THE LAW SOCIETY OF HONG KONG
香港律師會

Comments on the Revised Draft Code of Practice on Employment under the Race Discrimination Ordinance

1. Generally

The Revised Code (published in March 2009) is fundamentally different in both content and structure from the document produced for circulation in October 2008. In our view it should be treated as an entirely new document and all interested parties be given the opportunity to be fully consulted.

The EOC should be applauded for attempting to present a more practical document. However, there are certain areas (highlighted below) where we are of the view that the EOC has overstepped the mark in advising employers. For example, employers are not under any obligation to "*promote*" racial equality or to monitor compliance with the Race Discrimination Ordinance (RDO) (Paragraph 5.2.1). Similarly the lengthy section on equal pay for equal work (which is a concept enshrined in UK legislation quite separate from the main UK discrimination legislation), whilst undoubtedly a noble sentiment, is an entirely separate issue from race discrimination.

There are 16 illustrations in the revised Code. There were 50 in the October 2008 version. Illustrations are a vital part of any employer's or employee's understanding of this complicated piece of legislation. Moreover, employers are entitled to expect reliance on the Code for clear practical guidance on practices, action or conduct that they may be able to adopt in order to comply with the RDO. We strongly encourage the EOC to introduce further illustrations, especially in those areas of particular complexity.

2. Specific Comments

(a) Section 1 - Introduction

Our only comment is that section 63(3) RDO requires the Commission to "*consult*" with appropriate organisations in the course of preparation of the Code. Whilst detailed consultation occurred on the October 2008 version of the Code, the revised Code is so totally different we suggest that further consultation is appropriate.

(b) Section 2 - Meaning of Race under the RDO

Paragraph 2.1.3 - The reference to "*ICERD and related documents*" is unlikely to be of much use to employers. It would be more helpful to include in the Code those sections of the ICERD documents which the EOC considers relevant.

Paragraph 2.2.2 - *Illustration 1* states "*She meets all the requirements of the job*". This statement is irrelevant, misleading and should be deleted.

(c) Section 3 - Scope of Part 3 of the RDO

Paragraph 3.3.1 - Section 16(1) RDO states that employment is to be regarded as being at an establishment in Hong Kong "*unless the employee does his or her work wholly or mainly outside Hong Kong*". This section mirrors certain provisions of the UK legislation on which there is case law. However, the revised Code presents a method of determination of section 16 expressed with absolute confidence as if the UK cases somehow were binding on Hong Kong courts. This is not appropriate. Similarly the illustrations in the revised Code on this point (which are absolutely specific) could prove misleading.

Paragraph 3.7.1 – Outsourcing is now a commonly adopted arrangement by many businesses in Hong Kong and it is important that the Code provides clear guidance on how a '*contractor /principal*' could conduct itself in order to comply with its obligations under the various situations set out in section 15. For example, it would be useful for an employer to know whether it would be sufficient for it, as a *contractor/principal,* to impose a contractual obligation in the subcontract for the sub-contractor to comply with the RDO?

Illustration 6 in the draft offers no help on this. As a reference, it may be worthwhile to point out that an employer is afforded a defence under section 47 if he has taken reasonably practicable steps to prevent the employee from doing an unlawful act. The section also provides a principal with an implied defence that no authority has been given to the agent to do the unlawful act under the Ordinance. However, Section 15 does not afford such a defence.

(d) Section 4 - Rights and Responsibilities under the RDO

Paragraph 4.1.2(1) - It is inappropriate for the revised Code to recommend the adoption of a *specific* policy as set out in the Code. The policy in question imposes obligations upon employers over and above those required by the RDO. In particular it is not a policy which could be considered appropriate for smaller employers. Instead this section should be re-written in order to provide for a recommendation that an employer implements a policy which covers compliance with the restrictions in the RDO. The Code can then simply make reference to an example of a policy attached to an Annex.

This point appears in various other paragraphs throughout the Code, each of which should be amended.

Paragraph 4.1.2(2) - The case law is actually far more complex than implied in this paragraph. Certainly it is not correct to state that all "*social gatherings involving employees immediately after work*" are within the course of employment. This paragraph needs to be refined.

Paragraph 4.1.3 - Normally an "*agent*" is not an employee, but this paragraph refers to "*employment practice*". Please clarify. This comment is made in addition to that given under paragraph 4.1.2(1) above.

(e) Section 5 - Practising and Promoting racial equality

Paragraph 5.2.2(2) - The word "*disparately*" is used in this paragraph (and in numerous places elsewhere throughout the Code). The actual wording in the RDO refers to a considerably smaller proportion. We recommend using the wording in the legislation.

Paragraph 5.2.3 - This paragraph states that "*the spirit of practising and promoting racial equality must always be followed*". There is no obligation upon any employer (or other person other than the EOC) to "*promote*" racial equality. Furthermore, at common law, we rarely talk about "*spirit*", unlike some other jurisdictions where the "*spirit*" of legislation can be used for construing legislative provisions. This paragraph as currently drafted is, therefore, misleading.

Paragraph 5.3.4(2) - We would suggest that you do not make the statement that "*asking for ID numbers would be acceptable*". As a matter of fact, this is very unlikely to be acceptable in light of the restrictions in the Personal Data (Privacy) Ordinance.

