



平等機會委員會  
EQUAL OPPORTUNITIES COMMISSION

# Equal Opportunities Casebook



To protect the privacy of the persons involved, the names and some of the details of the cases in this book have been changed.

While every effort has been made to ensure accuracy in this publication, the information it contains is for reference only and should not be taken as a substitute for legal advice.

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# Introduction

The Equal Opportunities Commission (EOC), set up in 1996, is a statutory body tasked with implementing the anti-discrimination ordinances in Hong Kong, which currently include the Sex Discrimination Ordinance (SDO) (Cap 480), the Disability Discrimination Ordinance (DDO) (Cap 487), the Family Status Discrimination Ordinance (FSDO) (Cap 527) and the Race Discrimination Ordinance (RDO) (Cap 602).

These ordinances protect individuals from discrimination on the basis of sex, marital status, pregnancy, disability, family status, and race. The EOC's mission is to eliminate discrimination and foster an inclusive society in which all individuals are treated with respect and dignity.

The EOC has a number of functions. These include undertaking investigation, conciliating complaints, providing litigation support, promoting equal opportunities through public education and training, conducting research, and advocating policy changes on issues related to discrimination and equal opportunities.

Upon receiving a complaint, the EOC would investigate into the matter and, if possible, attempt as an impartial facilitator to encourage conciliation or a voluntary settlement between the disputing parties.

Between September 1996 and December 2016, the Commission received 15,448 complaints, about half of which fell under the DDO (51%), followed by the SDO (42%), the RDO (4%), and the FSDO (3%). The EOC achieved an overall conciliation success rate of 71% in 2016/17. Settlement terms vary from case to case, and may include an apology,

changes in policies and practices, and monetary compensation.

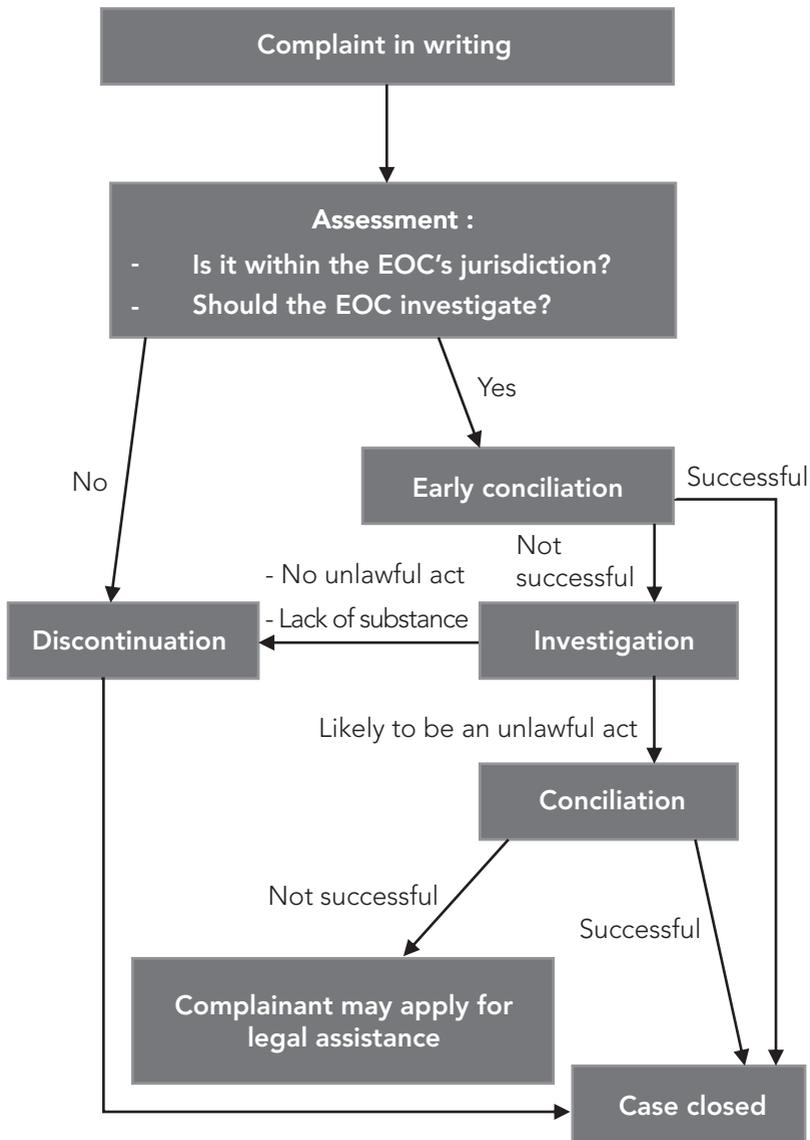
If conciliation fails, the complainant can apply to the EOC for legal assistance to take the case to the District Court. The Commission decides whether or not to give legal assistance based on a number of factors, including whether the case raises a question of principle.

In producing this book, the EOC's aims are multi-fold. First, by discussing typical discrimination cases, the Commission hopes to encourage those who face similar situations to seek redress. The cases can also deepen the understanding of employers and service providers on their legal responsibilities. Additionally, the cases clarify the application of the anti-discrimination ordinances and raise awareness of one's rights and responsibilities.

Furthermore, the cases serve to illustrate how the Commission approaches and handles complaints. The EOC is dedicated to maintaining transparency in its work. It is hoped that the cases will provide a clearer understanding of the EOC's complaint-handling process and considerations.

Finally, the EOC hopes that the cases can concretely demonstrate its commitment to creating a more equitable society. Discrimination is an issue that affects everyone. Only by working together, raising awareness and putting in place preventive measures can we eradicate discrimination and achieve a fairer and better city for all.

# Lodging a Complaint with the EOC (Flow Chart)



# Conciliated Cases

## Just a Regular Check-up? (Sexual Harassment)

*Sexual harassment remains commonplace. The EOC encourages those who face sexual harassment to speak up.*

### ◆ **The Complaint**

Feeling unwell, Ah Fa visited a doctor. In the examination room alone with the doctor, Ah Fa described her symptoms and had her throat checked as part of a regular check-up. The doctor then requested to examine her chest. Having had check-ups before, Ah Fa knew the routine, so she



acquiesced and unbuttoned part of her shirt. However, what surprised her was the doctor's next move. He turned towards her, edging closer. Placing his stethoscope on her right breast, he repeatedly touched her breast with his fingertips. Shocked and embarrassed, Ah Fa opened her mouth, but was unable to speak as he performed the same action on the left side of her chest. When he removed his hand from her shirt, the doctor winked at Ah Fa and said to her, "You'll be fine." Ah Fa quickly buttoned up her shirt and left the clinic.

Utterly humiliated, shaken and upset, Ah Fa returned to work and discussed with her colleagues what she could do. In the end, Ah Fa decided to lodge a complaint with the EOC.

### ✓ **What the EOC Did**

Upon receipt of the complaint, the EOC contacted the doctor and carried out an investigation. The doctor insisted that he did not deliberately touch Ah Fa's breasts and what he performed was just a regular chest examination. He claimed that when working with a stethoscope, some contact with the patient's skin was unavoidable. However, he felt sorry for the misunderstanding, which had led to Ah Fa's distress, and he wanted an opportunity to clarify his intention and action with her.

Under the Sex Discrimination Ordinance (SDO), it is unlawful for a person to sexually harass another person in the course of providing goods, facilities or services. Sexual harassment is unwanted sexual attention, including inappropriate touching, gestures or remarks. In this case, a reasonable person could anticipate that the doctor's behaviour would make his patient feel offended, humiliated, or intimidated.

The EOC arranged a conciliation meeting during which both parties agreed to resolve the complaint. Other than expressing apology in writing, the doctor agreed to pay Ah Fa monetary compensation for injury to her feelings.

## Points to Note:

- Everyone is protected from sexual harassment even if nobody saw it happen or it happened only once.
- Keep a written record of each incident, including the date, time, place, presence of any witnesses, nature of the harassment (what the harasser said and did) and your own responses. Such records may be useful if you decide to lodge a complaint.
- Employers are encouraged to take reasonably practicable steps to ensure that frontline staff members who regularly provide goods, facilities or services to customers are given adequate training to prevent sexual harassment.

## Being Pregnant is Not a Crime (Pregnancy Discrimination)

*Pregnancy discrimination constitutes the majority of employment-related complaints received under the Sex Discrimination Ordinance (SDO). Among the discriminatory acts is dismissal upon the employee's return from maternity leave.*

### ◆ **The Complaint**

Sarah had worked as a manager at a manufacturing company for more than 12 years. She enjoyed a good working relationship with everyone at the office and never faced any problem with the management during her service. However, she was dismissed from her job when she returned from maternity leave.

When she confronted her boss about the dismissal, he told her that it was only because of the economic downturn and it had nothing to do with her pregnancy. Sarah was indignant and felt the dismissal was due to her pregnancy. She also recalled her boss having commented that she looked like a pig when she was pregnant.



Even though she was upset, she offered to work for a lower salary if the dismissal was because of economic reasons. But her boss refused her offer. Another colleague offered to resign and let Sarah keep her position, but the boss refused the proposal. When both offers were declined, another of Sarah's colleagues suggested to her boss that the company could consider reducing the salaries of all staff members. The boss refused this suggestion, too.

Sarah later lodged a complaint of pregnancy discrimination against the company with the EOC.

### ✓ **What the EOC Did**

Upon receiving the complaint, the EOC case officer contacted the company and informed them about the complaint and explained the provisions on discrimination against pregnant women in the employment field under the SDO.

The SDO makes it unlawful for an employer to subject a woman to a disadvantage or dismiss her on the ground of her pregnancy (Section 8, SDO). Many people think that the dismissal of female employees upon their return from maternity leave is not unlawful. However, if it is clear that the employee would not have been dismissed had she not been pregnant and gone on maternity leave, the dismissal may be unlawful and a complaint may be lodged.

Both parties agreed on early conciliation and the case was settled after the company agreed to pay one year's salary to Sarah.

## Points to Note:

- The protection of the SDO extends beyond the period of pregnancy and covers both the recruitment stage as well as after maternity leave. The main consideration is not “when” the employee is dismissed (i.e. whether during or after the period of pregnancy and maternity leave), but “why.” If pregnancy is a reason for the unfavourable treatment, the act may already be unlawful.
- Pregnancy discrimination can take other forms of unfavourable treatment apart from dismissal, and may include refusal to grant training or promotion opportunities, or a smaller salary increase than other colleagues.
- Employers should adopt a set of non-discriminatory criteria for recruitment, promotion, and dismissal.

