



平等機會委員會  
EQUAL OPPORTUNITIES COMMISSION

# Equal Opportunities Casebook

For enquiries and complaints about discrimination under the anti-discrimination ordinances, please make use of the following online forms.



Enquiry related to  
anti-discrimination  
ordinances



Complaint related to  
anti-discrimination  
ordinances



Enquiry and complaint  
related to EOC's  
services

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.

For reprint permission or comments, please contact the Equal Opportunities Commission.

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# Introduction

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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, breastfeeding, disability, family status, and race; sexual harassment; breastfeeding harassment; and harassment and vilification on the grounds of disability 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 legal assistance where appropriate, promoting equal opportunities through public education and training, conducting research, and advocating policy changes on issues related to discrimination and equal opportunities.

Anyone who believes that he/she has experienced discrimination, harassment or vilification under one or more of the ordinances may lodge a complaint with the EOC in writing. Upon receiving a complaint in writing, the EOC will assess if the complaint falls within its jurisdiction and if investigation should be conducted.

In the course of investigation into a complaint, the EOC will endeavour to help the complainant and the respondent reach a settlement by way of conciliation, which is entirely voluntary. The purpose of conciliation is to bring together the parties concerned to look for ways of resolving the dispute to the satisfaction of both parties, so that they can move beyond the dispute.

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

The latest statistics on the complaints handled by the EOC, the conciliation success rate and the number of cases granted legal assistance are set out on the EOC website (<https://www.eoc.org.hk>) in the “Work Highlights” and “Statistics on Enquiries, Complaints and Legal Assistance” webpages.

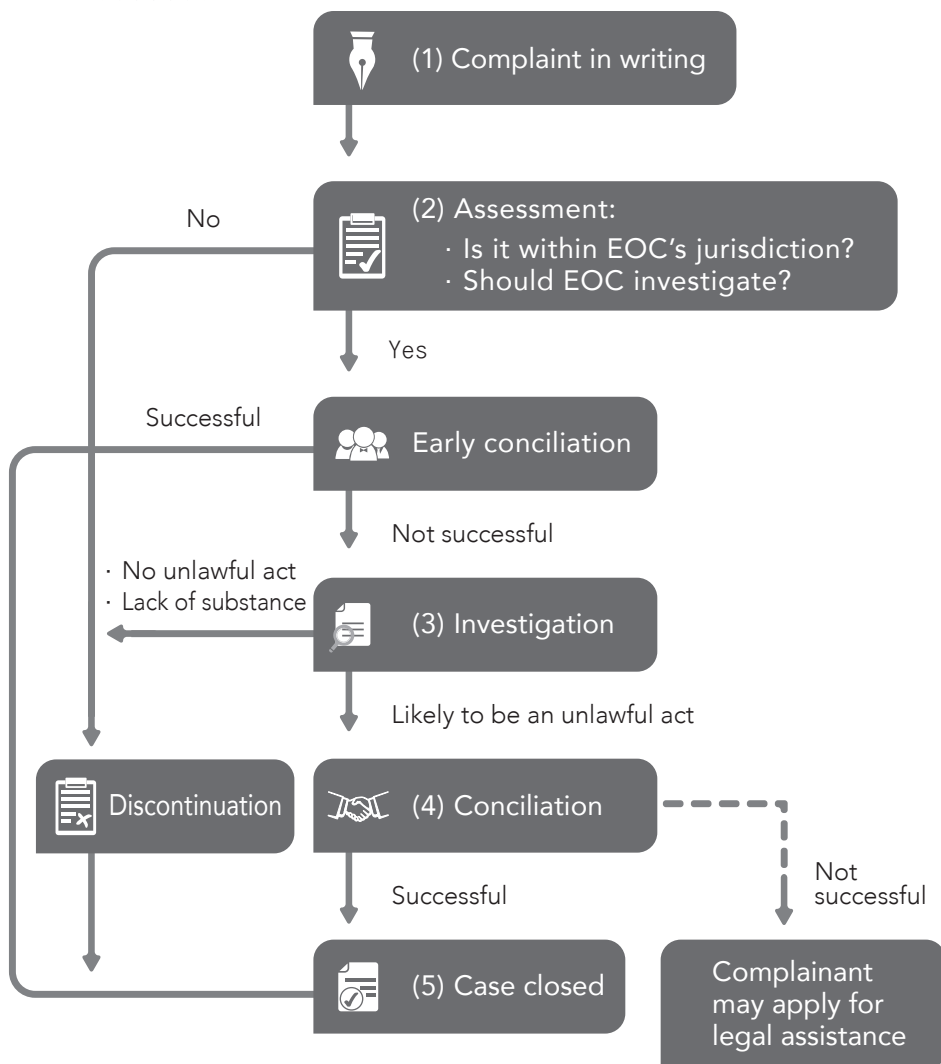
In producing this book, the EOC’s aims are multi-fold. First, by discussing typical discrimination cases, the Commission hopes to encourage those who face similar situations to seek redress. In addition to clarifying the application of the anti-discrimination ordinances and raising awareness of one’s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

Furthermore, 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. At all stages of the complaint-handling process, the EOC adopts a “victim-centric” approach, which recognises and pays special attention to the special needs of victims while adhering to the principles of fairness and impartiality.

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 society for all.

# Lodging a Complaint with the EOC (Flow Chart)

## Taking a Complaint to the EOC







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# Conciliated Cases

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# Just a Regular Check-up?

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*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 conduct of a sexual nature, 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. Besides expressing apology in writing, the doctor agreed to make a monetary payment to Ah Fa.

#### **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.

### Power Imbalance

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*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 conduct 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

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*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 sexual 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.

# What Does Marriage Have to Do with It?

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*To this day, the stereotypical belief that married women are indifferent to their career growth and unwilling to work overtime or irregular hours persists among some employers. Their recruitment decisions are driven by these assumptions, rather than based on an objective assessment of the individual's abilities and circumstances.*

### The Complaint

Jenny saw an online job posting from a marketing company for a personal assistant opening. Two days after she applied for the position, she received a call from a person claiming to be a supervisor at the company. He said that his boss found her a very suitable candidate, and commended her about her experience and the awards she had won.

