

Tort Law & Practice in Hong Kong, Third Edition, 2014

Chapter 5: ANTI-DISCRIMINATION

10. ENFORCEMENT AND THE ROLE OF THE EQUAL OPPORTUNITIES COMMISSION

5.180

This section examines aspects relating to how the anti-discrimination Ordinances are enforced in Courts, as well as the role of the Equal Opportunities Commission in enforcing the laws and promoting equality.

5.181

Claims. All four Ordinances provide that claims of unlawful acts of discrimination or harassment may be made the subject of civil proceedings in the same manner as any other claim in tort.³²⁵ All such claims are to be brought in the District Court, and must be commenced before the end of the period of two years beginning when the act complained of was done.³²⁶ The Court may consider any claim which is out of time if in the circumstances it is just and equitable to do so.³²⁷

5.182

It may be relevant for example if a claim overlaps with another claim where there have been continuing acts of discrimination over a period of time.³²⁸ In the Sunny Tadjudin case, the claimant was a woman who claimed acts of sex discrimination in her terms of employment, remuneration, benefits, promotional opportunities and other areas over a period of seven years. The defendant sought to strike out most of the alleged acts of discrimination as they did not occur within two years of the claim being commenced. The defendant argued that there were no continuing acts of discrimination as there was no continuing discriminatory policy or practice. The Court held that it was not appropriate to take a strict approach to the issue of what constitutes continuing acts of discrimination and instead the focus should be on the substance of the complaints. Claims should not be struck out on the issue of whether there are continuing acts of discrimination at an early stage unless there is clear evidence that there is no connection between them. As a result the claim was not struck out by the Court.

5.183

The burden of proof. As with any other claim in tort, it is up to the claimant in a discrimination claim to prove his or her case on the balance of probabilities. Yet, in cases of direct discrimination, it is not often easy to find direct evidence of discrimination. In *King v Great Britain-China Centre*³²⁹ the Court of Appeal held that the Industrial Tribunal had been clearly entitled to look to the respondent for an explanation in circumstances where the appellant, whose qualifications appeared on paper to meet the requirements of the job advertised, was not called for an interview, was Chinese, and none of the other candidates interviewed was Chinese. Where the explanation given was inadequate, it was legitimate in the circumstances to draw an inference that the discrimination was on racial grounds. Neill LJ extracted the following principles and guidance from the authorities considered, which provide useful guidance for cases in Hong Kong:

(1) "It is for the applicant who complains of racial discrimination to make out his or her case. Thus, if the applicant does not prove the case on the balance of probabilities he or she will fail.

(2) It is important to bear in mind that it is unusual to find direct evidence of racial

discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption 'he or she would not have fitted in'.

(3) The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.65(2)(b) of the [Race Relations Act 1976] from an evasive or equivocal reply to a questionnaire.³³⁰

(4) Though there will be some cases where, for example, the non-selection of the applicant for a post or for promotion is clearly not on racial grounds, a finding of discrimination and a finding of a difference in race will often point to the possibility of racial discrimination. In such circumstances the Tribunal will look to the employer for an explanation. If no explanation is then put forward, or if the Tribunal considers the explanation to be inadequate or unsatisfactory, it will be legitimate for the Tribunal to infer that the discrimination was on racial grounds. This is not a matter of law, but as May LJ put it in Noone, 'almost common sense'.

(5) It is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof. At the conclusion of all the evidence the Tribunal should make findings as to the primary facts and draw such inferences as they consider proper from those facts. They should then reach a conclusion of the balance of probabilities, bearing in mind both the difficulties which face a person who complains of unlawful discrimination and the fact that it is for the complainant to prove his or her case".³³¹

5.184

Remedies. The remedies obtainable, apart from those obtainable under the Ordinances, are those which would otherwise be obtainable in the Court of First Instance.³³² Furthermore, the District Court has all such powers as are necessary or expedient for it to have in order to provide the remedies provided for under the legislation,³³³ including the power to make declarations that the respondent has engaged in conduct, or committed an act, that is unlawful under the Ordinances and order that the respondent shall not repeat or continue it, order that the respondent shall perform any reasonable act or course of conduct to redress any loss or damage suffered by the claimant, order the respondent to employ, re-employ or promote the claimant, order the respondent to pay damages to the claimant and make an order declaring any contract or agreement to be void in whole or in part either ab initio or from a date specified.³³⁴

5.185

Order to perform reasonable act. In *Ma Bik Yung v Ko Chuen*³³⁵ the District Court had ordered the defendant to deliver to the claimant an apology in writing (through the parties' legal representatives) within 14 days. This was pursuant to s.72(4)(b) of the DDO, which gives the court power to order a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by the claimant. The Court of Appeal held that an unwilling apology was not within the scope of s.72(4)(b), and that since the respondent was not at all repentant, and had always indicated otherwise, such apology was meaningless.