## Power Imbalance (Sexual Harassment)

*Sexual harassment constitutes the majority of complaints received under the Sex Discrimination Ordinance (SDO). Unlawful acts include both unwelcome person-to-person conducts of a sexual nature and a sexually hostile environment.*

### ◆ **The Complaint**

Carol never imagined that, after 10 years, she would leave her job at a trading company this way. "My performance was consistently good and I was promoted three years ago. My job required me to engage in social activities outside the office and to go on overseas business trips with my boss, Mr Cheung. Mr Cheung frequently asked me to sit next to him, and he took every opportunity to touch me. He even described the shape of my body in front of others. I gave him hostile looks and it should be obvious to him that his behaviour was totally unwelcome. I avoided seeing him, but he threatened to demote me if I did not talk to him face to face," said Carol.

Distressed and suffering from insomnia, Carol could not concentrate on her work. Her complaint to the Personnel Department was ignored. She then sought help from a senior manager, who promised to transfer her to a post at a subsidiary which was similar to her present job. However, she was offered a junior post with less pay. She eventually resigned.

## ✓ **What the EOC Did**

Carol lodged a complaint with the EOC against her boss, Mr Cheung, for sexual harassment, and against the company for victimising her and being vicariously liable for the unlawful act of its employee.

The EOC's case officer explained to Carol the complaint-handling and conciliation procedures. The provisions of the SDO were also explained to Mr Cheung and the company. Under the SDO, sexual harassment includes any unwelcome behaviour of a sexual nature which a reasonable person would regard as offensive, humiliating or intimidating. Acts of sexual harassment may be direct or indirect, physical or verbal, and can include indecent or suggestive remarks or inappropriate touching.

After rounds of negotiations, the parties agreed on early conciliation. The trading company agreed to give Carol a reference letter and a monetary payment equivalent to three years of her salary. Although Mr Cheung stressed he never had any intention of offending Carol, he agreed to apologise in writing.

## Points to Note:

- While sexual harassment often happens in isolation without witnesses, the EOC considers all circumstances and information provided by the complainant in its investigation.
- The SDO provides protection against unlawful acts in the course of employment even if they occur outside Hong Kong, as long as the employee does his/her work wholly or mainly in Hong Kong.
- Intent to discriminate or harass is irrelevant. Unintended acts of a sexual nature, such as sex jokes, may still be unlawful under the SDO.
- An employer is vicariously liable for unlawful sexual harassment acts committed by employees in the course of their employment, whether with or without the employer's knowledge or approval of such behaviour. It is also unlawful for employers to victimise a person, such as treating a person less favourably because he/she has lodged a discrimination complaint.

## When Talking Turns Toxic (Sexual Harassment)

*Sexual harassment does not necessarily have to be physical in nature. Under the Sex Discrimination Ordinance (SDO), sexual harassment can involve physical, visual, verbal or non-verbal conduct of a sexual nature which is uninvited and unwelcome.*

### ◆ **The Complaint**

Emily was an administration clerk at a company. On various occasions, the company director made remarks of a sexual nature to her or in her presence. Once, when the two of them were travelling back to the office in a car, he asked Emily if she had ever had pre-marital sex. In another instance, he suggested to a female colleague in front of Emily that she should watch a pornographic movie in order to recover from her illness. The director also asked Emily whether all the men in this world were her husbands.

Emily said that she had to seek medical treatment as a result of the harassment. One week after the last incident that took place, she tendered her resignation together with a sick leave certificate. She did not give the one-month payment in lieu of notice, as the reason for her to resign was great distress caused by the sexual harassment.

Emily later lodged a complaint with the EOC against the director for sexual harassment.

## ✓ **What the EOC Did**

The EOC case officer contacted the respondent about the complaint and explained to him the provisions of the SDO, which protects all employees working in Hong Kong from being sexually harassed by their bosses, co-workers, service providers or customers.

Emily's case was settled through conciliation. The director agreed to provide Emily with a work reference letter and one-month basic salary, withdraw the labour claim against Emily for payment in lieu of notice, and not make any comment on Emily's performance should her prospective employers call for reference. Meanwhile, Emily agreed to some terms related to business undertakings and to provide the company with a letter of resignation on a voluntary basis.

### **Points to Note:**

- Conduct of a sexual nature, as long as it is uninvited and unwelcome, can constitute sexual harassment and is unlawful. Unwelcome conduct of a sexual nature, such as conversations on issues of a sexual nature, even not directly or consciously targeted at a particular co-worker, may cause that co-worker to feel offended, humiliated or intimidated, and may create a sexually hostile environment for him/her.
- Employers should develop policies to handle and prevent sexual harassment in the workplace. Otherwise, they can be held vicariously liable for their employees' sexual harassment acts.

## From Sick to Sacked (Disability Discrimination)

*The majority of complaints received under the Disability Discrimination Ordinance (DDO) are related to sick leave. Discriminatory acts can take many forms, including dismissal, poor performance review, limiting access to training opportunities, and refusal to grant salary increase.*

### ◆ **The Complaint**

Steve, a property management assistant, had been off sick for two months due to colon cancer. After a series of medical treatments, he fully recovered and returned to work.

"I had been in my job for five years. My performance had never been a concern until I returned to work from sick leave," said Steve, who found himself treated unfairly by his employer. "I found out my supervisor had rated me 'satisfactory' in my performance review, but the senior manager above him downgraded the rating without notifying me. As a consequence, I was not given any year-end bonus, and shortly afterwards, they made me redundant."

He continued, "They had no fair reason for treating me like this. I was shocked when I found out later that the only reason they lowered my rating was because of my long absence from work. Redundancy was the only excuse they could think of to get rid of me." Steve lodged a complaint with the EOC against his employer for disability discrimination.

## ✓ **What the EOC Did**

The EOC case officer looked into the complaint and explained to both parties the provisions of the anti-discrimination legislation.

Under the DDO, it is unlawful for an employer to discriminate against a person with a disability or sickness by dismissing that person. When an employee's disability hinders his/her capacity to perform the job duties, consideration of reasonable accommodation on the employer's part is warranted, unless that employee is unable to carry out the inherent requirements of the job even when provided with such accommodation, or if such accommodation would cause the employer unjustifiable hardship.

The employer admitted that Steve's appraisal score was adjusted downwards because of his lengthy sick leave, but they insisted that the dismissal was solely due to the realignment of work duties. However, the EOC's investigation revealed that the employer had hired someone else to replace Steve soon after he left.

The two parties agreed to resolve the dispute through conciliation. The matter was settled with the employer agreeing to provide monetary payment and a good reference letter to Steve.

## Points to Note:

- Disability-related absence is often required by employees in order to recuperate from illnesses and disabilities. Employers should balance between the accommodation of such needs and their operational requirements.
- At times, the provision of accommodation may cause the employer unjustifiable hardship. In determining what constitutes “unjustifiable hardship”, all relevant circumstances of the case will be taken into account, including the reasonableness of the accommodation sought and the financial resources of the employer vis-à-vis the estimated expenditure of the accommodation. The burden of proof is on the employer to make out this defence if so claimed.
- Training, recruitment, and redundancy exercises should be carried out fairly with the use of consistent and non-discriminatory criteria, with accompanying reasons for each selection.

## A Child's Struggle for a School Place (Disability Discrimination)

*The EOC believes every child should have equal access to quality education. The right to equal education opportunities is protected under the anti-discrimination ordinances including the Disability Discrimination Ordinance (DDO).*

### ◆ **The Complaint**

Liza is an 11-year-old student with Attention Deficit and Hyperactivity Disorder (ADHD), which impairs her ability to concentrate. Her educational needs were made known to ABC Primary School upon her admission.



At the beginning of the school term, all Primary 6 pupils, including Liza, were asked to pay a deposit in order to secure a Form 1 school place via the "through train" system, which allows secondary schools to admit Primary 6 pupils of their linked primary schools.

Towards the end of the school year, the primary school asked Liza's parents to withdraw her application for admission to Form 1 of the linked secondary school or provide an updated assessment report on Liza's condition within a few weeks. Liza's parents were also required to guarantee that they would follow all the recommendations in the updated report before the linked secondary school could consider admitting Liza.

Shocked by the news, Liza's parents had a meeting with the headmaster of ABC Primary School, during which they explained to the school that it would be impossible to produce the assessment results within such a short period of time, as it normally took a few months to complete the report. They pleaded with the school to give Liza an equal education opportunity, but to no avail. Frustrated and deeply concerned about their daughter's future, the parents lodged a complaint with the EOC against the school for discriminating against Liza due to her learning disability.

### ✓ **What the EOC Did**

The EOC case officer explained to both the parents and the school the EOC's complaint-handling procedures, as well as the legal provisions of the DDO in relation to the field of education.

Under the DDO, it is unlawful for educational establishments to discriminate against a person with a disability. Reasonable accommodation should be provided unless such a provision would impose unjustifiable hardship on the institution. Schools have the responsibility to ensure that persons with disabilities, like other students, have equal access to quality education.

Both parties were willing to resolve the matter through early conciliation. Upon the request of Liza's parents, ABC Primary School agreed to provide a letter of apology to the parents, give them monetary payment and review the school's admission policy and procedures.

## Points to Note:

- Many teachers have limited experience or training in working with students with special needs. More resources and training are required to enable teachers to support the different learning needs of their students.
- Children with ADHD are often perceived as misbehaving, due to the fact that there is limited public awareness about the condition. In a 2010 EOC survey, over half of the respondents disagreed that integrated education was preferred to special schools. Of these, 80% felt that students in integrated schools would not know how to respond when classmates with disabilities require assistance.
- Students with disabilities often face harassment and bullying in their schools. The DDO prohibits harassment in educational establishments, including harassment of students with disabilities by other students.

## Discriminatory Seating Arrangement (Disability Discrimination)

*Complaints involving the provision of goods, facilities and services under the Disability Discrimination Ordinance (DDO) remain commonplace. They may stem from stereotypical thinking about people with disabilities combined with service providers' lack of understanding of their liability.*

### ◆ **The Complaint**

Mr Lee was visually impaired. He was travelling on a flight with his friends, some of whom were also visually impaired. When they checked in, they requested the ground staff to arrange for them to sit together so that the ones without visual impairment could offer help to those with visual impairment. However, once they were on the plane, the flight attendants requested



all those with visual impairment to change their seats and sit next to the windows without giving any reasons. Mr Lee and his friends were thus separated during the flight and the visually impaired passengers were left on their own.

