

is given. Notification needs to be in writing, and a copy of any termination notice issued by either employer or employee must be sent to the Immigration Department within seven days of being issued.

(d) Post-termination obligations of employee

7.196 **Employee's continuing obligations to employer.** Upon the cessation of the employment relationship the parties are no longer bound by the terms of the contract of employment, save where the employee has agreed to be bound (whether in the original contract of employment or in a settlement agreement) by either a continuing obligation of confidentiality regarding the employer's confidential information, and/or restrictive covenants, which generally take the form of a non-solicitation and/or non-competition clause. Such clauses are permitted only insofar as they do not operate as a restraint of trade. Thus an employer is not entitled to restrain a former employee from deploying his own skills and knowledge for the benefit of himself and his new employer.³²¹

7.197 **Common law duty of confidentiality.** Regardless of the existence of an express post-termination confidentiality provision in the contract of employment or settlement agreement, the common law imposes an implied duty of confidentiality upon an employee regarding certain types of information. However, post-termination relief against an employee is generally confined to restraining misuse or disclosure only of trade secrets and confidential information of an equivalent status. Confidential information of lesser significance is generally not subject to such protection.³²²

³²¹ See *PCCW-HKT Telephone Ltd v Aitken* (2009) 12 HKCFAR 114. The extent to which an employer is entitled to rely upon clauses which may operate as restraints of trade is discussed more fully in Chapter 3.

³²² See the Court of Final Appeal's decision in *PCCW-HKT Telephone Ltd v Aitken* (fn 322), applying *Faccenda Chicken Ltd v Fowler* [1987] Ch 117. See also Chapter 3, paras 3.035–3.038.

CHAPTER 8

DISCRIMINATION LAW

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1. OVERVIEW

Overview of chapter. Hong Kong has four anti-discrimination ordinances—the Sex Discrimination Ordinance (SDO),¹ Disability Discrimination Ordinance (DDO),² Family Status Discrimination Ordinance (FSDO),³ and Race Discrimination Ordinance (RDO).⁴ These statutes are broad in scope and together prohibit direct and indirect discrimination on the grounds of sex, marital status, pregnancy, disability, family status, race, colour, descent and national or ethnic origin in employment and employment-related activities, among other fields. They also provide protection from sexual harassment, racial harassment, disability harassment, discrimination by way of victimisation and vilification and serious vilification on the grounds of disability and race. This chapter reviews the four anti-discrimination ordinances and their application to the field of employment and also considers discrimination related to pregnancy and trade union activities covered by the Employment Ordinance (EO).⁵

8.001

Anti-discrimination law in Hong Kong. This chapter begins with a review of the background and context in which the anti-discrimination legislation was enacted—and has since been developed and interpreted—including the relevance of human rights standards applicable to Hong Kong. It examines the definition of discrimination, including direct and indirect discrimination, harassment, victimisation, vilification and serious vilification as well as the appropriate test for establishing direct discrimination, the difficulties associated with identifying a “comparator” and determining the cause of discrimination, the possibility of justifying indirect discrimination and the concept of equal pay for equal work or work of equal value. The chapter also considers exceptions including the “genuine occupational qualification” defenses and exceptions for “special measures”. It concludes with a review of enforcement mechanisms including the role of the courts and the Equal Opportunities Commission (EOC), the statutory body tasked with overseeing the implementation of the legislation, encouraging conciliation of claims and promoting equal opportunities, and the available remedies for unlawful acts of discrimination in employment.

8.002

2. BACKGROUND AND CONTEXT

(a) The development of discrimination law in Hong Kong

The legislative framework. Hong Kong’s first two anti-discrimination statutes, the SDO and the DDO, were enacted in 1995 and came into force in December 1996. The third, the FSDO, has been in force since November 1997. The RDO was enacted more than a decade later in July 2008 and came fully into force on 10 July 2009. This legislative framework, along with the relevant case law, forms a limited but expanding body of anti-discrimination law in Hong Kong which prohibits discrimination, harassment and vilification on a range of grounds in several fields including employment. In addition

8.003

¹ Cap.480.

