall into more than one racial group<sup>13</sup>. For example, identifying people as Asian is an act done on the ground of race. The same is true of identifying people as having Chinese origin. A person living in Hong Kong may be in the Asian racial group as well as in the Chinese origin group.

- (2) National origin includes origin in a nation that no longer exists or a nation that was never a nation state in the modern sense<sup>14</sup>. National origin is not the same thing as nationality. The national origin of a person can be different from his nationality or citizenship. For example, a person living in Hong Kong of Indian origin may have Malaysian nationality.
- (3) A group is an ethnic group (and its members having the ethnic origin of the group) if it is a distinct segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a long common history or presumed common history<sup>15</sup>. On this basis, Jews and Sikhs have been held to be ethnic groups<sup>16</sup>. Other groups in the same nature will also be regarded as ethnic groups.
- (4) Religion in itself is not race. A group of people defined by reference to religion is not a racial group under the RDO<sup>17</sup>. The RDO does not apply to discrimination on the ground of religion<sup>18</sup>. But requirements or conditions relating to religion may indirectly discriminate against certain racial groups, and when this is so the RDO applies<sup>19</sup>.

## 2.2 What is not regarded as an act done on the ground of race under the RDO

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<sup>12</sup> *King-Ansell v Police* [1979] 2 NZLR 531 and *Mandla v Dowell Lee* [1983] ICR 385

<sup>13</sup> RDO section 8(1)(d) and the UK Code of Practice on Racial Equality in Employment, p.111, Commission For Racial Equality 2005

<sup>14</sup> The UK Code of Practice on Racial Equality in Employment, p.109, Commission For Racial Equality 2005

<sup>15</sup> *King-Ansell v Police* [1979] 2 NZLR 531; see also *Mandla v Dowell Lee* [1983] ICR 385 and *BBC Scotland v Souster* [2001] IRLR 150

<sup>16</sup> *King-Ansell v Police* [1979] 2 NZLR 531 and *Mandla v Dowell Lee* [1983] ICR 385

<sup>17</sup> *Nyazi v Rymans* (EAT, 10 May 1988, unreported)

<sup>18</sup> *Tower Hamlets London Borough Council v Rabin* [1989] ICR 693

<sup>19</sup> See RDO section 4(b); and paragraph 6.1.1(2) of the Code (p.41)

2.2.1 The RDO provides that acts done on the ground of the matters specified in section 8(3) are not acts done on the ground of race under the RDO. Acts done on the ground of these matters also do not constitute requirements or conditions within the definition of indirect discrimination under the RDO<sup>20</sup>. These matters are:-

- (1) Whether or not a person is an indigenous villager<sup>21</sup>;
- (2) Whether or not a person is a permanent resident, or has the right of abode or right to land, or is subject to any restriction or condition of stay, , or has permission to land and remain in Hong Kong<sup>22</sup>;
- (3) How long is a person's length of residency in Hong Kong<sup>23</sup>;
- (4) Whether or not a person has a particular nationality and citizenship<sup>24</sup>.

2.2.2 Although acts done on the grounds of the above matters would not constitute discrimination under the RDO because they do not come within the meaning of race under the RDO, these matters should not be used as a mask to hide what is in fact race discrimination under RDO. Where there is in fact race discrimination, the person discriminated against may bring legal proceedings in Court or complain to the EOC for investigation and conciliation<sup>25</sup>.

#### **Illustration 1**

*A Hong Kong resident of Pakistani origin applies for a job as a manager with a company. She meets all the requirements of the job, but she is not a permanent resident in Hong Kong. The company declined to consider her application and told her that it only employs people who are permanent residents in Hong Kong. In fact, the company does not only employ people who are permanent residents in Hong Kong and there are managers working in the company who are of various national or ethnic*

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<sup>20</sup> See RDO section 4(b); and paragraph 6.1.1(2) of the Code (p.41)

<sup>21</sup> RDO section 8(3)(a); "Indigenous inhabitant" is a term defined in the Village Representative Election Ordinance Cap.576; "Established village" is a term defined in the Government Rent (Assessment and Collection) Ordinance Cap.515.

<sup>22</sup> RDO section 8(3)(b)

<sup>23</sup> RDO section 8(3)(c)

<sup>24</sup> RDO section 8(3)(d)

<sup>25</sup> See Chapter 7 of the Code (p.52)

*origins and who are not permanent residents in Hong Kong. Although whether or not a person is a permanent resident is not a ground of race under the RDO, on the information above, the court can draw an inference that the real reason for declining to consider the job applicant's application was on the ground of her Pakistani origin, which is a ground of race under the RDO.*

### 3 Scope of Part 3 of the RDO

#### 3.1 Employment Field

Part 3 of the RDO deals with discrimination and harassment in the employment field, which includes employment as well as other occupational relationships and matters.