Mr Lee was upset and frustrated. He felt that he and his friends were treated unfairly because they were deprived of their right to sit together due to their visual impairment, leaving some of them unaccompanied. Later, Mr Lee lodged a complaint of disability discrimination against the airline with the EOC.

## ✓ **What the EOC Did**

Upon receiving the complaint, the EOC case officer contacted both Mr Lee and the airline. Under the DDO, it is unlawful to discriminate against a person with a disability in the terms or conditions on which to use services and facilities. People with visual impairment have the same rights as those without impairment to choose their companions and seats during flights, subject to the availability of seats. In this case, the airline, being the service provider, should have ensured that the policies they implemented would not result in less favourable treatment for customers with disabilities.

During the conciliation meeting, the airline representative said that the concerned staff members made the seat changes because they thought it was the requirement under the Civil Aviation Department's guideline on passenger safety, but the representative admitted that such "window seat arrangement" for persons with visual impairment was not specified in the guideline and it was the company's own interpretation.

Both parties opted for early conciliation and the airline agreed to offer a few short-trip air tickets for free to the affected passengers. The case was settled amicably.

## Points to Note:

- Many people assume that people with disabilities cannot lead fulfilling, independent lives, and discriminatory attitudes and acts remain common. In an EOC survey in 2010, almost one in three respondents perceived that people with visceral disability would not be able to lead a happy and fulfilling life even if treatment was received.
- Advancement in assistive technology has provided a higher level of independence for people with disabilities to participate in daily activities, as well as created a market of consumers with disabilities. Businesses should not ignore people with disabilities as both potential talents and customers.
- It would be advisable for service providers to provide sensitivity training to staff who have to interact or serve people with different needs. This could help open up more business opportunities and prevent potential legal problems in the long run.

## **Job Lost with Disclosure of Mental Illness (Disability Discrimination)**

*For many mental disorders, there are effective treatments that allow the affected persons to lead a productive life. Yet, stigma and discrimination often prevent these people from seeking and receiving the necessary treatment, making it impossible for them to engage in gainful employment and become self-reliant. The EOC advocates equal rights and opportunities for people with mental disabilities to participate and integrate in society, which are protected by the Disability Discrimination Ordinance (DDO).*

### **◆ The Complaint**

Mr Cheung was offered a job as a security guard at a company. He was instructed to undergo a medical examination, after which he would be given uniforms and arranged to attend training courses.

Upon completing the medical examination, Mr Cheung called the company and told the staff member who answered the phone that he had mental illness. Mr Cheung was told by that staff member to wait for further notice. However, he had not heard from the company since. He believed that the company withdrew the job offer because of his mental illness.

### **✓ What the EOC Did**

Represented by a social worker, Mr Cheung lodged a complaint of disability discrimination with the EOC against the company.

Under the DDO, it is unlawful to discriminate against a job applicant on the ground of his/her disability. The employer can be held liable

for refusing or withdrawing a job offer due to the applicant's disability, unless the employer can prove that the applicant is unable to perform the inherent requirements of the job, or that providing services or facilities to help the applicant perform the job duties would impose unjustifiable hardship on the employer.

The two parties conciliated after the company agreed to apologise for having caused Mr Cheung displeasure due to misunderstanding in the communication process.

### **Points to Note:**

- Mental illness is covered by the DDO, and defined as a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgement or that results in disturbed behaviour, that presently exists, previously existed but no longer exists, may exist in the future, or is imputed to a person\*.
- Not only employees, but also job applicants are protected under the DDO, which states that it is unlawful for an employer, in relation to employment by him/her at an establishment in Hong Kong, to discriminate against another person with a disability by refusing or deliberately omitting to offer that other person the employment.

\* A disability that has simply been imputed to a person who does not have the particular disability.

## Family or Job First (Family Status Discrimination)

*Many people have responsibilities to care for their families. But long working hours, a near absence of family-friendly work arrangements, and prevalent gender stereotypes mean that work-family balance remains difficult for many Hong Kong workers.*

### ◆ **The Complaint**

Mrs Ng, an executive at a financial institution, had to rush her son to the hospital late one night. He was diagnosed with acute respiratory disease and was immediately admitted given his critical condition.

Early next morning, Mrs Ng informed her supervisor and colleagues that she had to be absent from work for a day to take care of her son. Later that day, the doctor informed her that her son needed to stay in the hospital for a few more days. She called her supervisor in the evening to request for another day off, but he curtly asked her whether she wanted her job or her family.

When Mrs Ng went to work the next day, she was asked to go to the conference room where her supervisor chided her. Two hours later, she received a phone call from the hospital asking her to see the doctor immediately as her son's condition had deteriorated. She requested for an urgent leave from her supervisor but was denied. Left with no choice, she handed in her resignation and left.



Mrs Ng later lodged a complaint with the EOC against the supervisor for discriminating against her, and the company for being vicariously liable for the act of her supervisor.

✓ **What the EOC Did**

Upon receiving the letter from Mrs Ng, the EOC case officer notified the company about the complaint.

The Family Status Discrimination Ordinance makes it unlawful for a person or an organisation to discriminate against any individual on the basis of his/her family status, which is defined as a person's responsibility to take care of an immediate family member — a person related by blood, marriage, adoption or affinity. By denying Mrs Ng an urgent leave despite her responsibility to look after her son, whom the law describes as her relative by blood, the company likely discriminated against her.

Both parties agreed on early conciliation and an agreement was reached. As requested by Mrs Ng, the company provided a reference letter for her and also waived the payment, which she was supposed to make, in lieu of the notice period for leaving employment. Mrs Ng decided not to pursue a case against her supervisor since he left the company after she filed a complaint with the EOC.

## Points to Note:

- In considering what constitutes “family status”, a factor for consideration is “the responsibility of care”, defined generally as a specific relationship of being usually responsible for the care of an immediate family member.
- Family-friendly employment policies can help retain talent and boost staff morale. A survey by Community Business, a non-governmental organisation, showed that nearly 40% of the respondents would leave their current jobs for better work-life balance.
- Employers are vicariously responsible for the discriminatory acts of their employees, done in the course of their employment, whether or not these were done with the employers’ knowledge or approval, unless the employers have taken reasonably practicable steps to prevent such acts from occurring. The EOC encourages employers to formulate clear policies to eliminate discrimination on the ground of family status in the workplace.

## **Breastfeeding Not Allowed in Libraries? (Family Status Discrimination)**

*Many mothers have encountered discrimination or unpleasant experience when breastfeeding their babies in public. The EOC supports the right of nursing mothers to use facilities and enjoy services as other customers do. The issue might come under the Family Status Discrimination Ordinance (FSDO), which stipulates that it is unlawful for any persons concerned with the provision of goods, facilities or services to the public to discriminate against a person on the basis of family status as he/she seeks to obtain or use those facilities or services.*

### **◆ The Complaint**

Mrs Cheung visited a local library with her baby son. While she was breastfeeding her baby in a quiet corner, two security guards repeatedly told her to stop breastfeeding, and one of them even requested her to leave. A staff member of the library was called to the scene later, and she asked Mrs Cheung to breastfeed the baby in the female staff restroom or in the activity room, as breastfeeding was not allowed in the library. Mrs Cheung felt it was her right to breastfeed her baby and refused to leave the library area. She later lodged a complaint of family status discrimination with the EOC against the library.

### **✓ What the EOC Did**

The case was settled through fast-track conciliation. The library agreed to issue a written apology and remind its staff members of its breastfeeding guideline. The library also agreed to provide training

to its frontline staff and the contract security service team to make clear that breastfeeding in the library is permitted. A notice would be displayed in the library to inform breastfeeding users that they might seek assistance from the library staff whenever necessary.

### **Points to Note:**

- Under the FSDO, it is unlawful for a service provider to discriminate against a service user on the ground of his/her family status. "Family status" in relation to a person means the status of having responsibility for the care of an immediate family member who is related to that person by blood, marriage, adoption or affinity.
- The EOC considers complaints by breastfeeding women as family status discrimination relating to having the care of an immediate family member.
- The EOC believes that the public should respect mothers' right to breastfeeding. The EOC has been urging for the provision of more baby care facilities in the community. Service providers and property owners, including the Government, are encouraged to provide facilities such as baby care rooms for use by breastfeeding customers.

## **Babies Cannot Eat at Restaurants? (Family Status Discrimination)**

*While there is currently no express provision in the anti-discrimination laws stating that discrimination on the ground of breastfeeding is unlawful, discrimination complaints related to breastfeeding can be considered as a violation of the Family Status Discrimination Ordinance (FSDO), which makes discrimination against those who have responsibility to care for an immediate family member unlawful.*

### ◆ **The Complaint**

Holly was having lunch with her family, including her newborn, at a restaurant. During the lunch, her baby started to cry. Holly knew that he was hungry, and so she breastfed the baby at the table discreetly. Not long after she started, staff members of the restaurant went over to her table and asked her to stop breastfeeding, saying that the act would offend other customers. Holly then asked them to provide her with a private space to breastfeed her baby, but her request was refused.

Holly later lodged a complaint with the EOC against the restaurant for not providing her with the facilities needed to breastfeed her child.

### ✓ **What the EOC Did**

Through the EOC's facilitation, Holly and the restaurant agreed to settle the complaint through conciliation. The restaurant offered an apology to Holly and agreed to offer assistance as far as possible in the future to customers who needed to breastfeed their babies. It also agreed to train its staff on providing assistance in this regard.

## Points to Note:

- Breastfeeding is beneficial to the health of both babies and mothers. The World Health Organization recommends that babies should be breastfed exclusively in the first six months.
- However, many mothers in Hong Kong have to give up breastfeeding their babies due to insufficient breastfeeding facilities in public. There is also a lack of a breastfeeding-friendly culture in the city. A UNICEF Hong Kong survey in 2016 revealed that nearly 40% of mothers who had breastfed in public premises, including restaurants, shopping malls and parks, had encountered unpleasant experiences.
- Under the FSDO, family status is defined as the status of having responsibility for the care of an immediate family member, including a mother having the need to breastfeed her baby. The Ordinance offers protection not only in employment and education, but also in the provision of goods, facilities or services.