The supervisor then asked Jenny to send over full body pictures of herself, saying he needed to see if her dressing style fit in with the company's image. Upon receiving the photos, he said, "You have such a great figure. It's turning me on." He added that the job required her to be unmarried and single, and she would have to act as if she was the boss's girlfriend, have sexual relations with him, and attend banquets with him wearing scanty clothing. When she told him she was married and would not be able to comply with the said requirements, the supervisor said she was not suitable for the job.

### What the EOC did

Jenny lodged a complaint with the EOC under the Sex Discrimination Ordinance (SDO), alleging that the supervisor had sexually harassed her, and that his employer (the Respondent) had discriminated against her on the ground of her marital status while being vicariously liable for the supervisor's sexual harassment act.



The Respondent said that the supervisor asked about Jenny's marital status because they had previously employed a married person who refused to take calls after work and on public holidays, leading to complaints from clients. The parties agreed to early conciliation and reached a settlement, with the Respondent agreeing to make a monetary payment to Jenny.

### Points to Note:

- Under the SDO, it is unlawful for an employer to treat a job applicant less favourably on the ground of his/her marital status, such as by refusing employment. During an interview, employers are advised to raise questions directly related to the nature and genuine requirements of the job, such as whether the candidate is willing to work overtime or answer calls from clients at night. Assumptions and questions based on an applicant's marital status should be avoided.
- Under the SDO, unlawful sexual harassment occurs if an employer or employee engages in conduct of a sexual nature in relation to a job applicant (including but not limited to making a sexual advance or a request for sexual favours), where the conduct is unwelcome to the applicant, and a reasonable third person, having regard to all the circumstances, would have anticipated that the applicant would be offended, humiliated or intimidated by the conduct. Whether the conduct was a one-off incident is irrelevant.
- An employer is vicariously liable for any unlawful act of sexual harassment committed by their employees in the course of their employment, whether or not it was done with the employer's knowledge or approval. This is unless the employer can show that reasonably practicable steps have been taken to prevent the act.
- Some examples of preventive measures may include formulating a comprehensive anti-sexual harassment policy (covering the definition of sexual harassment, complaint-handling procedures, information of contact persons, etc.), informing employees of the policy through different channels, and providing relevant training for staff on a periodic basis.

# Being Pregnant is Not a Crime

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*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 to accept it. 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 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.

## Disability Discrimination

### From Sick to Sacked

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*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

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*The EOC believes every child should have equal access to quality education. The right to equal education opportunities is protected under 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" mode, 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 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

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*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 the service providers' lack of understanding of their liability.*

### The Complaint

Mr Lee was visually blind. 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 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 still 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

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*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.

# Improving Fire Safety for People with Hearing Challenges

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*Fire alarms help to keep people safe by facilitating speedy evacuation. Their sounds, however, can easily escape the notice of people with hearing challenges. What can be done to ensure their safety in case a fire breaks out?*

### The Complaint

Ka-wai is a person with hearing challenges who lives in a public housing unit with his family. One day, when he was home alone, he looked out of the window and saw that the street downstairs had been lined with fire engines and ambulances. Only then did he realise a fire had broken out in the building next to his. He opened the door, only to find out all of his neighbours had evacuated. He was the only one left in the dark.

He later visited the Estate Office and asked for a visual fire alarm to be installed in his unit, so that he could escape in time in case of a fire. A staff member allegedly rejected his request, citing concerns about the building's structure and adding that no approval had been given by management for the installation. Ka-wai subsequently lodged a representative complaint with the EOC, alleging that the relevant department had discriminated against him on the ground of his disability.

## ★ What the EOC did

After EOC contacted the department (the Respondent), the parties agreed to attempt early conciliation. The Respondent said that prior to the incident, it had already picked a public housing unit for installing a visual fire alarm system under a trial scheme. The trial was soon rolled out and the system proved ready for wide adoption after six months of assessment. The Respondent then started accepting applications for free installation of the system from tenants of public housing units with hearing impairment. Whenever the fire siren went off, the light on the visual alarm system would start flashing in sync. This effectively solved Ka-wai's problem. The case was concluded successfully through conciliation.

## ✦ Points to Note:

- Under the Disability Discrimination Ordinance (DDO), if a service/facility provider applies a condition (e.g. being able to hear the sound of a fire alarm) to all service/facility users that adversely and disproportionately affects those with a disability (e.g. people with hearing challenges) because they are unable to comply with it, and the service/facility provider cannot show the condition to be justifiable, it may amount to indirect disability discrimination.
- It is unlawful for a service provider to discriminate against a person on the ground of disability in the manner in which the services are provided, or by refusing to provide services to that person unless provision of the services would impose unjustifiable hardship on the provider.

- What constitutes unjustifiable hardship is to be determined by reference to all relevant circumstances of a case, including but not limited to: the reasonableness of the accommodation to be made available to the person with disability; the effect of the disability concerned; the financial circumstances of and the estimated amount of expenditure (including recurrent expenditure) required to be made by the person claiming unjustifiable hardship; and the nature of the benefit likely to accrue, or of the detriment likely to be suffered by any persons concerned.
- A central idea of the United Nations Convention on the Rights of Persons with Disabilities is that the challenges facing people with disabilities are not inherent in them, but rather result from environmental or attitudinal barriers. To enable them as well as other communities to participate in different aspects of life with greater independence, the EOC believes that the idea of universal design should be more widely adopted. This means creating goods, services and facilities with the needs of different social groups in mind, including people with disabilities, the elderly, carers and others, and ensuring they are accessible to a broader spectrum of society.

### Fold Your Stroller

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*It is common for parents travelling with a child in a stroller to be asked to fold the stroller when getting on a bus. But what if the child has mobility challenges and is too heavy for the parent to hold? What should the bus driver do?*

#### The Complaint

Mr Luk has a four-year-old daughter with physical impairment. He and his wife have to put her in a stroller whenever they go out. In the past, there was one time when they were trying to get on a bus and the driver not only asked them to fold the stroller, but also made offensive remarks about their daughter. They complained to the bus company, who said that passengers wouldn't have to fold the stroller upon presenting a "Registration Card for People with Disabilities" (RC) issued by the Government for their child who had disability. The company also undertook to provide relevant guidelines for all drivers.