² Cap.487.

³ Cap.527.

⁴ Cap.602.

⁵ Cap.57.

to these statutes, the EO provides protection from pregnancy and trade union-related discrimination and the Basic Law and Bill of Rights provide for a constitutional right to equality and non-discrimination binding on public authorities.

8.004 Initial efforts to legislate. The Hong Kong colonial government, supported by business interests, had traditionally opposed the introduction of anti-discrimination legislation.⁶ When Anna Wu Hung-yuk, at the time a member of the Legislative Council (LegCo), introduced a comprehensive Equal Opportunities Bill (EOB) in 1994—which would have prohibited discrimination on a range of grounds including family responsibility, sexuality, age, religious or political conviction, trade union activities and spent conviction—the government countered with its own compromise Sex Discrimination and Disability Discrimination Bills. These were followed a year later by the Family Status Discrimination Bill. These bills contained a mix of provisions based on UK legislation and Wu's EOB which had been modelled largely on Australian anti-discrimination law.⁷

8.005 Attempts to provide protection on other grounds. After the enactment of the three initial statutes, further attempts by members of LegCo to introduce laws which would have addressed discrimination on other grounds, including sexual orientation and age, were unsuccessful. The government responded to these efforts by publishing non-binding guidelines for employers⁸ and emphasising publicity and education measures.⁹ Some non-governmental organisations (NGOs) and UN human rights treaty bodies, which monitor the implementation of state parties' obligations under core international human rights treaties, have called for an extension of anti-discrimination legislation to ensure protection from discrimination on a range of grounds.¹⁰ Initially, the government resisted implementing legislation prohibiting racial discrimination but eventually agreed after a sustained local and international campaign and increasing support from international business organisations based in Hong Kong.¹¹

⁶ See Petersen CJ, "Investigation and Conciliation of Employment Discrimination Claims in the Context of Hong Kong" (2001) 5 *Employment Rights and Employment Policy Journal* 627 at 632 and Petersen CJ, "Critique of Hong Kong's Legal Framework for Gender Equality" in Cheung FM and Holroyd E (eds), *Mainstreaming Gender in Hong Kong Society* (Hong Kong: Chinese University Press, 2009) at 405. Petersen notes that the "colonial government justified its position [not to apply Convention on the Elimination of all Forms of Discrimination against Women to Hong Kong or enact anti-discrimination law] on the ground that it did not wish to interfere with traditional Chinese customs or 'over-regulate' private sector employers".

⁷ *Ibid* (Petersen, 2001).

⁸ Labour Department, "Practical Guidelines for Employers on Eliminating Age Discrimination in Employment", Jan 2006, available at: www.labour.gov.hk/eng/plan/.../Employers/PracticalGuidelines.pdf and Constitutional and Mainland Affairs Bureau, "Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation", <http://www.cmab.gov.hk/en/issues/sexual.htm>.

⁹ See the Constitutional and Mainland Affairs Bureau website: <http://www.cmab.gov.hk/en/issues/equal.htm>.

¹⁰ For example, see the IDAHO Hong Kong website: <http://idahohk.org/2009/home.php>. See also "Concluding observations of the Committee on Economic, Social and Cultural Rights, People's Republic of China (including Hong Kong and Macao)", UN Doc. No. E/C.12/1/Add.107, 13 May 2005, para 78(a). Although legislation concerning sexual orientation discrimination has not been enacted, the Hong Kong Court of Final Appeal has confirmed that a constitutional right to equality under the Basic Law (art.25) and Bill of Rights (arts.1 and 22) prohibits discrimination by public authorities on the ground of sexual orientation. See *Secretary for Justice v Yau Yuk Lung* [2007] 3 HKLRD 903.