## Culturally Sensitive Enough? (Race Discrimination)

*Since the Race Discrimination Ordinance (RDO) came into effect in 2009, the majority of complaints received by the EOC under the RDO were related to the provision of goods, facilities or services.*

### ◆ **The Complaint**

Laila is a Muslim originally from Pakistan. She enjoyed swimming in her neighbourhood pool. Due to her religious customs, Laila preferred to dress modestly. When swimming, she wore a T-shirt and long pants (covering the knees) on top of her swimsuit. She had always worn such an outfit at her local pool without any problem.



However, one day, she was stopped by a pool staff member for her attire. She alleged that she had seen Chinese women in a very similar type of outfit using the facility. Laila felt she was unfairly treated and decided to lodge a complaint of race discrimination with the EOC against the facility management.

### ✓ **What the EOC Did**

The EOC case officer contacted the pool's facility manager and explained the provisions of the RDO.

Under Section 27 of the RDO, it is unlawful to discriminate against a person on the ground of race when providing goods, facilities or services. While the RDO does not apply to discrimination on the ground of religion, some requirements or conditions relating to religion may result in indirect discrimination against certain racial groups, in which case the RDO may apply.

In this case, many female Muslims dress modestly according to their religious customs, which was the reason for Laila to wear a T-shirt and pants over her swimsuit. If the swimming pool had a policy against wearing such attire, it may be discriminatory against Muslims and indirectly against Pakistanis, given most of them are Muslims. In such a case, the RDO would be applicable.

The facility management denied the allegation of race discrimination and explained that this type of clothing for swimming was actually allowed according to their policy. The facility manager claimed the incident might have arisen from a misunderstanding between Laila and the swimming pool staff about whether Laila had worn a bathing suit underneath her T-shirt.

Both parties agreed to settle the matter through conciliation. The concerned staff member agreed to apologise to Laila for creating an unpleasant experience for her. Confirmation was also given by the swimming pool's management that people wearing a loose T-shirt and loose pants (covering the knees) over their swimsuit are permitted to use the swimming pool.

## Points to Note:

- Under the law, intent to discriminate is irrelevant. Both direct and indirect racially discriminatory acts which arise from cultural insensitivity, even without the intention to discriminate, may still be unlawful.
- Employers may be, under the RDO, vicariously responsible for any discriminatory act done by their employees in the course of their employment, even if the employers do not know or approve of what the employees have done. Employers are encouraged to avoid inadvertent discrimination by providing their employees, especially those who have to serve customers, with the knowledge and skills to sensitively deal with different customer groups.
- The EOC encourages providers of goods, facilities or services to cater for a diverse range of customers, as this promotes not only racial harmony, but also business opportunities.

## Unlawful Act of Inciting Hatred through the Internet (Racial Vilification)

*The Internet and social media have become popular platforms for self-expression, but care should be taken to guard against any action which may cause racial hatred or discord.*

### ◆ **The Complaint**

Lana, a national of a Southeast Asian country, came across racially derogatory and demeaning remarks, such as “swine” and “meaner than dogs”, targeted at people of her nationality while surfing a discussion forum on a website.



Lana felt humiliated and lodged a complaint of race discrimination against the website company with the EOC, as the company had allowed its members to post the remarks which could incite hatred towards people of her race.

### ✓ **What the EOC Did**

The EOC case officer investigated into the matter and sent a letter to the website company informing it about the complaint.

Under Section 45 of the Race Discrimination Ordinance (RDO) on the subject of vilification, it is unlawful for a person (in this case the writer who wrote and posted the derogatory remarks), by any activity in

public, to incite hatred towards, serious contempt for, or severe ridicule of, another person or members of a class of persons on the ground of the race of the person or members of the class of persons.

Under Section 48 of the RDO, the website company could be seen as aiding the unlawful act if it allowed its members to post such remarks.

The company replied that its forum master was unaware of the derogatory remarks. The website company, however, immediately removed the comments from the discussion forum. The case was quickly settled as the company agreed, shortly after a discussion with the EOC, to post a notice reminding users and members that it is against the RDO to post racially derogatory remarks. It also reminded its members that the company would delete any such message and deactivate the accounts of members who post discriminatory remarks.

## Points to Note:

- Although the Internet offers anonymity in expressing one's opinion, verbal and written comments which vilify a person on the basis of his/her race may still be unlawful. Aside from such comments, vilification covers any "activity in public", including any form of communication to the public (such as broadcasting, screening or playing of recorded materials); any conduct observable by the public (such as gestures, flags, signs, or emblems); or the distribution or dissemination of any matter to the public.
- Racially vilifying remarks are often the product of prejudicial thinking about different races. Ethnic minorities constituted about 8% of Hong Kong's population as at the end of 2016. Unfamiliarity with other people's customs, cultures and languages may give rise to biases and stereotypes of different groups. The EOC encourages the community to learn more about the traditions and cultures of other ethnic groups, so as to promote mutual understanding and racial integration.
- Any racist incitement involving threat of physical harm to persons or their properties or premises is considered serious vilification and is liable to a maximum fine of HK\$100,000 and imprisonment for a maximum of two years.

## Necessary Requirement for the Job (Race Discrimination)

*Under the Race Discrimination Ordinance (RDO), language requirements in recruitment exercises may constitute indirect discrimination if such requirements are not genuine or objective.*

### ◆ **The Complaint**

Manoj was a Hong Kong permanent resident of South Asian descent. He saw a job posting for a technical operator at a local company X. The job advertisement listed Chinese language skills as one of the requirements. As Manoj



had over a decade of specifically relevant experience, he applied for the job even though he did not read or write Chinese. He had been able to perform satisfactorily in similar roles at other companies without Chinese language abilities, which led him to believe that such language skills were not truly required for the job.

Manoj did not receive any response to his application, though he saw that the job continue to be advertised. He applied again and again for the same post over the next few months, but still heard nothing from company X. As Manoj felt that Chinese language skills were not truly necessary for the job, he believed that company X was using the language requirement as an excuse for not considering

non-Chinese applicants. Manoj also claimed that his application was unsuccessful because of his ethnic origin. He lodged a complaint of race discrimination with the EOC.

### ✓ **What the EOC Did**

The EOC case officer explained to both the employer and the complainant the provisions under the RDO.

Under the RDO, it is unlawful for employers not to hire an applicant on the ground of his/her race. It is also unlawful for employers to indirectly discriminate against an applicant by setting an unjustifiable requirement that applicants of certain races may be less able to comply with. Although language in and of itself is not a protected characteristic under the RDO, some requirements or conditions relating to language abilities which are not justifiable may indirectly discriminate against certain racial groups, who may be less able to meet such conditions. When this is so, the RDO may apply.

Both parties showed willingness to resolve the matter through the early conciliation mechanism. Company X agreed to refer Manoj's CV to another unit with English-speaking positions for consideration, as well as to invite him for interviews when vacancies arose for relevant posts at the company. The case was thus settled.

## Points to Note:

- The race of a person does not affect his/her ability to do a job, so long as he/she possesses the necessary and relevant qualifications, skills and personal qualities required for the job. Employers must not assume that people belonging to certain racial groups are not suitable for employment. As a good practice, all applicants should be assessed based on consistent selection criteria.
- Employers must ensure that any language requirement (including academic qualification, fluency and accent requirement) for a job is relevant to and required for achieving satisfactory performance in a job.
- The EOC encourages employers to promote workplace diversity and nurture an inclusive work environment. In fact, workplace diversity can offer real benefits, as the exchange of different perspectives can help foster creativity and innovation.

## Get out of the Common Areas (Racial Harassment)

*More than half of the ethnic minorities in Hong Kong work as domestic helpers. Hong Kong's anti-discrimination ordinances protect them from discrimination on the grounds of sex, marital status, pregnancy, family status, disability and race during their stay and employment.*

### ◆ **The Complaint**

Lina was a domestic helper from South Asia. She was a resident of a private housing estate managed by a property management company (the management company). On various occasions, including a Christmas celebration organised for residents, Lina and her friends, who were also foreign domestic helpers residing in the same housing estate, were rudely told to leave by the security guards of the management company and another resident, Mr A. The guards and Mr A claimed that the behaviours of Lina and her friends were causing a disturbance. Mr A also made remarks such as “you are dirty because you are foreign maids” and accused them of making a mess. The same treatment did not occur to the Chinese or European residents. The incident took place in front of many other residents. Lina and her friends felt humiliated, insulted and belittled.

### ✓ **What the EOC Did**

Lina and her friends lodged separate complaints under the Race Discrimination Ordinance (RDO) with the EOC, represented by the same authorised person, against the management company for racial harassment and against Mr A for aiding the unlawful act.

The complaints were settled through early conciliation with the following terms of settlement:

The management company agreed to set up guidelines for handling complaints regarding gatherings in common areas of the housing estate, and ensure proper implementation of the guidelines by educating the staff. Notices with contact numbers of the control room and management office would be posted in public places so that residents could contact the management company for assistance where necessary. Residents/users of the housing estate might seek help from the police where necessary, and the management company would cooperate with the police if needed. Complaints from residents would be investigated fairly, regardless of their race, and the complainants would be provided with advice where appropriate.

Mr A agreed that, should he lodge complaints for irregularities in the common areas of the housing estate, he would stay out of sight for a certain period of time and let the management company's staff members take follow-up actions. If Mr A found that the staff members failed to carry out their duties properly in the course of following up on the complaints within the specified period, Mr A could then observe the process at a distance without interfering in order to monitor the work of the staff members. He could report the problems to the management company afterwards.

## Points to Note:

- Under the RDO, it is unlawful for a person concerned with the provision of goods, facilities or services, or in relation to the management of premises, to racially harass a user or a person occupying the premises. Employers would be liable for the unlawful act done by their employees in the course of employment, whether or not it was performed with the knowledge or approval of the employers. It shall be a defence for the employers to prove that reasonably practicable steps have been taken to prevent the employees from committing that act.
- Furthermore, a person who knowingly aids another person to commit an act made unlawful by the RDO is to be treated as committing the act himself/herself.
- Private housing estates are not exempted from the anti-discrimination ordinances. The EOC urges property managers to ensure that they are not inadvertently discriminating against particular racial groups in the course of managing the premises, including in enabling access to particular facilities such as public area or park. Policies related to access to the building's facilities should be regularly reviewed, and proactive effort made to promote amicable neighbourly relations, so as to avoid possible legal liabilities.

