

Public Consultation – Code of Practice on Employment under the Race Discrimination Ordinance

29 November 2008

Lam Siu-wai

Aims

- Collect stakeholders' views
- Develop a user-friendly code of practice
- Assist employers to understand their obligations and develop good management practices
- Assist employees to understand their rights and obligations
- Statutory requirement

Consultation Questions

- Does it contain the guidance that you would expect to see?
- Are the examples helpful and realistic?
- Is there anything that should be added to or removed?
- Is it clearly written and easy to understand?
- Are there any other comments you would like the EOC to consider?

Effective Dates

- Provisions relating to the operation of the EOC
 - Functions & powers, code of practice, rules & regulations
 - October 3, 2008
- Substantive provisions
 - April 2009

Contents

- Introduction (purpose and status of the Code)
- Meaning of “race”
- Scope of employment protection
- Overview of prohibited/unlawful acts
- Liability for unlawful acts
- Further details on direct and indirect discrimination
- Exceptions and matters not affected
- Good practice
- Complaint and legal proceedings

Status

- A statutory code of practice
- Not legally binding and cannot prevail over other statutes
- However, Courts will take into account of any relevant parts of the Code in deciding cases

Meaning of “Race”

- Race
- Colour
- Descent (forms of social stratification)
- National origin
- Ethnic origin

Not Race

- Indigenous inhabitants
- Permanent residency
- Right of abode
- Permission to land and remain
- Restriction or condition of stay
- Length of residency
- Nationality
- Citizenship or resident status of other countries

Scope of Protection

- Work wholly or mainly in Hong Kong
- Recruitment and terms
- Promotion, training, transfer, other detriments
- Termination: non-renewal, constructive dismissal
- Contract workers, partnerships, commission agents
- Qualifying bodies, vocational training, employment agencies
- Not apply to “small employers”, “domestic helpers” and “compliance with religious doctrines”

Prohibited Acts

- Race discrimination (direct / indirect)
- Discrimination on the ground of near relative’s race
- Harassment (including hostile environment)
- Vilification/serious vilification
- Victimization
- Other unlawful acts (“discriminatory advertisements” and “instructions and pressure to discriminate”)

Liability

- Employer and principal liability
- Employee liability for aiding employer’s unlawful acts
- Employee’s direct liability
- Reasonably practicable steps by an employer to prevent unlawful acts
- Policy
- Training, supervision and remedial action

Direct Discrimination

- Less favourable treatment
- Hypothetical comparator
- Motive not necessary, but relevant
- More than one reason
- Other persons of the same race not discriminated against – may be relevant, but not necessarily a complete answer
- Segregation is less favourable treatment

Direct Discrimination

- Direct evidence is rare
- Discriminator may not even be aware of their own prejudice and discrimination
- Court look to defendant for explanation and may draw inference from circumstantial evidence in the absence of satisfactory explanation

Indirect Discrimination

- Equal application of requirement or condition to people of different races
- Adverse impact or disadvantage for people of particular racial group(s)
- Not justifiable

Indirect Discrimination

- Requirement or condition
- Compliance
- Comparison of proportions of complying people
 - Group A (16/20), 80%
 - Group B (40/80), 50%
 - Group B is disadvantaged

Indirect Discrimination

- Justifiable
 - Legitimate objective
 - Rational and proportional connection to the objective
 - consideration of alternatives
 - balance between discriminatory effect and the need
 - Burden is on the defendant

Indirect Discrimination

- Dress code
- Language
 - Service / product definition
 - Methods of communication
 - Justifiable, resources, practical limitations
 - Employment

Exceptions

- Genuine occupational qualification
- Skills and knowledge outside Hong Kong
- Existing local & overseas terms
- Special / positive measures
- Training arrangements and encouragement to underrepresented groups
- Nationality and immigration law
- Statutory authority

Good Practice

- Drawing up policy
- Implementation (dissemination & training)
- Recruitment (objective criteria)
- During employment
- Grievance and disciplinary matters
- Termination and redundancy selection
- Language
- Review and monitoring
- Under represented racial groups

Complaint & Legal Proceedings

- Complaint handling
- Investigation
- Conciliation
- Legal assistance
- Right to take legal proceedings

Q & A

- Welcome any immediate questions or comments
- Give you comments in writing to the Equal Opportunities Commission by 8 December 2008

Address: 19/F, Cityplaza Three
14 Taikoo Wan Road, Taikoo Shing
Fax: 2511 8142
Email: eoc@eoc.org.hk
Tel: 2511 8211

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