¹¹ See Home Affairs Bureau of the Government of the Hong Kong SAR, "Legislating Against Race Discrimination: A Consultation Paper" (Sept 2004).

Legislative models and the application of English law. The Hong Kong statutes were modelled on older versions of UK legislation, the original 1975 Sex Discrimination Act (SDA) and the 1976 Race Relations Act (RRA), as well as Australian anti-discrimination law.¹² As a result, Hong Kong courts have relied on both English and Australian case law for guidance when interpreting the Hong Kong legislation. In *Chang Ying Kwan v Wyeth (HK) Ltd*,¹³ a case involving pregnancy discrimination and discrimination by way of victimisation, the District Court confirmed this approach. It considered that English case law could serve as persuasive authority although it also noted that Hong Kong courts should not blindly follow the English courts' reasoning which may not always be appropriate for the Hong Kong context.¹⁴

Relevance of the Codes of Practice on Employment. All four ordinances grant the EOC power to issue codes of practice (COPs) which contain practical guidelines for the purposes of the elimination of discrimination, the promotion of equality of opportunity and the elimination of harassment.¹⁵ The EOC has issued four COPs on Employment which are intended to provide guidance to employers on how to comply with their obligations under the anti-discrimination laws.¹⁶ Although the COPs do not create binding duties, employers may be able to avoid vicarious liability for their employees' unlawful acts if they follow the Codes' suggestions.¹⁷ The EOC will also take compliance with the COPs into account when investigating alleged discriminatory acts or conducting a formal investigation.¹⁸ In *Sit Ka Yin Priscilla v Equal Opportunities Commission*, the court rejected the plaintiff's submission that a failure to follow the SDO COP on Employment amounted to unlawful discrimination.¹⁹ It held that this

¹² The Western Australia Equal Opportunities Act 1984 (No. 83) (WAEOA), served as the model for Anna Wu's comprehensive Equal Opportunities Bill (EOB) in Hong Kong. Although the EOB was not ultimately enacted, the Hong Kong Government borrowed certain provisions from the Bill when drafting the Hong Kong statutes. Therefore, the four ordinances contain elements from the WAEOA as well as Federal Australian anti-discrimination legislation, such as the Sex Discrimination Act 1984 and the Disability Discrimination Act 1992. For example, SDO s.10, which explains how comparisons should be made for the purposes of determining direct discrimination, reflects similar language in the WAEOA (s.8(1)). The SDO also includes protection from discrimination on the grounds of marital status and pregnancy, also covered in the WAEOA, but not in the original UK SDA (1975), although the SDA has since been amended to include the grounds of pregnancy and exercising a statutory right to maternity leave. The employment provisions in the four Hong Kong statutes closely follow similar sections in the Australian legislation. The SDO also defines sexual harassment in the same terms as the Australian Sex Discrimination Act, s.28A. Sexual harassment was not defined in the UK legislation until it was amended to reflect the requirements of the European Equal Treatment Directive (Council Directive 2000/78/EC, 27 Nov 2000).

¹³ [2001] 2 HKC 129.

¹⁴ *Ibid* at 134.

¹⁵ SDO s.69(1), DDO s.65(1), FSDO s.47(1), RDO s.63(1).

¹⁶ The texts of all four Codes are available on the EOC's website: <http://www.eoc.org.hk/eoc/GraphicsFolder/CoPs.aspx>.

¹⁷ SDO s.69(14), DDO s.65(13), RDO s.63(14). It is a defense for an employer to prove that he/she took such steps as were reasonably practicable to prevent the employee from doing unlawful, discriminatory acts. See SDO s.46, DDO s.48, FSDO s.34, RDO s.47. See also SDO Code of Practice (COP) on Employment at para 4.5 and discussion of the vicarious liability of employers at para 8.0137.

¹⁸ *Ibid* (SDO COP) at para 4.3.

¹⁹ (unrep., DCEO 11/1999, [2010] HKEC 208) at 161.