## The Bank that Said No (Race Discrimination)

*When a person is treated less favourably than another under comparable circumstances because of his/her race, it is considered as direct discrimination under the Race Discrimination Ordinance (RDO).*

### ◆ The Complaint

Adnan, a Pakistani, submitted an application to a bank to open a bank account. Although he provided all the required documents, the assistant manager of the bank who handled his application informed him that his application could not be accepted because he was not a permanent resident of Hong Kong. However, Adnan knew that some of his friends who were not permanent residents of Hong Kong had successfully opened accounts at the same bank. He felt that his application was rejected on the ground of his race. He later lodged a complaint with the EOC against the bank's discriminatory practice.



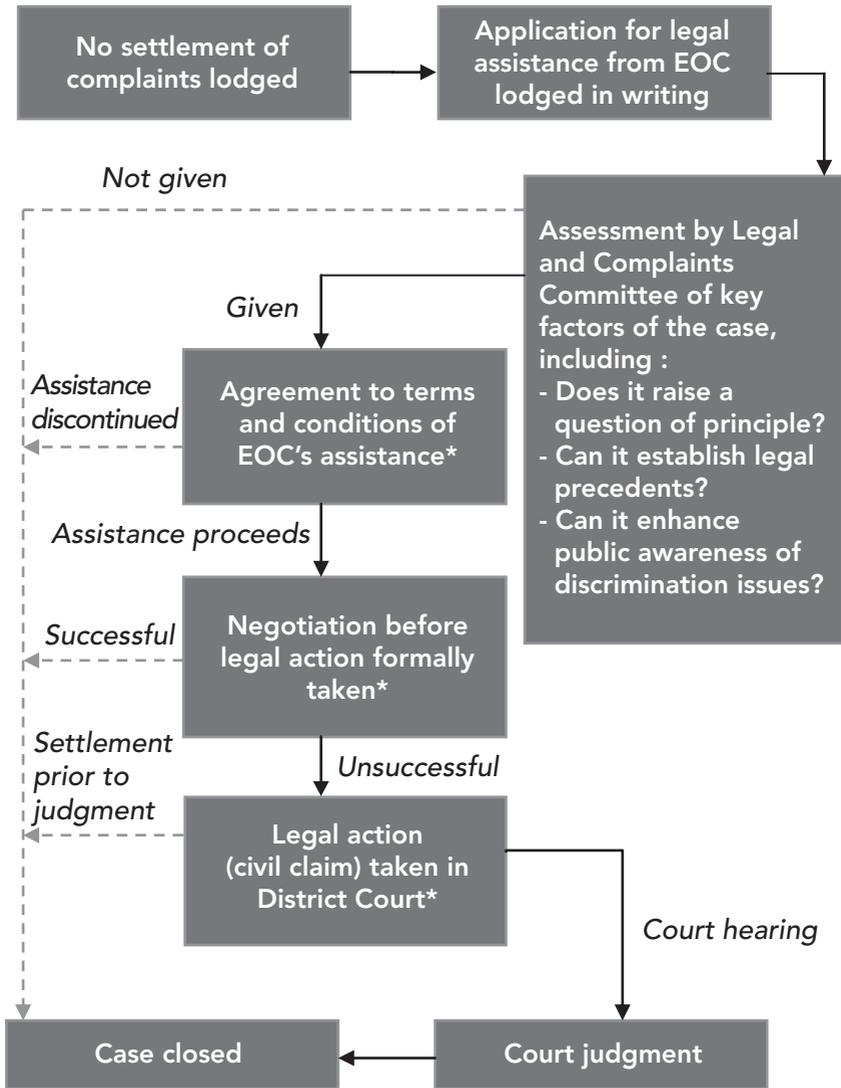
### ✓ What the EOC Did

The EOC case officer contacted the bank after receiving the complaint and explained the provisions under the RDO. The complaint was eventually settled through conciliation after the bank agreed to arrange for Adnan to re-apply for a bank account and to handle his application by applying the bank's usual internal procedures and criteria in handling such applications.

## Points to Note:

- A study conducted by the EOC in 2015 found that it is common for ethnic minorities in Hong Kong to come across discrimination when they are obtaining goods and services, especially when they are looking for accommodation and using financial services, such as opening a bank account and applying for a credit card.
- Under the RDO, it is unlawful to refuse to provide goods, services or facilities on the ground of a person's race. By race, it means the race, colour, descent, national origin or ethnic origin of a person. Both permanent residents and non-permanent residents are protected under the RDO.

# Applying for Legal Assistance (Flow Chart)



\* EOC will continuously assess the case in the light of further development, and may change the manner of assistance or even discontinue assistance accordingly.

# Assisted Cases Settled without Proceeding to Trial

*The following cases were given legal assistance by the EOC after conciliation attempts were unsuccessful during the complaint-handling process. The cases were eventually settled before trial by the Court.*

## **Cracking the Dress Code (Sex Discrimination)**

*In Hong Kong's first legal challenge to sex discrimination related to work attire, the EOC sought to establish a precedent regarding the application of dress codes on men and women in the workplace and question the stereotypical thinking on gender roles underlying such rules. Subsequently, the case was settled out of court.*

### **◆ The Complaint**

Jennifer was employed as a teacher at a secondary school. At the first staff meeting before the school year commenced, the school principal announced that all female teachers were required to wear a dress or a skirt to work.

Jennifer reported to the school in a knit top and dress pants on the first school day. She was summoned by the principal for her attire, but the principal later agreed that Jennifer could wear pant suits if she chose not to wear a dress or a skirt. Despite this agreement, Jennifer was repeatedly criticised for not wearing a dress or a skirt, sometimes even in front of students. Meanwhile, male teachers were not obliged to wear any particular type of clothing apart from the ban on t-shirts and jeans. Jennifer was aggrieved that male teachers were allowed to wear less formal pants, and they were not required to put on a jacket. She indicated that when she refused to wear skirts but instead put on

pant suits to work, the principal took out her employment contract and coerced her, which gave her the feeling that the principal was indirectly requesting her to resign.

Jennifer believed the school had discriminated against her because the school unnecessarily restricted her choice of work wear while the male teachers were not subjected to corresponding requirements. Jennifer felt that in requiring female teachers to wear skirts, the school ignored women's concerns about wearing skirts, including exposing their body parts or being peeped at. The school also ignored the rights of women to stay warm and be safe from being taken upskirt photographs, therefore subjecting female employees to less favourable treatment. Jennifer then lodged a complaint of sex discrimination against the school with the EOC.

### ✓ **What the EOC Did**

Upon receiving the complaint, the EOC case officer investigated into the matter and tried to facilitate a settlement by way of conciliation. However, this attempt was unsuccessful. The EOC later gave legal assistance in this case on the basis that the case raised a question of sex discrimination in the field of employment, where a restriction affects members of one gender less favourably than members of the other gender.

Under the Sex Discrimination Ordinance, it is unlawful for an employer to treat a person less favourably than another person in comparable circumstances because of a person's sex. In this case, female teachers were subjected to a stricter dress code than male teachers, to the former's detriment. Any dress code policy which requires members of both sexes to dress in a comparable standard of smartness and

conventionality should be reasonable and necessary according to the nature of the job; it should also be applied in an even-handed manner on both sexes.

After a writ was issued, the school agreed to settle the matter by giving an apology and monetary payment to Jennifer. The school also undertook to review its dress code.

### **Points to Note:**

- While the anti-discrimination ordinances do not explicitly state that dress codes are unlawful, employers should avoid setting dress codes that may inadvertently discriminate due to gender, pregnancy, disability or race. Rules and standards should be based on the requirement of the job, not arbitrarily imposed based on stereotypical assumptions. For example, whether female teachers wear skirts or not does not affect their performance in their routine teaching duties. On the other hand, conveying a rigid gender stereotypical image of “women wear dresses” to both teachers and students might pose inconvenience and a burden to female teachers.
- Employers should be sensitive when considering exemptions for people with special needs due to their disabilities or religious backgrounds.
- As a good practice, employers should review the code periodically in order to take into account changing social conventions.

## Job Application by Pregnant Women (Pregnancy Discrimination)

*Not hiring a pregnant woman due to her pregnancy is a common situation of pregnancy discrimination in employment under the Sex Discrimination Ordinance (SDO).*

### ◆ **The Complaint**

Ms A and Ms B were both pregnant and worked as security guards at a housing estate. The estate's security service was contracted out on a three-year basis. When the service tender of the contractor ended, the employment of Ms A and Ms B also ended. A new contractor (the Defendant) successfully won the service bid for the next three years. The Defendant held recruitment talks for the estate's existing staff about employment prospects with the company. During the Q&A session, staff from the Defendant stated that the company would not employ pregnant staff for safety reasons. Ms A and Ms B were deterred from applying for a job with the Defendant. They lodged a complaint with the EOC against the Defendant for pregnancy discrimination.

### ✓ **What the EOC Did**

The EOC launched an investigation into these two cases after receiving the complaints lodged under the SDO. The Defendant denied discrimination. Conciliation between the parties was unsuccessful. After assessing the merits of each case, the EOC assisted Ms A and Ms B in commencing legal proceedings for pregnancy discrimination. Legal representation and advice were provided by the EOC's lawyers, who also assisted in settlement negotiations with the Defendant. The parties to each case eventually reached a settlement. Ms A and Ms B each received a settlement sum as compensation.

## Points to Note:

- It is unlawful under the SDO for an employer to subject a woman to a disadvantage, including in the recruitment process, or dismiss her on the ground of her pregnancy. All types of employment (including contract work) are protected under the Ordinance.
- Acting upon stereotypical assumptions based on sex, marital status or pregnancy could lead to discrimination. Employers should adopt a set of job-related and non-discriminatory criteria for recruitment.
- Also, employees handling job applications and conducting interviews should be trained to avoid acts of discrimination.

## A Long Battle for Dignified Access (Disability Discrimination)

*Given Hong Kong's ageing population, accessibility is everyone's issue. Accessibility is a common type of non-employment-related complaint received under the Disability Discrimination Ordinance (DDO).*

### ◆ **The Complaint**

Tina used a wheelchair as a result of cerebral palsy and global developmental delay. Now in her 20s, she had been residing in the building since birth.

Each time Tina entered or exited the building, her elderly mother needed to pull both her and her wheelchair up/down five steps. Tina's mother had made requests to



the Incorporated Owners (IO) of the building in writing for accessible facilities for wheelchair users. Although the building had undergone renovations twice, her mother received no response from the IO regarding her requests.

Tina's mother complained to the EOC, requesting a ramp or a stair-lift.

## ✓ **What the EOC Did**

Under the DDO, it is unlawful to discriminate against persons with disabilities in relation to the provision of means of access to a premise. Accessible facilities, such as access ramps, also benefit other residents, such as baby pram users or elders who use wheelchairs.