On a rainy day a few months later, however, Mrs Luk ran into the same problem when taking her daughter to school. The bus driver only opened half of the door and signalled to Mrs Luk that she had to fold the stroller. Showing her daughter's RC, she told him the bus company had said that the rule could be relaxed under such circumstances. Still, the driver insisted, saying he had never been informed of the policy. Eventually he drove away, causing them to be late for school.

## ★ What the EOC did

Mr Luk lodged a complaint with the EOC on behalf of his daughter, alleging that the bus driver had discriminated against her on the ground of her disability. Through conciliation by the EOC, he reached a settlement with the bus company. The company agreed to:

1. Issue a staff circular stating that children with physical impairment can stay in a stroller or paediatric wheelchair when getting on the bus, and providing a sample RC as reference while adding that presentation of the RC is not a necessary condition for the rule to be relaxed;
2. Spread the above message to the public through its official website and social media platforms; and
3. Liaise with civil society groups to further communicate the policy to parents and others in need.

## 📌 Points to Note:

- Under the Disability Discrimination Ordinance, indirect disability discrimination may occur if a service provider imposes a requirement on all customers that is not justifiable, and disproportionately and adversely affects people with a disability because they cannot comply with it.
- Employers are vicariously liable for any unlawful act of discrimination committed by their employees, including frontline staff, in the course of employment, whether or not they knew of or approved the act. A defence may be available if the employer can prove that they have taken reasonably practicable steps to prevent the act.
- Employers are advised to issue clear guidelines and provide training for both new recruits and existing staff, in order that they understand the importance of providing reasonable accommodation for people with disabilities and their carers.



### Feeling Excluded at a Concert

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*More and more cinemas and performance venues are including wheelchair spaces in their seating plans, allowing wheelchair users to watch art shows and entertainment events alike. However, they remain limited in number and are often confined to a small area, leaving wheelchair users with not much of a choice.*

#### The Complaint

Claire is a wheelchair user. Reading online that her favourite band would be having a concert soon, she made a date with a friend to go see it together. When the organiser first announced the ticket prices, they didn't specify which ones applied to wheelchair spaces. Only until they released the seating plan did Claire find out that there was only one ticket option available for wheelchair users, and all the seats were confined to an area designated as the "Wheelchair Zone".

Claire and her friend decided to pick seats in another zone, which were more expensive but also accessible as they were located on flat ground. Unfortunately, on the day of the concert, staff of the organiser denied them admission to the seats they bought, citing safety concerns. They were directed to the Wheelchair Zone and given a refund of the price difference. To their disappointment, there were mill barriers in front of the zone, blocking their sight.

## ★ What the EOC did

Claire lodged a complaint with the EOC under the Disability Discrimination Ordinance (DDO), alleging that the organiser (the Respondent) had discriminated against her on the ground of her disability by confining all wheelchair spaces to one area in the seating plan, in effect providing her with much fewer options than those available for non-wheelchair users. Further, given that the venue was all flat land, she believed that there were no environmental constraints preventing the organiser from providing wheelchair spaces across different zones in the first place.

The parties reached a settlement following investigation and conciliation by the EOC. The Respondent agreed to issue a written apology to Claire and, starting from three months after the date of the conciliation agreement, undertake the following in relation to any new event the Respondent is contracted to organise and plan: (i) providing information on barrier-free seats (including prices, locations and enquiry contacts) in publicity materials; (ii) distributing wheelchair spaces across different zones in the seating plan; and (iii) reminding staff members to be mindful of their attitude towards wheelchair users and enhancing their awareness of accessibility issues.

## ★ Points to Note:

- Under section 6 of the DDO, disability discrimination occurs when a person with a disability is, on the ground of his/her disability, treated less favourably than a person without a disability.
- Under section 9 of the DDO, a person is deemed to discriminate against another person on the ground of his/her disability if the former treats the latter less favourably because of the fact that the latter is accompanied by or in possession of an auxiliary aid used by him/her (e.g. a wheelchair).
- Section 26 of the DDO makes it unlawful for service providers to discriminate against a person with a disability in the conditions or manner in which they provide the relevant service, unless not doing so would impose unjustifiable hardship on the service provider.
- What constitutes unjustifiable hardship is to be determined by reference to all relevant circumstances of the case, including: the reasonableness of the accommodation to be made available to the person with disability; the effect of the disability concerned; the financial circumstances of and the estimated amount of expenditure (including recurrent expenditure) required to be made by the service provider claiming unjustifiable hardship; and the nature of the benefit likely to accrue, or of the detriment likely to be suffered by any persons concerned.
- In this case, wheelchair users are likely to suffer less favourable treatment because of the seating arrangements by the concert organiser, which give non-wheelchair users a much wider range of seat options. Also, the organiser may be unable to claim unjustifiable hardship as a defence since the venue, being on flat land, could have allowed the inclusion of wheelchair spaces

across different zones. The arrangements therefore may constitute unlawful disability discrimination.

- Event organisers are advised to accommodate the needs of people with disabilities and other communities as far as practicable, beginning from the early stages of event planning. This would help to ensure compliance with the law, as well as expand the customer base and facilitate business growth.

### A Sudden Firing

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*Many people in Hong Kong hire a foreign domestic worker to share the burden of doing household chores and looking after family members. Currently, there are nearly 400,000 foreign domestic workers in the city. They, too, are entitled to the protections of the anti-discrimination ordinances.*

#### The Complaint

Nia had been working in Hong Kong as a domestic worker for many years. Having worked for four families and completed her contract with the fourth, she signed a contract with a new employer through an agency. On her first day, when Nia reported duty at the agency office, she was asked to do a medical check-up. A few days later, her agent texted her, asking her if she had had breast surgery before and whether she needed medication. Nia replied with a call, saying she was diagnosed with breast cancer and had surgery two years ago. After recovering, she only had to take medicine once a day. Her doctor had advised that she could keep on working, and so she continued to work for her former employer for a year until the contract was completed.

Upon hearing this, the agency asked Nia to write a letter declaring that she would resign if her breast cancer recurred. They added that they would inform her employer of her situation and let them decide if the employment should continue. Two days afterwards, Nia received an update from the agency. They said the employer had decided to terminate the contract.