5.186

On further appeal to the Court of Final Appeal, it was held that there was power under s.72(4)(b) of the DDO to make an apology order against an unwilling defendant, but that such order should be made only in rare and exceptional cases. Furthermore, before making an apology order against an unwilling defendant, the Court of Final Appeal said that the court must satisfy itself that an

insincere apology would, in fact, redress the plaintiff's loss and damage to some extent, and that it was a reasonable act for the defendant to perform in all the circumstances. In so finding, the Court of Final Appeal took into account the defendant's own right to freedom of thought or conscience guaranteed under art.32(1) of the Basic Law and Art 5 of the Hong Kong Bill of Rights, as well as the defendant's right to freedom of expression guaranteed under Art 27 of the Basic Law and Art 16 of the Bill of Rights. Although the Court of Final Appeal rejected the defendant's argument that these were absolute rights, it did accept that such rights were to be considered as part of the balancing exercise in each case. Of particular note was the Court of Final Appeal's comments as to the effect of an apology made at an early stage or prior to legal proceedings, and the effect of an apology made late in the day or not at all. In respect of the former, the court held that this should ordinarily mitigate the plaintiff's loss or damage. In respect of the latter, a late apology might still have the effect of redressing any loss or damage, but where no apology was ordered, this deficiency should be accounted for by a substantial increase in the quantum of damages.

5.187

Damages. Damages in proceedings brought under the three Ordinances include damages by way of compensation for any loss or damage suffered by reason of the respondent's conduct or act,³³⁶ as well as punitive or exemplary damages.³³⁷ In *Yuen Sha Sha v Tse Chi Pun*³³⁸ the court awarded the plaintiff HK\$50,000 damages for injury to her feelings (as well as ordered an apology against the defendant). In *Ma Bik Yung v Ko Chuen*³³⁹ the District Court had ordered the defendant to pay to the plaintiff HK\$15,000 for injury to feelings and HK\$5,000 in punitive damages because of the oppressive and insulting circumstances of the taxi-driver's comments to her. On appeal, the Court of Appeal reduced the total sum of damages to HK\$10,000, on the basis that the finding of unlawful disability discrimination could not be upheld, although the finding of unlawful disability harassment could. The Court of Final Appeal subsequently observed that damages of HK\$20,000 in the first place had been on the low side.

5.188

In *K v Secretary for Justice*,³⁴⁰ the plaintiffs were compensated for past loss of earnings (including interest), future loss of earnings and loss of housing and pension benefits. They received damages for loss pursuant to s.72(4)(e) of the DDO totaling HK\$985,143.28, HK\$775,742.48 and HK\$1,061,134.80 respectively. The first and third plaintiff were also awarded HK\$100,000 each as damages for injury to feelings, while the second plaintiff was awarded HK\$150,000 damages for injury to feelings on the basis that the circumstances of his treatment extended his humiliation over a period of days and he was given menial tasks to do.

5.189

In *Yuen Wai Han v South Elderly Affairs Ltd*,³⁴¹ the plaintiff had been awarded damages of HK\$62,500 for loss of income, HK\$62,500 for injury to feelings and HK\$30,000 as punitive damages. The Court of Appeal found that the award of HK\$62,500 damages for injury to feelings was not excessive but, given that this amount took into consideration the defendant's conduct in making a report against the plaintiff to the police, the same consideration could not be used again to award a considerable amount of punitive damages. Accordingly, the Court of Appeal reduced the sum of punitive damages ordered against the defendant to HK\$10,000. The Court of Appeal had also considered *Vento v Chief Constable of West Yorkshire Police*³⁴² in respect of the scale of seriousness, and found that the present case did not belong to the least serious category. On the other hand, in *Siu Kai Yuen v Maria College*,³⁴³ the plaintiff was awarded HK\$30,000 for injury to feelings, on the basis that this was at the lowest end of the scale.

5.190

Recent cases. In *Lam Wing Lai v YT Cheng (Chingtai) Ltd*,³⁴⁴ the defendant dismissed the plaintiff after her childbirth. The court held that the defendant was liable to discrimination against the plaintiff on the ground of her pregnancy and family status, and awarded HK\$88,500.00 for loss of income, and HK\$75,000.00 for injury to feelings. The court considered that the injury to the plaintiff

in this case was more serious than that in *Yuen Wai Han v South Elderly Affairs Ltd*³⁴⁵ as the plaintiff had worked for the defendant for one and a half year in a respected position and had developed friendship with colleagues, and therefore awarded a slightly higher amount in the present case. In the case of *Chan Choi Yin v Toppan Forms (Hong Kong) Ltd*,³⁴⁶ the plaintiff was transferred to a smaller team and subsequently dismissed by the defendant after her childbirth and her lodging of complaint to EOC. The court held that the defendant was liable to discrimination against the plaintiff on the ground of her pregnancy and victimisation, and awarded HK\$164,505.20 for loss of earnings, HK\$179,650.95 for future loss of earnings, and HK\$200,000.00 for injury to feelings. The court awarded a substantial amount for injury to feelings, as the plaintiff had suffered a long period of injury for two years and was deprived of a favourable reference from the defendant for more than three years. In the sexual harassment case of *L v Burton*,³⁴⁷ the Court awarded HK\$100,000 for injury to feelings, HK\$77,000 for loss of income and HK\$20,000 in punitive damages.