15.134 **Transfer of service.** Many judges were also professional civil servants with experience in the Department of Justice and have therefore served both as public officers in established offices in addition to their appointment to the bench. As such, public officers who accrued benefits under the Old and New Pension schemes may also choose to transfer such benefits for consideration under the Pension Benefits (Judicial Officers) Ordinance.³⁹¹ The judicial pension scheme also provides for dependants and surviving spouses in the unfortunate event that the judicial officer passes away.³⁹²

³⁹¹ *Ibid*, s.9.

³⁹² *Ibid*, Cap.401 s.20(1)(i). The pension will cease when the dependant attains 18 years of age unless he or she is receiving full-time education which, in such a case the pension ceases when he or she attains 23 years of age. A dependant pension is payable as soon as possible after the death of the officer and shall be paid in monthly instalments, or less frequently if so requested by the recipient.

CHAPTER 16

TRADE UNIONS

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1. INTRODUCTION

Overview of chapter. This chapter provides an overview of industrial relations in Hong Kong including the statutory requirements regarding registration and regulation of trade unions, the four major labour organisations, employees' trade union rights, the enforceability of collective bargaining agreements, the freedom of association and the right to strike. The focus will be on the regulation of trade unions because, as will be seen, collective bargaining is not widely practised nor, as a general rule, legally enforceable, and industrial action, although lawful, is comparatively rare. Nonetheless, participation in trade unions remains steady, and has even experienced some incremental growth in recent years. 16.001

Trade Unions in Hong Kong. As of 31 December 2009, there were 812 trade unions, consisting of 768 employees' unions, 18 employers' associations and 26 mixed organisations of employers and employees registered under the Trade Unions Ordinance (TUO).¹ There were also four trade union federations in Hong Kong, namely, the Federation of Trade Unions in Vocational Training Council, the Hong Kong Federation of Civil Service Unions, The Federation of Hong Kong Electrical & Mechanical Industries Trade Unions and The Federation of Hong Kong Food & Beverage Industries Trade Unions, registered under the TUO.² 16.002

Trade union participation rate. The trade union participation rate³ measures the declared membership of employees' unions as a percentage of salaried employees and wage earners. In Hong Kong, the trade union participation rate in 2009 was 22.48 per cent.⁴ This figure represented a slight increase from 21.51 per cent in 2008.⁵ By way of comparison, with regard to all employees⁶ in the United Kingdom, the trade union density was 27.4 per cent in both 2008 and 2009.⁷ 16.003

(a) Sources of fundamental rights

Basic Law. Hong Kong's Basic Law is the foundation for most of the fundamental rights that are important in the context of trade unions. Article 27 of the Basic Law guarantees that Hong Kong residents shall have freedom of association and the right 16.004

¹ Cap.332. Figures from the Annual Statistical Report 2009, issued by the Registry of Trade Unions of the Labour Department: <http://www.labour.gov.hk/tc/public/pdf/rtu/ASR2009.pdf>, pp 1–2. There were 22 new trade unions registered in 2009 (Hong Kong Yearbook 2009, p 128 at <http://www.yearbook.gov.hk/>).

² Annual Statistical Report 2009, *ibid*, pp 1, 2, 93 and 187. These four trade union federations should not be confused with the four major labour organisations which, not being "trade unions" or "federations", are not registered under the TUO but under the Societies Ordinance (SO) (Cap.151). See paras 16.031 to 16.034 for elaboration on trade union federations.

³ Also known as trade union density.

⁴ Annual Statistical Report 2009 (fn 1 above), p 1.

⁵ *Ibid*.

⁶ The statistics for United Kingdom include information on trade union density for both "all employees" and "all in employment". In order to adopt a consistent basis for comparison with the Hong Kong statistics, only information on "all employees" is shown.

⁷ See "Trade Union Membership 2009" by James Achur, issued by the Department for Business Innovation & Skills in Apr 2010, at <http://stats.bis.gov.uk/UKSA/tu/TUM2009.pdf>, p 6.