## ★ What the EOC did

Nia lodged a complaint with the EOC, alleging that the new employer (the Respondent) had discriminated against her on the ground of her disability. The Respondent claimed that they terminated the contract because they had found a day care centre for their child and no longer needed Nia's assistance. Through conciliation by the EOC, the parties settled their dispute with the Respondent agreeing to make a monetary payment to Nia.

## 📌 Points to Note:

- Under the Disability Discrimination Ordinance (DDO), disability is defined to include not only disabilities which presently exist, but also those which previously existed, may exist in the future, or are imputed to a person.
- While Nia has had surgery and recovered, her previous breast cancer and its possible recurrence in the future both fall within the definition of disability under the DDO.
- It is generally unlawful for an employer to discriminate against an employee on the ground of his/her disability, such as by dismissing him/her. However, under section 12 of the DDO, if the employee, due to his/her disability, is unable to fulfil the inherent requirements of the job in question or requires services or facilities in order to fulfil those requirements (and providing such accommodation would impose an unjustifiable hardship on the employer), then the discriminatory act may not be unlawful – the factors to take into account include the employee's performance, qualifications, experience and past training, as well as other relevant circumstances of the case.
- Here, after her surgery, Nia continued to work for her former employer for a year until the contract was completed. Further, her doctor had advised that she only had to take medication once a day, and it would not be a problem for her to work like she used to. This sufficiently indicates that she would be able to carry out the inherent requirements of her employment as a domestic worker.

# Transgender Customer Denied Access to Fitting Room

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*A transgender person relates to a gender identity that does not correspond to the sex assigned at birth. Notably, the latest edition of the International Classification of Diseases (ICD-11) published by the World Health Organization no longer classifies being transgender under the section "Mental or Behavioural Disorders", but rather as one of various "Conditions Related to Sexual Health". The official name has also been revised from "gender identity disorder" to "gender incongruence", echoing international calls for depathologisation and destigmatisation.*

*While there is currently no express protection against discrimination on the ground of gender identity under Hong Kong's anti-discrimination ordinances, gender incongruence may fall within the definition of disability under the Disability Discrimination Ordinance (DDO). Therefore, transgender people may consider seeking redress under the DDO when subject to discrimination.*

## The Complaint

Jo is a transwoman, meaning that she identifies as female although she was assigned male at birth. Having undergone sex reassignment surgery, she has applied successfully for her identity card to indicate that she is female.

One day, while shopping at a woman's clothing store, Jo asked the store manager if she could try on a sports bra in the fitting room. The manager told her that she would have to purchase it and try it on at home, and if it didn't fit, she could return it and get a different

size at the store. As Jo walked towards the cashier, she saw another customer leaving the fitting room and holding the exact same product as the one she was about to buy.

Questioned by Jo, the manager said that only female customers could access the fitting room. Jo immediately presented her identity card, which says she is female. Still, the manager insisted that she was not allowed to use the room. Jo then explained that she is a transwoman, showing the manager her Registration Card for People with Disabilities issued by the Government. The manager did not budge. This led Jo to lodge a complaint with the EOC, alleging that the store had discriminated against her on the ground of her disability.

### ★ What the EOC did

After the EOC contacted the company which owned the store ("the Respondent"), both parties agreed to attempt early conciliation to resolve the dispute. A settlement was reached, with the Respondent undertaking to issue a letter of apology to Jo and provide their employees with gender awareness training in order to enhance their sensitivity towards the LGBT community. To further demonstrate sincerity, the Respondent took the initiative to offer complimentary gifts to Jo.



### ★ Points to Note:

- Under the DDO, disability discrimination occurs when a person, on the ground of her/his disability, is treated less favourably than a person without a disability.
- It is unlawful for a provider of goods, services or facilities to discriminate against a customer on the ground of her/his disability by refusing to provide those goods, services or facilities to her/him (unless the exemptions under section 26(2) of the DDO apply).
- It is not uncommon for transgender people to regard being transgender as simply an identity rather than a disease, hence their reluctance to be defined as people with a “disability”. Nonetheless, as gender identity is not an expressly protected characteristic under Hong Kong’s anti-discrimination ordinances, the DDO serves as the only available basis for transgender people to lodge a complaint with the EOC when they are discriminated against by employers, educational establishments and service providers alike. The EOC recognises that the current legislation is not ideal, and therefore has conducted research and advocacy over the years in relation to legislating against discrimination on grounds of gender identity (and sexual orientation). For details, please visit the EOC website.

## Family Status Discrimination

### Family or Job First

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*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's 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.

# The Fatherhood Penalty

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*As more people shake off the shackles of traditional gender roles, child-rearing is no longer a woman's job alone. In Hong Kong, statutory paternity leave took effect in 2015, and was extended from three to five days in 2019. New fathers now have more time to learn the ropes of taking care of their newborns while providing emotional support to postpartum mothers.*

### The Complaint

Mr Ho was employed as a foreman at a construction company. When his wife got pregnant, he decided to apply for paternity leave so that he could help her look after the baby after it was born. When he first mentioned his plan to his employer, a manager told him he wasn't entitled to paternity leave since he was a contract worker. However, under the Employment (Amendment) Ordinance 2014, provided that notice has been given to the employer in accordance with the law, male employees are eligible if they have been employed under a "continuous contract", meaning that they have been employed by the same employer for four weeks or more, and have been working for at least 18 hours a week.

The terms of Mr Ho's employment met the requirements of a continuous contract. But before he had a chance to reason with his employer, the HR department informed him that his contract had been terminated since his performance had been unsatisfactory. He found this implausible, as he had just been given a pay raise not long ago. He believed the company had dismissed him because he had applied for paternity leave and taken up the responsibility to look after his wife and their soon-to-be-born child.

## ★ What the EOC did

Mr Ho lodged a complaint with the EOC against the construction company (the Respondent), alleging that they had discriminated against him on the ground of his family status. The case was settled through early conciliation. The Respondent agreed to pay Mr Ho a sum more or less equivalent to the paternity leave pay he would have received.