#### 3.2 Meaning of employment

3.2.1 The RDO defines “employment” as a contract of service or apprenticeship, or a contract to personally do any work<sup>26</sup>. This definition of employment is wider than under the common law or labour legislation. People who are not employees under the common law or labour legislation are protected from discrimination and harassment on the ground of race under the RDO if they fall within the RDO definition of employment.

***Illustration 2:-***

*The RDO applies to a self-employed musician of Filipino origin who contracts with a bar-owner to personally perform in the bar. The bar-owner may not discriminate or harass him or her on the ground of race under the RDO.*

3.2.2 Private employers as well as the Government<sup>27</sup> and other public bodies are all bound by the RDO, and their employees and workers are entitled to work free from discrimination and harassment on the ground of race under the RDO.

#### 3.3 Work wholly or mainly outside Hong Kong

3.3.1 The RDO does not apply to people who work wholly or mainly outside Hong Kong<sup>28</sup>. Reference case law indicates that:-

(1) The RDO applies to all employment situations, unless the employee

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<sup>26</sup> RDO section 2; and a contract within this definition needs not be written.

<sup>27</sup> RDO section 3

<sup>28</sup> RDO section 16(1)

works wholly or mainly outside Hong Kong, or works wholly outside Hong Kong on a Hong Kong registered ship or aircraft<sup>29</sup>

- (2) To determine whether a person work wholly or mainly outside Hong Kong, the whole period of employment should be taken into account<sup>30</sup>.
- (3) A person works mainly outside Hong Kong as long as the person has spent more time working outside Hong Kong in the whole period of employment than in Hong Kong, in which case the RDO does not apply<sup>31</sup>.
- (4) When a person works mainly in Hong Kong, the RDO applies even if the act of discrimination takes place outside Hong Kong. This means that the RDO applies to a person who is discriminated against when he is stationed outside Hong Kong, as long as he has worked more time in Hong Kong than outside Hong Kong in the whole period of his employment<sup>32</sup>.

**Illustration 3:-**

*The RDO applies to a manager of Dutch origin who works in Hong Kong 55% of the time and 45% of the time outside Hong Kong in the whole period of his employment. On the other hand, the RDO does not apply to a factory supervisor of Japanese origin employed by a company to stay and work in a factory in the mainland and does not work in Hong Kong at all.*

**Illustration 4:-**

*An accountant of Chinese origin who has worked for a company in Hong Kong for 5 years has just been transferred to stay and work in the company's factory in the mainland. Even though the accountant no longer has to work in Hong Kong, the RDO applies to him because for the whole period of his employment he has spent the majority of working time in Hong Kong. When he has worked in the mainland for more than 5 years, he would have worked more time outside Hong Kong for the whole period of his employment and the RDO will not apply.*

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<sup>29</sup> *Haughton v Olau Line (UK) Ltd* [1986] IRLR 465; RDO section 16(1) and (2)

<sup>30</sup> *Saggar v Ministry of Defence* [2005] IRLR 618

<sup>31</sup> *Carver v Saudi Arabian Airlines* [1999] ICR 991

<sup>32</sup> *Saggar v Ministry of Defence* [2005] IRLR 618

3.3.2 The RDO applies to people who work on:-

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

unless they work wholly outside Hong Kong<sup>33</sup>.

**Illustration 5:-**

*The RDO applies to a person who works on a Hong Kong registered ship even if this person only spends 10% of time in Hong Kong waters. The RDO does not apply to a person who works on a Hong Kong registered ship but spends all the time outside Hong Kong waters.*

3.4 Grace period for small employers

3.4.1 For the first 3 years after the enactment of the RDO, there is a grace period during which RDO section 10(1) and 10(2) (provisions making discrimination under the RDO in employment unlawful) do not apply to employers who employ no more than 5 employees<sup>34</sup>. If a company is controlled by another company or if 2 companies are controlled by a third person, the employees of both companies are included for the purposes of counting the number of employees<sup>35</sup>.

3.4.2 The grace period does not apply to acts of harassment on the grounds of race or discrimination by way of victimisation<sup>36</sup>. All employers may not at any time harass their employees on the ground of race or discriminate against them by way of victimisation. The grace period also does not apply to the employment of domestic helpers<sup>37</sup>. Employers of domestic helpers may not at any time discriminate against them after recruitment<sup>38</sup>.