The EOC case officer, after investigation, attempted to facilitate conciliation between the parties, but was unsuccessful. The IO later installed a stair-climber at the building's entrance. However, the stair-climber did not meet Tina's needs. On three separate occasions she tried the stair-climber, but found it to be, respectively, out of battery, out of order, and unsuitable due to its backward tilt and potential loss of balance.

Tina's mother sought technical advice, and was told that a ramp or a stair-lift would be a feasible solution and might be better than a stair-climber in providing access. Tina and her mother then requested legal assistance from the EOC, which was given.

The trial was scheduled for mid-2011. During the pre-trial review hearing, the IO consented to install a ramp or stair-lift within the agreed timeframe. The case was thus settled.

## Points to Note:

- It is important for facility managers or owners to strive to address the genuine needs of all users, including people with disabilities, for independent, unassisted and barrier-free means of access, as well as to ensure that any such facility is actually usable. In many instances, physical barriers continue to exist even in places where measures have seemingly been taken to improve access features.
- Independent access to premises should be provided, unless such provisions would cause unjustifiable hardship to facility managers or owners. Reasonable accommodation refers to any modification or adjustment to the environment that makes it possible for an individual with disability to enjoy equal access.
- The EOC advocates the mainstreaming of Universal Design concepts. Everyone stands to gain from environments and products that are planned, with respect to individual human needs, to be usable by all people regardless of their age and disabilities to the greatest extent possible, without requiring expensive adaptation or specialised design in later years.

## Once is Enough! (Disability Harassment)

*Apart from being unlawful, disability harassment negatively impacts both employees and employers. It violates a person's dignity, lowers morale, and eventually affects the person's overall performance. Employees and employers should work together to foster a harassment-free workplace.*

### ◆ **The Complaint**

Emma worked as a security guard. She walked with a limp because of her disability (poliomyelitis). At the end of her work shift, she was required to make a report using the telephone system in the control room of the premises. One day, as she was preparing to make her report, she could not hear the instructions from the system clearly as a supervisor, Mindy, was speaking loudly to two colleagues in the same room. Emma asked Mindy to lower her voice, but Mindy



refused, saying that she was doing her work. As Emma was leaving the control room, she heard Mindy say loudly, "Go break the other leg."

Emma was deeply troubled by the remark. She complained to her managers the day after the incident, but it was not until a few months later that they told her a warning letter had been issued to Mindy. Emma requested a report but was denied. Emma was dissatisfied with the handling of the incident, and felt she deserved an apology. She then lodged a complaint to the EOC against Mindy for disability harassment.

## ✓ **What the EOC Did**

Using the early conciliation mechanism, the EOC case officer tried to facilitate a settlement before investigation. Emma demanded a written apology. However, the parties could not reach a settlement as they could not agree on the wording of the apology letter. The EOC then commenced investigation, and found a supporting witness to Emma's claims. Conciliation was still unsuccessful, and Emma applied to the EOC for legal assistance, which was given.

Harassment against a person with disability is unlawful under the Disability Discrimination Ordinance. Harassment refers to any unwelcome conduct on account of a person's disability where it can be reasonably anticipated that the person would be offended, humiliated or intimidated. Harassment can involve physical, verbal, written, or visual acts, including insulting remarks, gestures, or offensive jokes about a person's disability.

The case was eventually settled without going to the Court, with monetary compensation given to Emma along with a letter of apology.

## Points to Note:

- In order for a conduct to constitute harassment, it must first be unwelcome to the recipient, meaning that the conduct is not solicited, invited, incited or reciprocated by the aggrieved person. An act can constitute harassment even if it happened only once and appeared to be trivial. The EOC urges everyone to cultivate a workplace that promotes mutual respect and inclusion.
- Often, when the harasser holds a senior or high position in the office, those who have been harassed may choose to remain silent. 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 its “unwelcome” nature.
- The EOC encourages those who encounter disability harassment to speak up and let the harasser know that their conduct is inappropriate. Employees should also support colleagues who have been subjected to harassment to end the situation. In addition, employers have a responsibility to maintain a harassment-free work environment.

## Victimisation (Disability Discrimination)

*Victimisation means treating a person less favourably because he/she has made or plans to make a discrimination complaint, takes legal action, acts as witness against discrimination or helps somebody else do so. Victimisation is an unlawful act under the anti-discrimination ordinances, including the Disability Discrimination Ordinance (DDO).*

### ◆ **The Complaint**

Mary worked for a dental clinic. She suffered from work injury and as a result, had to take sick leave from time to time. After commencing a personal injury action against the dental clinic, she was forced by the clinic to go on sick leave because of her work injury. One year later, she was dismissed. Mary lodged a disability discrimination complaint (in respect of the forced sick leave) and a victimisation complaint (in respect of the eventual dismissal) against the dental clinic with the EOC.

### ✓ **What the EOC Did**

The EOC commenced an investigation after receiving the complaint. The dental clinic denied that it discriminated against or victimised Mary, and claimed that her dismissal was due to a restructuring exercise. However, there was no documentary evidence supporting the claim. Conciliation between the parties was attempted but unsuccessful.

After assessing the merits of the case, the EOC decided to assist Mary in commencing legal action against the clinic for disability discrimination and victimisation. Legal advice was provided by the EOC's lawyers, who also assisted in the settlement negotiations with the dental clinic. The

parties eventually reached a settlement. Mary received a settlement sum as compensation and the dental clinic agreed to conduct an internal investigation into the matter.

### **Points to Note:**

- Disability-related absence is often required by employees in order to recuperate from illnesses and disabilities. Employers should balance between the accommodation of such needs and their operational requirements.
- Under the DDO, it is unlawful for an employer to discriminate against a person with a disability or sickness by dismissing that person. Where an employee's disability hinders his/her capacity to perform the job duties, consideration of providing reasonable accommodation by the employer should be given, unless the employee is unable to carry out the inherent requirements of the job even when provided with such accommodation, or if such accommodation would cause the employer unjustifiable hardship.
- It is also unlawful for an employer to victimise an employee, i.e. to give the employee worse treatment, after the latter has lodged or made plans to lodge a complaint or take legal action relating to disability discrimination.

## Disqualified for Family Ties (Family Status Discrimination)

*Nowadays, both female and male workers bear family responsibilities such as the care of children and elderly relatives. Yet many face unfounded assumptions about their commitment to the job based on family responsibilities. This can negatively impact hiring decisions and may be unlawful.*

### ◆ **The Complaint**

Mona was a mother with a four-month-old baby. She applied for a junior manager post at a production house. She passed her first interview and was invited for a second interview with a senior manager, Ms Wong.



During the interview, Ms Wong asked Mona if she had any children. Upon learning that Mona had a baby, Ms Wong enquired as to who would care for the child while Mona was at work. Mona replied that her mother would help her, but Ms Wong responded that Mona would miss her baby and take leave if her baby was sick, which would make other colleagues unhappy during busy periods at work.

Mona was distressed by Ms Wong's comments and cried. Ms Wong said she personally did not want staff to work overtime and told Mona that the fact that she had a young child would not be factored into the hiring decision. In the end, Mona did not get the job. She felt that this

was due to her childcare responsibility, and lodged a complaint against the production house for family status discrimination with the EOC.

✓ **What the EOC Did**

The EOC case officer tried to facilitate a settlement by way of conciliation. However, the parties could not come to a settlement. The respondent attributed the rejection of Mona's candidacy to her performance during the second interview, and denied that her family status was a factor. Mona later applied to the EOC for legal assistance, which was given.

Under the Family Status Discrimination Ordinance, it is unlawful to discriminate against a person based on family status in the way an employer determines who should be offered employment. Employers should ensure that, where it is necessary to assess whether personal circumstances will affect performance of the job (for example, where it involves extensive travel), interviewers should discuss this objectively with the applicant, avoiding questions about family status, children, and domestic obligations.

The case was eventually settled without going to the Court, with monetary compensation given to Mona.

## Points to Note:

- An interviewer who seeks evidence of abilities and relies on facts rather than assumptions will have less tendency to be biased. Employers should ensure that all employees who may be involved in staff recruitment receive training on lawful, non-discriminatory practices.
- In line with good management practices, interviewers should only ask questions at job interviews that relate directly to the essential requirements of the job. For example, if it is an essential requirement of the job that the employee be available to work late on a regular basis, ask the applicant whether he/she is able to work late on a regular basis and avoid asking whether he/she has any family responsibilities.
- Employers should develop consistent selection criteria as one of the first steps in establishing a fair recruitment practice. The criteria should specifically relate to the job, such as the type of experience or skills required. From time to time, the criteria should be re-examined to see whether they need to be modified.

# EOC Court Cases

*The following cases, unless otherwise indicated, were given legal assistance by the EOC after conciliation attempts were unsuccessful during the complaint-handling process.*

*In cases where damages for injury to feelings were awarded, the Court generally took into account precedents set by local and overseas cases of a similar nature.*

## Sexual Harassment



### **B v King of the King Group Limited DCEO 9/2010**

#### **◆ Background**

The Plaintiff was sexually harassed by a dim sum worker employed by the Defendant. The harassment incident involved the dim sum worker making a sexual remark and touching her chest. The Plaintiff complained to the Defendant, who did not take any prompt action. When the Plaintiff wanted to report the harassment to the police, the Defendant pressured her not to do so or both she and the harasser would be dismissed.

The Defendant eventually arranged a meeting during which the harasser was told to apologise to the Plaintiff. However, he did so in a disrespectful manner. Aggravated by the harasser's disrespect, the Plaintiff slapped the harasser in the face. She was then dismissed by the Defendant. The Plaintiff filed a complaint with the EOC against the

harasser for sexual harassment and against the Defendant for being vicariously liable for the harassment respectively. The Plaintiff's claim against the harasser was settled via conciliation, while the Plaintiff's case against the Defendant was brought to the Court under the Sex Discrimination Ordinance (SDO).

### ✓ **The Court's Decision**

The Court accepted the Plaintiff's evidence and found that the acts committed by the harasser amounted to unlawful sexual harassment. The Defendant, as the harasser's employer, was liable for his acts because it did not take reasonably practicable steps to prevent sexual harassment against the Plaintiff in the workplace. However, the Court ruled that the dismissal was because the Plaintiff slapped the harasser, not because she was sexually harassed or she was female. The Court awarded damages to the Plaintiff for injury to feelings in the sum of HK\$80,000, as well as costs to the Plaintiff.