## ✦ Points to Note:

- Under the Family Status Discrimination Ordinance, a person with “family status” is someone who has responsibility for the care of an immediate family member, who can be anyone related to that person by blood, marriage, adoption or affinity. Examples include one’s biological mother, father, sister, brother, daughter, son, grandmother, grandfather, grandchild, aunt, uncle, cousin, niece and nephew; spouse; lawfully adopted children; and parents- and siblings-in-law.
- Unlawful family status discrimination occurs when an employer treats an employee less favourably on the ground of his/her family status, such as by terminating his/her contract.
- Granting paternity leave to eligible employees is not only a matter of legal obligation for employers, but also an integral part of a family-friendly corporate culture that can help boost employees’ morale and productivity. It is a win for all.

# Breastfeeding Not Allowed in Libraries?

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*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) in the past. Starting from 19 June 2021, women in Hong Kong are protected from discrimination and harassment on the ground of breastfeeding under the Sex Discrimination Ordinance (SDO), which stipulates that breastfeeding discrimination and harassment is unlawful in various areas of public life, such as employment; education; provision of goods, facilities or services; and disposal or management of premises.*

## 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.

\*Starting from 19 June 2021, the Sex Discrimination Ordinance prohibits discrimination and harassment on the ground of breastfeeding.

## ★ What the EOC did

The case was settled through early 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 may seek assistance from the library staff whenever necessary.

## ✈ Points to Note:

- The EOC considers complaints by breastfeeding women as family status discrimination in the past. Starting from 19 June 2021, the amended SDO has provided further *locus standi* to protect breastfeeding women from discrimination and harassment. Under the amended legislation, breastfeeding is defined as where: (i) a woman is breastfeeding a child; (ii) a woman is expressing breast milk; or (iii) a woman feeds a child with her breast milk, but is not doing so when the relevant act is committed.
- 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?

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### 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 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 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

Though 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.

\*Starting from 19 June 2021, the Sex Discrimination Ordinance prohibits discrimination and harassment on the ground of breastfeeding.

### 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.

# Culturally Sensitive Enough?

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*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 and 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 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 responsibilities to serve customers, with the knowledge and skills to sensitively deal with different customer groups.
- The EOC encourages providers of goods, facilities and services to cater for a diverse range of customers, as this promotes not only racial harmony, but also business opportunities.

# Necessary Requirement for the Job

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*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 is 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 of a job.
- The EOC encourages employers to promote workplace diversity and nurture an inclusive work environment. In fact, workplace diversity can have real benefits, as the exchange of different perspectives can help foster creativity and innovation.

# The Bank that Said No

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*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 service, 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.



### "You Must Speak Chinese"

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*Non-ethnic Chinese make up around 8% of the Hong Kong population. Some were born and raised in the city; others came from other parts of the world. The language a person feels most comfortable speaking is not necessarily linked to his or her race and skin colour; the linguistic environment of one's upbringing and schooling plays a vital part. In any event, we should avoid making assumptions and engaging in discriminatory and offensive behaviour.*

#### The Complaint

John is a Chinese Australian living and working in Hong Kong. He mostly speaks English in his daily life. One day, when he was shopping in a supermarket, he asked a cashier, a Caucasian, if there was any discount for the toilet paper he was buying. He asked the question twice in English but the cashier didn't respond on both counts. When he asked it the third time, again in English, the cashier said yes in Putonghua and added in English, "You're Asian. You don't deserve to speak to me in English. Talk to me in Chinese or else I won't serve you."

John immediately sent to a complaint email to the company that managed the supermarket. The customer service department later got in touch with John, saying that the cashier acted the way he did because he was occupied with scanning goods and affected by the noise in the surroundings.

#### ★ What the EOC did

Unconvinced, John lodged a complaint with the EOC, alleging that the cashier had racially harassed him with an insult about him being Asian and discriminated against him on the ground of his race by refusing to serve him unless he spoke Chinese. He added that the cashier's employer (the Respondent) was vicariously liable for the alleged acts.

John and the Respondent agreed to early conciliation and settled their dispute after the Respondent undertook to issue a letter of apology and make a donation to a non-profit organisation specified by John.

### **Points to Note:**

- Under the Race Discrimination Ordinance (RDO), it is unlawful for a service provider to treat a customer less favourably by refusing to serve the customer on the ground of his/her race, or by refusing to serve the customer in the same manner or on the same terms as with other customers on account of his/her race.
- Here, assuming that the cashier normally wouldn't require customers to speak Chinese and that, because John was Asian, he required John to do so or else he wouldn't serve him, then this may constitute unlawful racial discrimination.
- Further, if a service provider engages in any unwelcome conduct (including oral and written statements) towards a customer on the ground of his/her race, where a reasonable person, having regard to all the circumstances, would have anticipated that the customer would be offended, humiliated or intimidated, the conduct would amount to unlawful racial harassment under the RDO. (Note: Conversely, it is also unlawful for a customer to racially harass a service provider.)
- Where an employee commits an unlawful act under the RDO in the course of his/her employment, the employer will be held vicariously liable for the act (whether or not it was done with the employer's knowledge or approval), unless the employer can prove that reasonably practicable steps were taken to prevent the employee from doing the act. Examples of preventive measures may include establishing a comprehensive anti-racial discrimination policy and providing relevant training to employees on a periodic basis.

### Get out from the Common Areas

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*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, breastfeeding, family status, disability and race during their stay and employment.*

#### The Complaint

Lina is 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 on the spot. 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 at 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 co-operate 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 done 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 proactively effort made to promote amicable neighbourly relations, so as to avoid possible legal liabilities.

# Unlawful Act of Inciting Hatred through the Internet

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*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 national origin 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.