Paragraph 5.3.4(3) - It would be useful to have an understanding of the term "*widely*".

Paragraph 5.3.6(2) - The beginning of this paragraph should read "*race related information should only be sought for the purposes of making ...*".

Paragraph 5.3.7 - We would recommend that the Code make reference to the risk of holding interviews on days on which certain ethnic groups may not be able to attend (for example Saturdays).

Paragraph 5.3.10(3) (Footnote 56) – We suggest the reference to Ahmad v Inner London Education Authority be removed, as there is, to our knowledge, no case law to suggest that Muslims should be considered a distinct ethnic group for the purposes of the RDO.

Paragraph 5.3.10(4) to (8) - The RDO is entirely different from any equal pay legislation (in particular the Equal Pay Act in the UK which only relates to differential pay between men and women). It is inappropriate and misleading to compare any of the Hong Kong discrimination ordinances with equal pay legislation. These paragraphs should be deleted.

Paragraph 5.3.12(3) - Is the EOC's view that all relevant information relating to employment matters should be provided in a language (or languages) which can be read by all employees? This would appear to be the case from this paragraph. If it is not the case then this paragraph should be amended.

Paragraph 5.3.14(3)(f) - The imposition of excessive workloads or performance targets on people on the grounds of race is almost certainly going to be unlawful under the RDO. However, we do not consider that it would amount to harassment as defined in section 7.

Paragraph 5.3.15(1) - The more likely scenario is that persons who have brought a complaint or assisted in a complaint do not get considered for particular training or promotion, or are otherwise "*sidelined*". You may wish to use this as a better example.

Paragraph 5.3.15(4) - There is no "*rule of confidentiality*". Instead the appropriate sentence should read "*Confidentiality should be observed where possible and the rights of....*".

Paragraph 5.3.17 - Whilst the monitoring of practices and policies and their impact is a useful (and perhaps necessary) exercise for large employers, it could amount to a very dangerous exercise when carried out other than with the greatest care. For this reason we recommend any suggestion that monitoring should be carried out by all employers in Hong Kong should be removed from the Code. It is far more likely to result in perceptions of actual discrimination than it is likely to solve problems. There is also a material cost which would inevitably be involved in any such monitoring exercise.

(f) Section 6 - Unlawful acts under the RDO

Paragraph 6.1.1(1) - We have comments on both of the illustrations in this paragraph. In *Illustration 7* it is not necessary that "*another job seeker not of Pakistani origin would not have been declined*" for unlawful discrimination to exist. Further, the fact that the two people mentioned in *Illustration 8* are "*in the same or materially similar employment situation (such as they both do the same job and have similar experience and their performance are both good)*" is not essential. It will constitute race discrimination if someone is paid less than they otherwise would have been on the grounds of race, even without a direct comparator.

Paragraph 6.1.1(2) - The last few words in this illustration should read "*if information shows that the blanket ban is not justifiable, as face masks could have been used satisfactorily to meet health and safety standards*".

Paragraph 6.1.2 - The action in *Illustration 14* could still be race discrimination even if there is no subsequent appointment.

Paragraph 6.1.3 - You may wish to make clear in *Illustration 15* that victimisation can occur even when the allegation of unlawful discrimination is without merit.

Paragraph 6.7.3 and 6.7.4 - As mentioned previously, the Code provides no illustrative assistance in relation to the expatriate exceptions or the grandfathering provisions. There are provisions which are unique to Hong Kong, and the view of the EOC would be most useful to employers.

Key points in respect of which guidance would be useful are:-

a) what steps should be taken by an employer to demonstrate that the relevant "*skills, knowledge or experience*" are not readily available in Hong Kong? (For example, must the employer actively search for an employee with such skills, knowledge and experience in Hong Kong, and for how long?)

b) what is an employer required to do to demonstrate that he has reviewed and considered the prevailing terms of employment offered to persons with those skills etc outside Hong Kong? Must an employer repeat this exercise every time an offer is made to such an overseas employee, and/or when such an employee is promoted or transferred, or employment is renewed?

c) what "*relevant circumstances*" must be taken into account in determining the reasonableness of the benefits?

d) an explanation of "*overseas terms*" and "*local terms*".

(g) Section 7 - When discrimination and harassment is encountered

No comments.

(h) Annex - Sample Policy on Racial Equality

Paragraph 1.1 - This refers to "*race, colour, caste, or national or ethnic origins*". We suggest that this should reflect the actual definition in the legislation.

Paragraph 3.4 and 3.5 - It could well be that the policy will be incorporated into the contract of employment of employees. By including paragraphs of this nature in the policy (dealing with training and consultation) you are imposing contractual obligations upon employers which do not exist in the legislation or elsewhere. It should, as a minimum, be made clear to employers that they are not obliged to include these sections unless they wish to do so.

Paragraph 3.7 - This is incorrect. The only restriction should be that criteria and performance appraisals are not racially motivated. It is perfectly lawful for an employer to select candidates on the basis of a whole range of attributes which are not related to the job or training opportunity.

Paragraph 3.8 and 3.9 - As mentioned previously it is inappropriate to impose an obligation upon employers to monitor. This may also be very dangerous.

Paragraph 3.10(2)(f) - In our opinion this does not necessarily amount to harassment.

The Law Society of Hong Kong

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