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<sup>33</sup> RDO section 16(2)

<sup>34</sup> RDO section 10(3) and (8)

<sup>35</sup> RDO section 10(9)

<sup>36</sup> See RDO section 6 and 10(3); and paragraph 6.1.3 of the Code (p.44)

<sup>37</sup> RDO section 10(3)

<sup>38</sup> See paragraph 3.5 of the Code (p.14)

3.4.3 The grace period will expire on 10 July 2011, by which time the provisions making discrimination under the RDO in employment unlawful will apply to all employers. Even during the grace period, if an employer at any time has more than 5 employees, the RDO will apply in respect of any acts of discrimination on the ground of race done at that time.

### 3.5 Domestic helpers

3.5.1 RDO section 10(1) (a) and (c) make discrimination on grounds of race in recruitment unlawful. But these provisions do not apply to the recruitment of domestic helpers who work in the place where the employer or his or her near relatives live<sup>39</sup>. For example, an employer may choose to recruit a domestic helper of Indonesian origin to work at his or her home and declines to recruit a domestic helper of Thai origin on the ground of the difference in origin.

3.5.2 Once the domestic helper has been employed, however, RDO section 10(2) applies and the employer may not discriminate against the domestic helper on the ground of race.

### 3.6 Religion

Part 3 of the RDO (provisions relating to discrimination under the RDO in employment field) does not apply to employment for the purposes of an organized religion if the employment is limited to persons from particular racial groups in order to comply with the doctrines of the religion or to avoid offending the religious susceptibilities common to its followers<sup>40</sup>.

### 3.7 Other occupational relationships

#### 3.7.1 Contract workers

RDO section 15 applies to people who are contract workers. Contract workers are workers who are employed by a contractor or a sub-contractor of a principal to do work for the principal<sup>41</sup>. A contractor is a person who enters into a contract with the principal to

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<sup>39</sup> RDO section 10(7)

<sup>40</sup> RDO section 23(1)

<sup>41</sup> RDO section 15(1)

undertake work for the principal<sup>42</sup>. A sub-contractor is a person who enters into a contract with the contractor or a sub-contractor to undertake all or part of the work<sup>43</sup>. The principal may not discriminate against its contract workers on the ground of race under RDO section 15. If a principal does not itself discriminate against or harass its contract workers, there would be no liability under RDO section 15. However, the principal should take reasonably practicable steps to prevent its employees from discriminating or harassing its contract workers and may not authorize its agents to discriminate the contract workers (see paragraph 4.1 of the Code (p.18)).

**Illustration 6:-**

*A cleaning contractor employs cleaners, and under a contract with a trading firm (the principal), sends the cleaners to the trading firm to clean its office. The cleaners are of different national origins (for example, some are of Chinese origin and others are of Nepalese origin). They are all contract workers of the trading firm and it must not discriminate against any of them on the ground of race.*

**3.7.2 Partners**

RDO section 17 applies to partnership firms having 6 or more partners. These firms may not discriminate against any of its partners or any person who wishes to become a partner on the ground of race.

**3.7.3 Commission agents**

RDO section 22 applies to commission agents, who are people remunerated in whole or in part by commission for work done for their principal. For example, an insurance company as a principal may not discriminate on the ground of race against its insurance agents who are paid commission in whole or in part under RDO section 22.

**3.7.4 Barristers**

RDO section 35(1) and (2) apply to barristers and their clerks, and they may not discriminate on the ground of race against a pupil or a tenant or

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<sup>42</sup> RDO section 15(7)

<sup>43</sup> RDO section 15(7)



against any person in relation to the offer of a pupilage or tenancy<sup>44</sup>. RDO section 35(3) applies to any person giving, withholding or accepting instructions to a barrister, and there may not be discrimination on the ground of race in these matters. For example, a lay client may not refuse to instruct a barrister because the barrister is of Indian origin.

### 3.8 Other matters

#### 3.8.1 Vocational training

- (1) RDO section 20 applies to providers of vocational training. These providers may not discriminate on the ground of race against any person seeking or undergoing training to help fit him or her for employment. For example, a technical college may not refuse to admit a student of Pakistani origin to enrol in a mechanic training course because of his or her origin.
- (2) A vocational training provider is not required to modify its arrangements or make different arrangements regarding holidays or medium of instructions for any persons of any racial group<sup>45</sup>. A provider may set language requirement for courses and may refuse enrolment for people who do not meet the requirement regardless of their race. Such language requirement should be commensurate with the contents of the course.
- (3) Course information and material may be provided only in the language required for the course. However, where practicable it is good practice to design and provide courses, programmes, information and material in ways which enable people from different racial groups have equal opportunities to undergo vocational training, and providers are encouraged to do so.