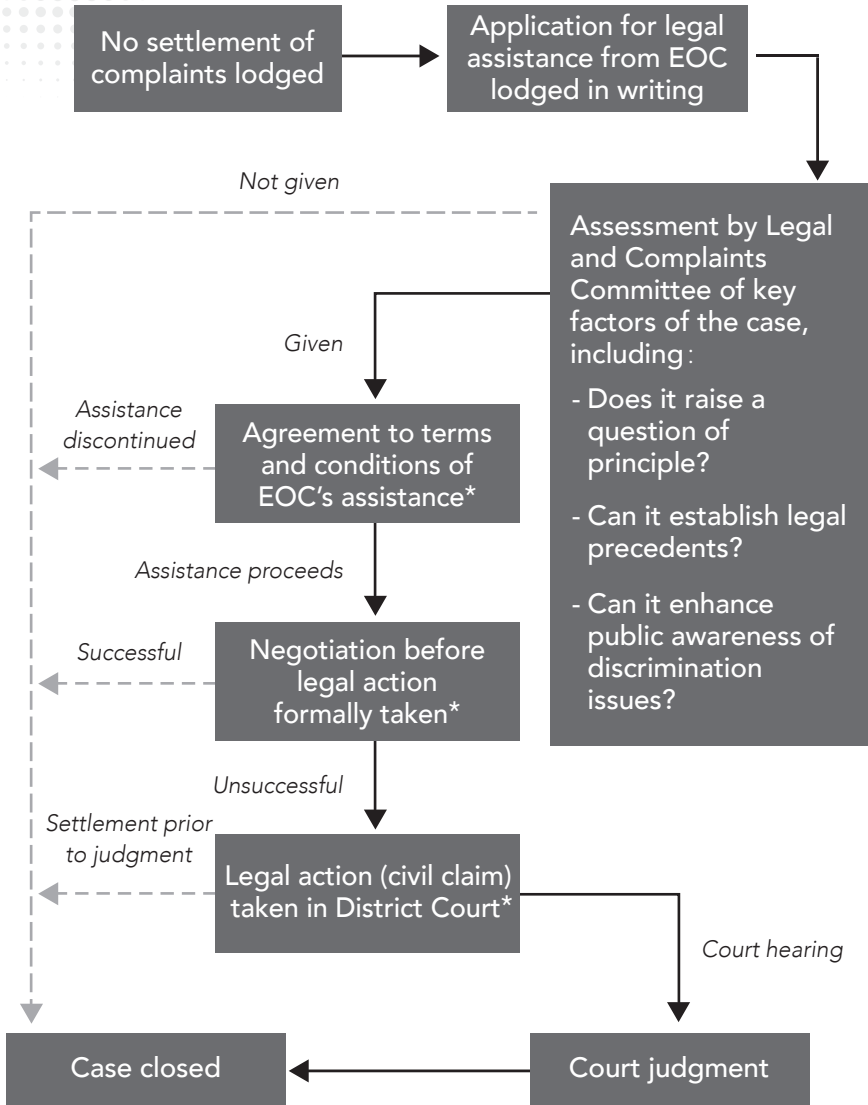
Under Section 48 of the RDO, the website company could be seen as aiding the unlawful act if it allowed its members to post such remarks.

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 unlawful discriminatory remarks.

### ✦ Points to Note:

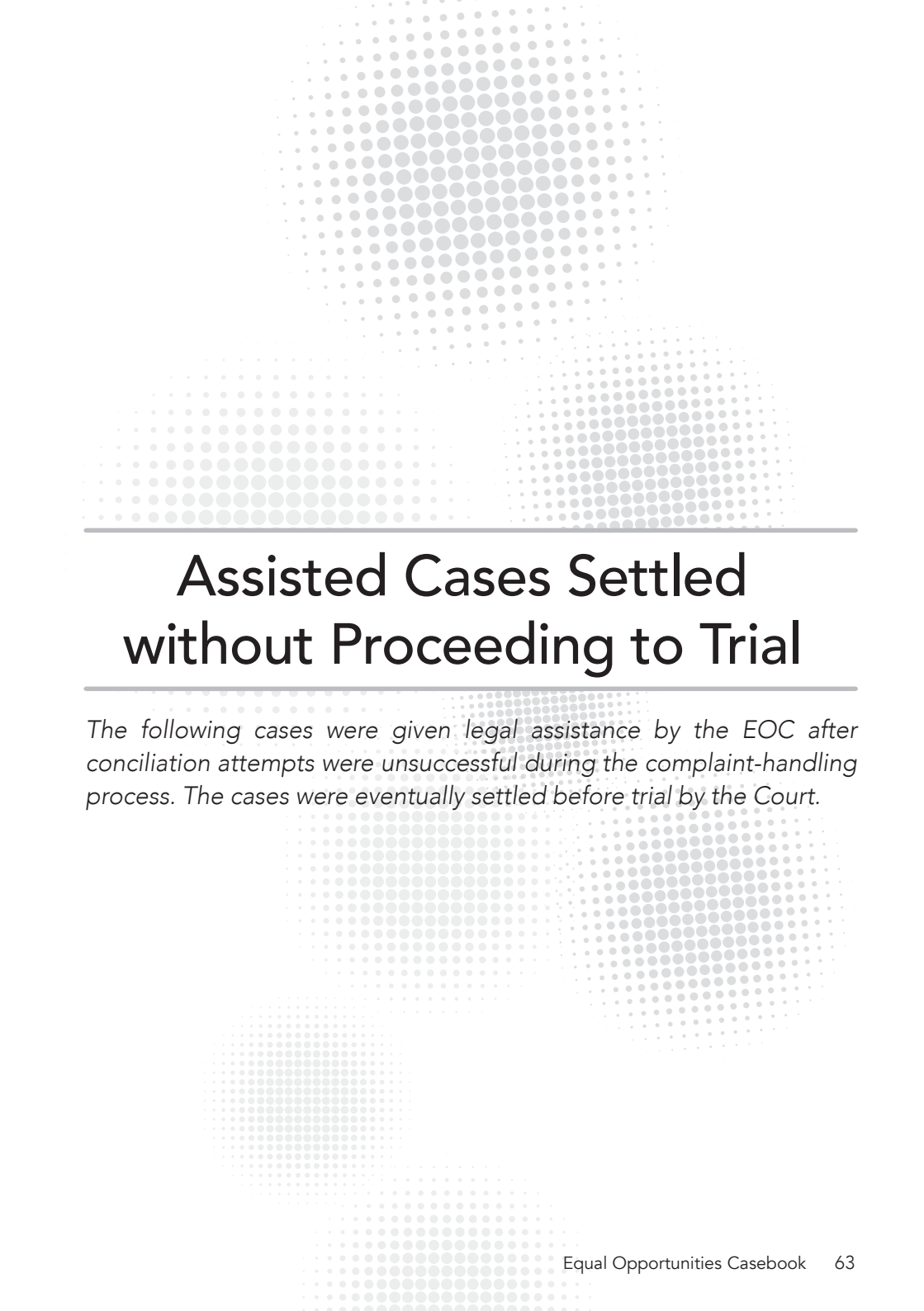
- Although the Internet offers anonymity in expressing one's opinion, verbal and written comments which vilify a person on the basis of his/her race may still be unlawful. Aside from such comments, vilification covers any "activity in public", including any form of communication to the public (such as broadcasting, screening and 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 end-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 fine of a maximum of HK\$100,000 and imprisonment for a maximum of two years.