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## **L v David Roy Burton DCEO 15/2009**

### ◆ **Background**

The Plaintiff was offered a position with a marketing firm, of which the Defendant was the general manager. Before the Plaintiff commenced her employment and during her employment, the Defendant made numerous sexual advances towards her and twice touched her inappropriately. The Plaintiff rejected the Defendant's advances every time. The Defendant's attitude towards the Plaintiff deteriorated and finally he dismissed her. When informing her of the dismissal, he

forcefully grabbed and bruised the Plaintiff's wrist. The Plaintiff lodged a complaint to the EOC, but attempts of conciliation were not successful. With the EOC's assistance, the Plaintiff brought proceedings against the Defendant under the SDO.

### ✓ **The Court's Decision**

The Court found that there was a clear case of sexual harassment under the SDO based on the Plaintiff's undisputed evidence. The Court awarded damages to the Plaintiff for injury to feelings, loss of earnings, and exemplary damages.

<b>Injury to feelings</b>	HK\$ 100,000
<b>Loss of earnings</b>	HK\$ 77,039
<b>Exemplary damages</b>	HK\$ 20,000
	<hr/> <b>HK\$ 197,039</b> <hr/>

The Court awarded HK\$100,000 in damages for injury to feelings flowing from both the acts of sexual harassment and the dismissal. In assessing the award, the Court considered the fact that the offensive behaviour of the Defendant persisted for over a month, and that the eventual dismissal of the Plaintiff was high-handed and abusive to the Plaintiff's personal dignity. As a result of the sexual harassment, the Plaintiff suffered anxiety, stress, humiliation, physical injury, and insomnia.

For loss of earnings, the Court awarded an amount equal to five months and 14 days' income, as the Plaintiff was unemployed for that period before finding other employment.

The Court further awarded HK\$20,000 in exemplary damages. The objective of exemplary damages is to punish the Defendant for his conduct and to mark the Court's disapproval of such conduct as the compensatory award was insufficient to punish the Defendant in the present case.

The Court also awarded legal costs to the Plaintiff, which it found to be warranted by the circumstances of the case. The Plaintiff had conducted the proceedings in a reasonable manner, whereas the Defendant refused to settle or to apologise for his wrongful conduct. Furthermore, the Court was of the view that the Defendant should have known from the outset that his conduct was wrong, as every adult should know that it is wrong to make unwelcome sexual advances on another person.

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## **A v Chan Wai Tong DCEO 7/2009**

### **Background**

The Plaintiff worked with the Defendant in the Food and Environmental Hygiene Department (FEHD) as an Assistant Hawker Control Officer. In the workplace, the Defendant sexually harassed the Plaintiff by making sexual remarks, physical contacts and other unwelcome conducts of a sexual nature against her. The Plaintiff complained to the FEHD which conducted an internal investigation. However, the Plaintiff's complaint was found to be unsubstantiated.



Despite the result of her internal complaint, the Plaintiff persisted and lodged a complaint with the EOC. The Defendant denied the allegation and claimed that the Plaintiff's complaint was a revenge for his gossiping with other colleagues about the Plaintiff's relationship with one of her supervisors. The Plaintiff brought her claim against the Defendant to the Court under the SDO.

### ✓ **The Court's Decision**

The Court accepted the Plaintiff's claims, whose timeline and details were corroborated by witnesses and supported by her own notes of the acts. It found that the Defendant committed unlawful sexual harassment, and rejected his defence that the Plaintiff's claim was in retaliation for his gossiping.

The Court indicated that the result of the internal investigation did not affect its ruling in the present case, because the internal investigation adopted the criminal standard of proof of "beyond all reasonable doubt", which is more stringent than the "balance of probability" standard used by the Court.

The Court made an order that the Defendant should give a written apology to the Plaintiff. It also awarded costs and monetary compensation to the Plaintiff as below:

<b>Injury to feelings</b>	HK\$	50,000
<b>Exemplary damages</b>	HK\$	10,000
	<b>HK\$</b>	<b>60,000</b>

The Court awarded HK\$50,000 in damages for injury to feelings. It further awarded HK\$10,000 in exemplary damages to punish the Defendant for his conduct in inflicting harm as he completely fabricated his defence that the Plaintiff's claim was in retaliation for his gossiping.

The Court also awarded costs to the Plaintiff because the Defendant refused to attempt conciliation arranged by the EOC and made a totally fabricated defence.

## Pregnancy Discrimination

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### **Lam Wing Lai v YT Cheng (Chingtai) Ltd DCEO 6/2004**

#### ◆ **Background**

The Plaintiff was employed in 2001 as an executive secretary to the Director of the Defendant. Her work performance was satisfactory, as evidenced by her salary increment after she had passed the probation period. Later, the Plaintiff became pregnant. In February 2002, the Plaintiff suffered a threatened miscarriage and informed her boss of the condition. From June to August 2002, the Plaintiff needed to take frequent sick leave due to further pregnancy complications. During this period, the Plaintiff discovered that a permanent secretary was recruited. She worried that the new secretary would be her replacement, though the Defendant assured her then that it would not be the case.

After the Plaintiff gave birth, the Defendant's human resources manager told her that her boss thought she should stay at home to look after her baby and take more rest given her poor health situation. Nevertheless, the Plaintiff resumed duty upon the completion of her maternity leave in November 2002 as scheduled. However, she was moved to another work station with no properly equipped computer. In addition, she was not given her original duties. A week later, she was dismissed under the pretext that a customer had complained about her.

The Plaintiff brought proceedings against the Defendant under the SDO and the Family Status Discrimination Ordinance (FSDO).

✓ **The Court’s Decision**

The Court found that the Plaintiff had established the relevant facts so that inferences could be drawn to support her claims of pregnancy and family status discrimination. On the other hand, the Defendant had failed to offer a reasonable explanation to the Plaintiff’s dismissal. Therefore, the Court found that the Defendant discriminated against the Plaintiff on the grounds of pregnancy and family status.

As a result, the Plaintiff was awarded a total of HK\$163,500, with the breakdown of the damages as follows:

<b>Injury to feelings</b>	HK\$	88,500
<b>Exemplary damages</b>	HK\$	75,000
	<b>HK\$</b>	<b>163,500</b>

The Court granted damages for loss of income as it took the Plaintiff four and a half months to find a new job. Since the new job’s salary was lower than the one offered by the Defendant, the Court had also awarded the salary difference to the Plaintiff, but limited to a period of three months, as the Court realised that work in the private sector offered no guarantee of security of salary and employment.

For injury to feelings, the Court considered that the Plaintiff had worked for the Defendant for one and a half years in a respectable position and had established friendships with colleagues. Therefore, the amount of injury to feelings awarded was slightly higher than in other cases.

**5****Chan Choi Yin v Toppan Forms  
(Hong Kong) Ltd  
DCEO 6/2002****◆ Background**

The Plaintiff began her employment as an account manager with the Defendant in 1997. Around a year later, she became pregnant. After giving pregnancy notice to the Defendant, the Plaintiff faced a series of less favourable treatments by the Defendant.



These included derogatory remarks made by the senior management about her pregnancy, repeated demands by her supervisor ordering her to return to work during sick leave and black rainstorm warnings, and transfer to a new team which resulted in a substantial reduction of her income and difficult working conditions.

The less favourable treatments continued when the Plaintiff resumed duty upon the completion of her maternity leave in 1999. Particularly, she was transferred to another division against her will, resulting in a further reduction of her income as well as a demotion.

As a result, the Plaintiff lodged a complaint with the EOC. Later, the Defendant informed her that she would be made redundant due to the

closing of her division. She was further told to withdraw her complaint or she would be dismissed. Eventually she was dismissed in 2000.

The Plaintiff brought proceedings against the Defendant under the SDO.

✓ **The Court's Decision**

The Court found that the Plaintiff had established the relevant facts so that inferences could be drawn to support her claims of pregnancy discrimination and victimisation, whereas the Defendant had failed to offer a reasonable explanation for the Plaintiff's less favourable treatment and dismissal. The Court found that the Defendant discriminated against the Plaintiff on the ground of pregnancy and by way of victimisation under the SDO.

As a result, the Plaintiff was awarded a total of HK\$544,156.15, with the breakdown of the damages as follows:

<b>Loss of earnings</b>	HK\$	164,505.20
<b>Future loss of earnings</b>	HK\$	179,650.95
<b>Injury to feelings</b>	HK\$	200,000.00
	<b>HK\$</b>	<b>544,156.15</b>

The loss of earnings was calculated based on the amount that the Plaintiff could have earned if she had not been transferred.

For the future loss of earnings, the Court decided that the Plaintiff should recover six months' loss of income because the Court viewed that she should be able to find alternative employment with a similar salary within that period.

For injury to feelings, the Court viewed that a substantial amount should be awarded to the Plaintiff to reflect the long period of injury she suffered. While the Defendant's unfair treatment towards the Plaintiff since her pregnancy had lasted for two years until her dismissal, the Plaintiff was further deprived of a favourable reference from the Defendant for more than three years while the legal proceedings were going on.



**Lau Hoi Man Kathy v Emaster  
Consultants Ltd  
DCEO 11/2012**

◆ **Background**

The Plaintiff was first employed by the Defendant under a one-year contract, during which she was seconded to work for the Defendant's contractor. Near the end of her one-year contract, she signed a second contract which extended her employment period under the one-year contract continuously for another nine months.

Immediately after signing the second contract, the Plaintiff gave notice of pregnancy to the Defendant. The next day, the Defendant cancelled the second contract, but later offered a third contract. The third contract was the same as the second (cancelled) contract, except that the start

of the nine-month period was postponed by one day, meaning that there would be a one-day break between the first one-year contract and the third nine-month contract. The Defendant refused to give the Plaintiff paid maternity leave because of the one-day break.

The Plaintiff's claim for maternity leave at the Labour Tribunal was disallowed, because it was held that the one-day break meant she was not employed under a continuous contract for no less than 40 weeks immediately before the date of the commencement of maternity leave. The Plaintiff then lodged a complaint with the EOC against the Defendant for pregnancy discrimination.

The EOC commenced an investigation after receiving the complaint. The Defendant denied discrimination. Conciliation between the parties was attempted but was unsuccessful. After assessing the merits of the case, the EOC decided to assist the Plaintiff in commencing legal action under the SDO for pregnancy discrimination.