#### 3.8.2 Employment agencies

- (1) RDO section 21 applies to employment agencies. These agencies may not discriminate on the ground of race against any person who wants to obtain their services.

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<sup>44</sup> Under RDO section 35(4), the terms "pupil", "pupilage", "tenant" and "tenancy" have the meanings commonly associated with their use in the context of a set of barristers' chambers.

<sup>45</sup> RDO section 20(2)

- (2) RDO section 21(4) provides that an employment agency is not subject to any liability under section 21 if it can show that it relied on a statement by an employer that the employer could lawfully refuse employment to a person under the RDO, for example, the employer stating that race is a genuine occupational qualification<sup>46</sup>, providing that it is reasonable to rely on the statement.
- (3) For language requirement of a job and good practice relating to the language of advertisement, see paragraph 5.3.4(3) of the Code (p.26).

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<sup>46</sup> See paragraph 5.3.3 of the Code (p.24)

## 4 Rights and Responsibilities under the RDO

### 4.1 Responsibilities of employers and principals

4.1.1 Employees and workers are entitled to work free from discrimination and harassment on the ground of race under the RDO. Employers may not discriminate or harass their employees and workers on the ground of race. The RDO requires employers to take reasonably practicable steps to prevent discrimination and harassment. Only if an employer has done so, will it have discharged its legal responsibility under the RDO<sup>47</sup>.

4.1.2 RDO section 47(1) provides that anything done by an employee in the course of employment is treated as done by the employer as well under the RDO. This is so even if the employer did not know or did not approve of what the employee has done. If, for example, an employee discriminates or harasses another employee on the ground of race, the employer would be treated as having also discriminated or harassed that other employee on the ground of race, and be legally liable unless the employer has taken reasonably practicable steps to prevent discrimination and harassment from happening.

(1) In order to discharge their responsibility to take reasonably practicable steps to prevent discrimination and harassment on the ground of race, it is recommended that employers adopt and implement the policy of the good employment practice and procedures described in Chapter 5 of the Code (p.21).

(2) Social gatherings involving employees immediately after work and for an organized party were held by a tribunal in the UK on the facts of the case to be within the course of employment even though the events take place outside the workplace or normal work hours<sup>48</sup>.

4.1.3 Similarly, RDO section 47(2) provides that anything done by an agent with the authority of the principal (whether express or implied,

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<sup>47</sup> RDO section 47(3)

<sup>48</sup> *Chief Constable of the Lincolnshire Police v Stubbs* [1999] IRLR 81, a sex discrimination case which has reference value to the application of the RDO.

precedent or subsequent) is treated as done by the principal as well, so that, for example, the principal would be held liable for any discrimination or harassment on the ground of race done by the agent with the authority of the principal. Principals should take reasonably practicable steps to prevent discrimination or harassment by their agents, by adopting and following the good employment practice and procedures described in Chapter 5 of the Code as relevant to their situations. This will help principals to comply with the RDO by ensuring that their agents do not have authority to commit any act of discrimination and harassment on the ground of race.

#### 4.2 Rights of employees and workers and their role

4.2.1 All employees and workers have the right to work free from discrimination or harassment on the ground of race. This right covers access to job opportunities, terms and conditions of employment (including benefits and facilities), opportunities for promotion, transfer or training, and matters of dismissal or redundancy. They are entitled to be treated with respect and dignity and not to be subjected to any unwelcome conduct or hostile environment on the ground of race. They are also entitled not to be instructed or pressurized to discriminate or harass anyone on the ground of race<sup>49</sup>. The rights of employees and workers under the RDO are protected by law. They may seek redress by bringing legal proceedings or lodging complaints to the EOC when they encounter discrimination or harassment<sup>50</sup>. Their right to seek redress is itself protected by law and they are entitled not to be victimized for doing so<sup>51</sup>.

4.2.2 Employees and workers themselves may not discriminate or harass their colleagues in the course of employment and may not aid their employer to do so. RDO section 48(1) makes it unlawful for a person to knowingly aid another person to do an unlawful act under the RDO. RDO section 48(2) provides that, when the employer or principal is liable for the act of an employee or agent, the employee or the agent will be treated as aiding the employer or the principal to do the act. In other words, employees and workers are personally liable if they discriminate on the ground of race or instruct or pressurize another person to do so.

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<sup>49</sup> RDO section 43; and paragraph 6.6 of the Code (p.48)

<sup>50</sup> See Chapter 7 of the Code (p.52)

<sup>51</sup> See paragraph 6.1.3 of the Code (p.44)