# Applying for Legal Assistance (Flow Chart)



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





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## Assisted Cases Settled without Proceeding to Trial

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*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

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*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 subject 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 the performance of 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 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.

### Half-baked Policies Won't Do

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*Under the Sex Discrimination Ordinance (SDO), not only is sexual harassment between employees unlawful, but their employer can also be held liable for the harassing act, unless reasonably practicable steps have been taken to prevent it.*

#### The Complaint

Kay was employed by a global insurer (the Insurer) with office in Hong Kong. Five years into Kay's employment, her colleague Mr X was assigned to the workstation next to hers, with only a neck-level partition between them.

Kay alleged that over the subsequent eight months, Mr X sexually harassed her on multiple occasions by spreading his legs open towards her, staring at her chest, putting a piece of body hair on her desk, and sending her lewd and vulgar texts on SMS, among other acts. She expressed her disgust and repulsion every time they occurred.

When she filed a complaint to senior management of the Insurer, however, it was dismissed without any internal investigation. She was only given the option of swapping seats with another colleague, who previously sat directly behind her.

#### What the EOC did

Kay lodged a complaint with the EOC, alleging that Mr X had sexually harassed her in the workplace, and that the Insurer should be held vicariously liable for his acts. After the parties failed to reach a settlement through conciliation arranged by the EOC, Kay applied successfully for legal assistance from the EOC.

On behalf of Kay, the EOC's Legal Service Division (LSD) took part in negotiations with a law firm that represented both Mr X and the Insurer. The firm argued that even if Mr X's primary liability was proven, the Insurer could raise a defence under the SDO as it had issued an internal employee handbook, a business conduct policy and a whistle-blowing policy (collectively "the Documents") that covered issues of sexual harassment, which would constitute "reasonably practical" steps to prevent the alleged acts.

On examining the Documents, the LSD took the view that they were inadequate. For instance, they did not provide any definition or examples of sexual harassment, nor had they established procedures or designated personnel to handle complaints. The Insurer also had not provided any relevant training for its employees. The mere fact that Kay and Mr X had confirmed their receipt of the Documents could not plausibly amount to the Insurer having taken reasonably practicable steps to prevent Mr X's alleged acts.

Furthermore, the Documents were dated after the occurrence of some of the alleged acts. In other words, the measures taken by the Insurer after the alleged incidents had occurred were at best remedial in nature, rather than preventive. They would not be sufficient for the Insurer to avail itself of the statutory defence and discharge its vicarious liability.

Eventually, Kay agreed to settle her complaint against both Mr X and the Insurer, with the latter paying her monetary compensation on a "without admission of liability" basis.

### Points to Note:

- Employers should note that having an inadequate and out-of-date anti-sexual harassment policy, and with no proper relevant training provided to their employees, may fall a long way short of establishing that “reasonably practicable” steps were taken to prevent employees from engaging in acts of sexual harassment. The statutory defence is therefore unlikely to be available in these circumstances.
- The EOC provides anti-sexual harassment training for both public and private organisations on an ongoing basis. For details, please visit the EOC website.

# Job Application by Pregnant Women

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*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

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*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 elderly 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 for 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.

### Victimisation

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*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 plan to lodge a complaint or take legal action relating to disability discrimination.

# Making ATMs More Accessible

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*For many people, automated teller machines (ATMs) are a common way to conduct banking activities, particularly withdrawing cash. However, ATMs that are not equipped with a voice navigation system can be difficult for people with visual impairment to use independently.*

### The Complaint

Jay, a person with visual impairment, is a customer of a bank (the Bank). He complained to the EOC that the Bank had discriminated against him on the ground of his disability by failing to install ATMs equipped with voice navigation (Voice Navigation ATMs, also known as talking ATMs), and as a result he was not able to operate the Bank's ATMs independently.

### What the EOC did

The parties did not reach a settlement through conciliation arranged by EOC. Jay then applied for and was granted legal assistance by the Commission.

The parties subsequently returned to the negotiating table and reached a settlement whereby the Bank agreed to install Voice Navigation ATMs widely in Hong Kong and to ensure that such ATMs have certain important functions such as cash withdrawal, balance check, transfer of funds to accounts and change of ATM password.

### Points to Note:

- Under the Disability Discrimination Ordinance (DDO), it is unlawful for a service provider to discriminate against a person on the ground of disability in the manner in which the services are provided, or by refusing to provide services to that person unless provision of the services would impose unjustifiable hardship on the provider.

- What constitutes unjustifiable hardship is to be determined by reference to all relevant circumstances of the case, including: the reasonableness of the accommodation to be made available to the person with disability; the effect of the disability concerned; the financial circumstances of and the estimated amount of expenditure (including recurrent expenditure) required to be made by the service provider claiming unjustifiable hardship; and the nature of the benefit likely to accrue, or of the detriment likely to be suffered by any persons concerned.
- Although the DDO does not expressly require banks to install Voice Navigation ATMs, a bank would contravene the DDO if: (a) it refuses to provide them for people with visual impairment to access ATM services independently; and (b) it cannot be shown that providing such ATMs would impose unjustifiable hardship on the bank.
- As a result of the settlement reached in this case, people with visual impairment can now use the ATMs of the Bank independently. Besides, people who have deteriorating eyesight, such as some senior citizens, and those who are illiterate can also benefit from the Voice Navigation ATMs. This case, therefore, has helped to substantially improve the services provided by the Bank to these communities, as they no longer have to wait in line to speak to a teller and ask for assistance with an ATM, where they may risk disclosing personal banking information to others.
- The Hong Kong Association of Banks issued a Practical Guideline on Barrier-free Banking Services (the Guideline) in March 2018, which advises that Voice Navigation ATMs should be provided wherever feasible and that certain features should be gradually implemented for each Voice Navigation ATM. In this light, banks are strongly encouraged to install Voice Navigation ATMs in order to comply with the Guideline and avoid contravening the DDO.