5.191

In the case of *Ip Kai Sang v Federal Elite Ltd*,³⁴⁸ the plaintiff was dismissed on the ground of his disability. The Court awarded HK\$44,544.53 for loss of income, and HK\$50,000.00 for injury to feelings to the plaintiff, on the basis that such amount should fall into the lower end of scale. Similarly in *Kwok Wing Sun v Law Yung Kai*,³⁴⁹ the Court awarded HK\$44,544.53 for loss of income, and HK\$50,000.00 for injury to feelings to the plaintiff, having taken into consideration the length of time that the plaintiff had worked for the defendant and the treatment given to the plaintiff by the defendant.

5.192

In the case of *B v King of the King Group*³⁵⁰ the plaintiff was an employee working at the defendant restaurant. The Court found that the plaintiff was sexually harassed by a fellow employee chef who deliberately touched the plaintiff's breast. The Court awarded the plaintiff \$80,000 for injury to feelings.

5.193

In the case of *Kan Che Sing v Lucky Dragon boat (Belvedere) Restaurant Ltd*³⁵¹ the plaintiff was employed as a waiter for the defendant restaurant. The plaintiff suffered injuries as a result of lifting a customer in a wheelchair down stairs from the restaurant. He was awarded compensation for the medical expenses for the treatment of the injuries. After the injuries the plaintiff argued that he was subjected to both direct and indirect disability discrimination. He claimed direct discrimination by being subjected to disparaging comments because of his disability and being dismissed. He also claimed indirect disability discrimination by being required to continue to carry customers in wheelchairs after he suffered his disability. The Court found both direct and indirect disability discrimination. The Court awarded the plaintiff \$50,000 for injury to feelings and \$51,181.70 for loss of income for being dismissed as a result of his disability.

^{325.} See s.76(1) SDO; s.72(1) DDO; s.54(1) FSDO; and s.70(1) RDO.

^{326.} See s.86(1) SDO.

^{327.} See s.86(3) SDO.

^{328.} *Tsang v Cathy Pacific* [2002] 2 HKLRD 677 and *Sunny Tadjudin v Bank of America, National Association DCE* 4/2009.

^{329.} [1992] ICR 516 .

- [330.](#) The EOC has not yet issued such "questionnaires", pursuant to s.83 SDO, s.79 DDO; s.61 FSDO; and s.77 RDO.
- [331.](#) Ibid., 518. Although this case dealt with direct race discrimination, by analogy, it also applies to direct discrimination on the given grounds in the SDO, DDO and FSDO. See also *Glasgow City Council v Zafar* [1998] 1 WLR 1659 (HL), where it was held that the guidance given by Neill LJ should in future be applied in discrimination cases of race or sex discrimination.
- [332.](#) See s.76(3) SDO; s.72(3) DDO; s.54(3) FSDO; and s.70(3) RDO.
- [333.](#) See s.76(4) SDO; s.72(4A) DDO; s.54(4) FSDO; and s.70(4) RDO.
- [334.](#) See s.76(3A) SDO; s.72(4) DDO; s.54(4) FSDO; and s.70(4) RDO.
- [335.](#) [1999] 1 HKC 714 (CFI).
- [336.](#) See s.76(3A)(e) SDO; s.72(4)(e) DDO; s.54(4)(e) FSDO; and s.70 (4)(e) RDO.
- [337.](#) See s.76(3A)(f) SDO; s.72(4)(f) DDO; s.54(4)(f) FSDO; and s.70 (4)(f) RDO.
- [338.](#) [1999] 2 HKLRD 28 .
- [339.](#) (2006) 9 HKCFAR 888 , [2002] 2 HKLRD 1
- [340.](#) [2000] 3 HKLRD 777 .
- [341.](#) [2002] 3 HKLRD 621 .
- [342.](#) [2003] IRLR 102 .
- [343.](#) [2005] 2 HKLRD 775 .
- [344.](#) [2006] 1 HKLRD 639 .
- [345.](#) [2002] 3 HKLRD 621 .
- [346.](#) [2006] 3 HKC 143.
- [347.](#) [2010] 5 HKLRD 397 .
- [348.](#) [2008] 2 HKLRD 563 .
- [349.](#) [2008] 5 HKLRD 340 .

[350.](#) Equal Opportunities Action No 9 of 2010.

[351.](#) (unrep., DCEO 10/2010, [2012] HKEC 1130).

Westlaw Asia™