### ✓ **The Court's Decision**

The Court ruled in favour of the Plaintiff, because there would not have been a one-day break (and the Plaintiff would have been entitled to paid maternity leave) but for her pregnancy. The "cancellation" of the second employment contract and the one-day break between the two fixed-term employment contracts shall be regarded as "less favourable treatment" under the SDO.

As a result, the Plaintiff was awarded a total of HK\$90,769.71, and the breakdown of the damages was as follows:

<b>Maternity leave pay</b>	HK\$	20,072.74
<b>Exemplary damages</b>	HK\$	20,000.00
<b>Injury to feelings</b>	HK\$	50,000.00
<b>Loss of income</b>	HK\$	696.97
	<b>HK\$</b>	<b>90,769.71</b>

## Judicial Review Involving Issues of the SDO

7

### **Equal Opportunities Commission v Director of Education HCAL 1555/2000**

#### ◆ **Background**

Since 1978, gender scaling, separate queues in banding for boys and girls, and fixed gender quotas in co-educational schools had been used as criteria in the Government's Secondary School Places Allocation System (SSPA System). In its Formal Investigation Report issued in 1999, the EOC advised that these elements were discriminatory as individual boys and girls received less favourable treatment purely on the basis of sex. After the decision by the Director of Education to continue to maintain the discriminatory aspects of the SSPA System, the EOC applied to the High Court for judicial review to challenge the legality of the SSPA System.

#### ✓ **The Court's Decision**

The Court held that the operation of the SSPA System amounted to unlawful direct sex discrimination against individual pupils under the SDO in all three gender-based elements challenged by the EOC:

First, there was a scaling mechanism which adjusted the scores of students from different schools so as to enable comparison between them. Boys and girls were treated separately in the scaling process with different scaling curves. This meant that the eventual priority in school placement depended in part on gender.

Second, there was a banding mechanism which put all students into bands based on their adjusted scores. Different band cutting scores were used for boys and girls, so that girls needed a higher score for the top band than boys. This again meant that priority for placement depended in part on gender.

Third, there was a gender quota in co-educational secondary schools to ensure that a fixed ratio of boys and girls would be admitted to each school. This meant that admission might depend on gender.

The Government tried to rely on the special measure exception under the SDO in its defence. It argued that the discriminatory elements of the SSPA System were not unlawful because they were reasonably intended to ensure that boys had equal opportunities with girls by reducing the advantage girls enjoyed through their better academic performance. The Court rejected this argument for two reasons. First, there was no firm evidence of any developmental difference inherent in gender, and second, the discriminatory elements were disproportional to the objective of ensuring equal opportunities for boys.



## Disability Discrimination

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### **Kwok Wing Sun v Law Yung Kai Trading as Wan Kou Metal & Plastic Factory DCEO 2/2007**

#### ◆ **Background**

The Plaintiff had been having ventricular septal defect and renal disease for years. Though he needed to attend medical check-up regularly, his work ability was unaffected according to his doctor's opinion. He was employed as a family driver by the Defendant in May 2005 and he passed the three-month probation period in August 2005.

In September 2005, the Plaintiff submitted a sick leave application form for his medical check-up to the wife of the Defendant. She became angry and asked for details of his disabilities. From that moment on, she began to pick on the Plaintiff and imposed new restrictions on his work. In January 2006, the Plaintiff was dismissed by the Defendant without being given any reason.

The Plaintiff brought proceedings against the Defendant under the Disability Discrimination Ordinance (DDO).

#### ✓ **The Court's Decision**

The Court was satisfied that the Plaintiff had provided sufficient evidence to substantiate his disability discrimination claim. The Court took the view that there was no sufficient reason to dismiss the Plaintiff.

The Court found that the Plaintiff was unlawfully discriminated against and dismissed on the ground of his disabilities.

As a result, the Plaintiff was awarded a total of HK\$98,500, and the breakdown of the damages was as follows:

<b>Loss of income</b>	HK\$	43,500.00
<b>Injury to feelings</b>	HK\$	55,000.00
	<b>HK\$</b>	<b>98,500.00</b>

For the loss of earnings, the Court decided that the Plaintiff should recover six months' loss of income as the Court viewed that he should be able to find alternative employment with a similar salary within that period. For injury to feelings, the Court took into account the length of time the Plaintiff had worked for the Defendant and the treatment he had received during his employment period.



## **K & Ors v Secretary for Justice DCEO 3, 4 and 7/1999**

### **◆ Background**

There were three Plaintiffs in this case, namely K, Y and W. They applied for the posts of ambulance man, fireman and customs officer respectively in the Fire Services Department and the Customs and Excise Department. In all three cases, the Plaintiffs were given conditional offers of employment, which were subsequently withheld or terminated because they had a parent with mental illness.

It was both Departments' policies to reject job applicants who have a first-degree relative with a history of mental illness of a hereditary nature. The Departments defended such a policy by arguing that the safety of fellow employees and members of the public was an inherent job requirement, and as the Plaintiffs were unable to fulfil such a requirement, the Departments' above decisions were not unlawful.

### ✓ **The Court's Decision**

The Court held that the two Departments had discriminated against the Plaintiffs on account of the mental illness of their relatives, i.e. the disability of an associate under the DDO.

The Court further held that the Departments could not rely on the inherent job requirement exemption under the DDO. In the Court's view, the safety to fellow employees and members of the public was agreed to be an inherent job requirement for all three positions above. Nevertheless, the Departments failed to provide sufficient evidence to establish that the Plaintiffs' inability to meet such requirement was because of their parents' mental illness, as there was no information showing the Plaintiffs' risk to the mental illness was higher which would pose a real risk to safety. Hence, the Departments' discriminatory acts could not be exempted and were unlawful.

In calculating damages for injury to feelings, the Court took into account the prolonged period of injury caused to the Plaintiffs by the defence of the discrimination and the attitude of the Departments. The Court also considered the loss of past and future earnings as well as other benefits such as housing and pension entitled to the Plaintiffs had they

been able to work in the Departments. The damages awarded to each of them could be summarised as follows:

	<b>K</b> <b>HK\$</b>	<b>Y</b> <b>HK\$</b>	<b>W</b> <b>HK\$</b>
<b>Damages for injury to feelings</b>	100,000.00	100,000.00	150,000.00
<b>Interest thereon (11.5%)</b>	23,000.00	28,206.94	46,478.70
<b>Past loss of earnings (including interest)</b>	106,510.28	96,939.54	97,884.13
<b>Future loss of earnings</b>	194,224.00	114,300.00	42,480.00
<b>Loss of housing benefit</b>	299,400.00	267,300.00	409,860.00
<b>Loss of pension benefit</b>	262,009.00	168,996.00	314,432.00
	<b>985,143.28</b>	<b>775,742.48</b>	<b>1,061,134.83</b>

## Cases where EOC acted as Amicus Curiae

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### **Secretary for Justice v Chan Wah FACV 11 and 13/2000**

#### ◆ **Background**

Two non-indigenous villagers challenged the validity of the village representative election arrangements in the villages they lived in. This case involved a number of constitutional and administrative law issues, and the EOC was involved in this case by acting as Amicus Curiae<sup>1</sup> for issues relating to the Sex Discrimination Ordinance (SDO). The relevant points in the Court's decision as related to discrimination issues are detailed below.

#### ✓ **The Court's Decision**

First, in the villages concerned, non-indigenous females married to male indigenous villagers had the right to vote, while non-indigenous males married to female indigenous villagers were not entitled to the same right. The Court held that this amounted to sex discrimination against men under the SDO.

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<sup>1</sup> Amicus Curiae: one (as a professional person or organisation) that is not a party to a particular litigation but that is permitted by the court to advise it in respect to some matter of law that directly affects the case in question. (Source: Merriam-Webster Dictionary)

Second, due to the above arrangement, married non-indigenous females enjoyed the right to vote, whereas single non-indigenous females did not. This amounted to marital status discrimination under the SDO.

Third, in order to have the right to vote, married female indigenous villagers must have resided in the village for seven years while there was no such requirement for married male indigenous villagers. Fourth, female indigenous villagers were excluded from standing as candidates in elections, while there was no such prohibition against male indigenous villagers. These amounted to sex discrimination against women under the SDO.

The Court of Final Appeal restated the following general legal principles which are relevant to all sex discrimination cases:

1. In considering whether a particular arrangement is discriminatory or not, the Court will adopt the “but for” test, to look at whether there is less favourable treatment on the ground of a person’s sex. For example, if a female would have received the same treatment as a male but for her sex, then there is discrimination.
2. The intention or motive of the defendant to discriminate is not a necessary condition to liability, though it may be a relevant consideration. A prima facie case of discrimination will arise when a particular arrangement has the effect of favouring some persons because of their sex or marital status.

## Secretary for Justice v Yau Yuk Lung FACC 12/2006

### ◆ **Background**

This is a Court of Final Appeal case where the constitutionality of s.118F (1) of the Crimes Ordinance, which used to criminalise homosexual buggery committed otherwise than in private, was challenged. The main issue in this case is whether the section concerned amounts to sexual orientation discrimination. The EOC's participation in this case was to act as Amicus Curiae to provide assistance in respect of general principles of anti-discrimination law.

It should be noted that although there is no anti-discrimination ordinance to protect against sexual orientation discrimination in Hong Kong at present, sexual orientation discrimination is unconstitutional under art. 25 of the Basic Law and art. 22 of the Hong Kong Bill of Rights, in which the right to equality before the law is protected. Also, the principles elaborated by the Court as follows actually apply to differential treatments on all grounds in general.

### ✓ **The Court's Decision**

In this case, the Court viewed that the law should usually accord identical treatment to comparable situations in general. However, the guarantee of equality before the law does not invariably require exact equality. In order to determine whether differential treatments are justified, the test is to see whether the difference:

1. pursues a legitimate aim, which means there must be a genuine need for such a difference;
2. is rationally connected to the legitimate aim; and
3. is no more than is necessary to accomplish the legitimate aim.

The Court examined the difference in treatment in s. 118F (1) of the Crimes Ordinance, applied the above justification test and concluded that even step (1) of the above test could not be satisfied here because:

1. Only homosexuals, but not heterosexuals, were subject to the statutory offence, hence giving rise to differential treatments on the ground of sexual orientation; and
2. No genuine need for the differential treatments had been shown by the Government, meaning that no legitimate aim to be pursued by the differential treatments could be established.

Therefore, it was held by the Court that s. 118F (1) of the Crimes Ordinance was discriminatory and unconstitutional.