# Once is Enough!

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*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 works as a security guard. She walks 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 higher 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.

# Disqualified for Family Ties

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*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 is 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 later 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.



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# EOC Court Cases

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*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.*

# A v Chan Wai Tong

DCEO 7/2009

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### 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 Sex Discrimination Ordinance.



### 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:

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

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.

## Sexual Harassment

### **L v David Roy Burton**

DCEO 15/2009

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#### 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 Sex Discrimination Ordinance (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.

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

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.



# B v King of the King Group Limited

DCEO 9/2010

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### 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.

# Lau Hoi Man Kathy v Emaster Consultants Ltd

DCEO 11/2012

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### 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 her 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 Sex Discrimination Ordinance 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:

Maternity leave pay	HK\$ 20,072.74
Exemplary damages	HK\$ 20,000.00
Injury to feelings	HK\$ 50,000.00
Loss of income	HK\$ 696.97
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	<b>HK\$ 90,769.71</b>
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# Chan Choi Yin v Toppan Forms (Hong Kong) Ltd

DCEO 6/2002

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### 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 Sex Discrimination Ordinance (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:

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

# Tsun Sau Ching v Cheung Hung Aluminium Decoration Engineering Company Limited

DCEO 3/2018

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### Background

The Claimant was employed by the Respondent from 1 July 2014 to 10 July 2016 as a clerk. She alleged that Mr Chan, shareholder and director of the Respondent, pressured her to resign in June 2016 after learning in late May 2016 that she was pregnant. He allegedly said that if she didn't resign as told, he would reassign her to a hot and remote location to work, and she would have a very hard time.

The Claimant lodged a pregnancy discrimination complaint with the EOC against the Respondent. Soon afterwards, she miscarried and applied for sick leave to undergo surgery and recover from the miscarriage. Two days after she returned to work, she received a notice signed by Mr Chan saying that she had been dismissed because of her poor performance. She then lodged an additional complaint with the EOC, alleging that the Respondent discriminated against her on the ground of her disability.

Subsequently, in an email and a letter to the Claimant, the Respondent informed her that she would not be given any severance payment or proof of employment because she had lodged the aforesaid disability discrimination complaint with the EOC.

The parties failed to reach a settlement through conciliation arranged by the EOC. The Claimant then applied for and was granted legal assistance by the EOC. On behalf of the Claimant, the EOC issued legal proceedings under the Sex Discrimination Ordinance (SDO) and the Disability Discrimination Ordinance (DDO) against the Respondent in the District Court, claiming that the Respondent had engaged in unlawful pregnancy discrimination, disability discrimination and discrimination by way of victimisation against the Claimant.

## The Court's decision

While the Court acknowledged that the Claimant's miscarriage and post-surgery physical ailments came within the definition of disability under the DDO, her sick leave application only cited general gynaecological reasons. On this evidence the Court concluded that at the time of the dismissal, the Respondent was unaware of the miscarriage and instead believed that the Claimant had taken sick leave for pregnancy-related reasons. The claim for disability discrimination was therefore dismissed.

However, the Court ruled that the Respondent had indeed, on the ground of the Claimant's pregnancy, pressured her to resign, make threatening remarks and eventually dismissed her. The acts amounted to unlawful pregnancy discrimination under the SDO. Moreover, the Court made it clear that the miscarriage was irrelevant in this regard given that, as mentioned, the Respondent had no knowledge of it at the time of the dismissal.

The Court also held that the Respondent had committed discrimination against the Claimant by way of victimisation contrary to section 7(1) of the DDO, by refusing to give her severance pay and proof of employment because she had lodged a disability discrimination complaint with the EOC.

The Claimant was awarded the following damages:

<b>Injury to feelings</b>	HK\$ 90,000
<b>Loss of income</b>	HK\$ 33,000
<b>Exemplary damages</b>	HK\$ 10,000
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	<b>HK\$ 133,000</b>
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When assessing damages for injury to feelings, the Court reaffirmed that the amount should reflect the Court's determination in protecting pregnant women, adding that HK\$55,000 should be the starting point. Taking into account the intense pressure to which the Respondent subjected the Claimant with the threatening remarks, and the fact that the Claimant had to put up with the Respondent's discriminatory acts after a physically and mentally debilitating miscarriage, the Court decided that an additional HK\$35,000 in damages for injury to feelings would be reasonable.

The Court further awarded exemplary damages since the Respondent not only insisted that he had not dismissed the Claimant on account of her pregnancy, but also questioned her pregnancy and miscarriage without any reasonable ground, and conducted his defence case in an unreasonable manner, wasting much of the Court's time.

The Court also ordered the Respondent to issue a proof of employment to the Claimant for her use in seeking jobs in the future.



# Lam Wing Lai v Y T Cheng (Chingtai) Ltd

DCEO 6/2004

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### 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 Sex Discrimination Ordinance and the Family Status Discrimination Ordinance.

### 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:

Loss of income	HK\$	88,500
Injury to feelings	HK\$	75,000
	<u>HK\$</u>	<u>163,500</u>

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.

# K & Ors v Secretary for Justice

DCEO 3, 4 and 7/1999

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### 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 Disability Discrimination Ordinance (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 hence 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:

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

# Kwok Wing Sun v Law Yung Kai Trading as Wan Kou Metal & Plastic Factory

DCEO 2/2007

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### 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:

Loss of income	HK\$ 43,500
Injury to feelings	HK\$ 55,000
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	HK\$ 98,500
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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.

# Equal Opportunities Commission v Director of Education

HCAL 1555/2000

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(Judicial Review involving issues of the Sex Discrimination Ordinance)

## 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 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.

# Secretary for Justice v Chan Wah

FACV 11 and 13/2000

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(A Case where EOC acted as Amicus Curiae)

## 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\* 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.

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.

\*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)

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 a 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.