

employment was the subject of dispute in *Chong Cheng Lin Courtney v Cathay Pacific Airways Ltd.*^{197a} In that case, the plaintiff joined Cathay Pacific as a cabin attendant in 1979 and was dismissed in 1993. A few years after the termination of her employment, she asserted her right to receive retirement travel concession offered by Cathay Pacific. When the plaintiff joined Cathay Pacific, neither her contract of employment nor the then employee handbook contained any provision relating to retirement travel benefits. Such benefits were subsequently mentioned in an employee handbook which was issued about 10 years after the plaintiff joined Cathay Pacific. The retirement travel benefit scheme contained in the employee handbook provided that female cabin attendants who have completed 10 or more years' service and have reached the age of 40 would become eligible for retirement travel concessions, and for those female cabin attendants who qualify by service but not by age, they would become eligible upon reaching the age of 40. Cathay Pacific contended that the relevant retirement travel benefit provisions simply represented discretionary benefits and that Cathay Pacific was fully entitled to withhold them from the plaintiff. Further, the retirement travel benefits never formed part of the plaintiff's contract of employment and therefore had no contractual force. Cathay Pacific's arguments were rejected by the Court of Appeal. In reaching the conclusion, the court examined the factual circumstances under which the retirement travel benefits were granted. First, the court referred to the employee handbook of Cathay Pacific which set out the housing, medical and travelling benefits of its cabin attendants. Those benefits were described as "fringe benefits" or "perks". The court considered that, by the nature of things, those fringe benefits formed part of the employee's remuneration package and were of great importance to the employee's overall bargain, for which the employee undertook to work. Second, as a matter of fact, employees' eligibility for the retirement travel benefits was clearly set out in the employee handbook which provided that Cathay Pacific could withhold such benefits only if there was improper use of the retirement travel concessions by the employees. The wording of the employee handbook clearly suggested that the parties did not intend the benefits to be discretionary in nature only. Further, there was evidence that employee benefits, including post-retirement travelling benefits, were very common amongst airline companies. In other words, the retirement travel benefits were not something so exceptional or extraordinary in character that, unless set out in a formal contractual document signed by the parties, they would not normally be regarded as contractual. Andrew Cheung J said that an employee handbook could be quite a substantial document containing some matters which are intended to be contractual terms (even if not expressly incorporated). It was held that the retirement travel benefit provisions contained in the employee handbook were intended to have contractual force and did not merely represent discretionary benefits which Cathay Pacific could withhold from its cabin attendants whenever it sees fit.

[Add new note 197a: page [135]]

^{197a}[2011] 1 HKLRD 10.

CHAPTER 5

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4. STATUTORY REST DAY

(a) Entitlement to statutory rest days

[Delete the text of paragraph 5.046 and replace with new text: page [166]]

Rest day and statutory holiday. Statutory rest days shall be granted in addition to any statutory holiday, alternative holiday or substituted holiday.⁹¹ 5.046

[Replace note 91: page [166]]

⁹¹EO s.17(2).

6. ANNUAL LEAVE

(a) Entitlement to annual leave

[Delete the text of paragraph 5.073 and replace with new text: page [178]]

Statutory annual leave and contractual annual leave. The EO provides that an employee who has been employed under a continuous contract for not less than 12 months will be entitled to statutory annual leave and statutory annual leave pay in accordance with the EO.¹⁷¹ An employer may provide contractual annual leave to an employee in excess of the statutory minimum on such terms as the employer determines. Where an employer is unable to distinguish between statutory annual leave and the more generous contractual annual leave, the employer is at risk of a court finding that all annual leave provided to the employee shall be treated in accordance with the minimum requirements relating to statutory annual leave under the EO.¹⁷² So, for example, an employer may be required to calculate annual leave pay in accordance with the statutory formula (i.e. using daily average wages) for contractual annual leave or be required to allow an employee to carry over contractual annual leave from one leave year to the next. As such, if an employer intends to treat statutory annual leave differently to contractual annual leave, it should clearly distinguish between them and their different treatment. 5.073

[Replace notes 171 and 172: page [178]]

¹⁷¹EO s.41AA(1).

¹⁷²For example, *Kwan Siu Wa Becky v Cathay Pacific Airways Ltd* [2011] 5 HKLRD 1.

7. OTHER BENEFITS

(c) Leave entitlements above the statutory minimum

[Delete the text of paragraph 5.103 and replace with new text: page [188]]

Additional benefits may form part of contractual entitlements. Additional benefits provided to an employee may form part of the contract of employment and may be enforceable as a contractual term.²¹⁴ In *Kwan Siu Wa Becky v Cathay Pacific Airways Ltd*,²¹⁵ the Presiding Officer in the Labour Tribunal held that the statutory formula for annual leave pay under the EO should be applied to both statutory annual leave and the annual leave granted by Cathay Pacific Airways Ltd to a member of its cabin crew in 5.103

CHAPTER 8

DISCRIMINATION LAW

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3. FORMS AND DEFINITIONS OF DISCRIMINATION

(c) Harassment

(i) Sexual harassment

[Delete the text of paragraph 8.073 and replace with new text: page [328]]

Definition of sexual harassment. The SDO prohibits two types of sexual harassment. The first, often referred to as “misuse of authority” or “*quid pro quo*” harassment includes unwelcome sexual advances, unwelcome requests for sexual favours or other unwelcome conduct of a sexual nature in circumstances where a reasonable person, having regard to all the circumstances, would have anticipated that the individual (male or female) would be offended, humiliated or intimidated. The second type is generally referred to as “hostile environment” harassment and occurs when a person, alone or together with other persons, engages in conduct of a sexual nature which creates a hostile or intimidating environment for an individual.¹⁶⁵ Hong Kong courts have considered a number of sexual harassment claims under the SDO.¹⁶⁶

8.073

[Replace notes 165 and 166: page [328]]

¹⁶⁵ SDO s.2(5)(i).

¹⁶⁶ See, for example, *Chen v Tamara Rus* (fn 79 above); *Yuen Sha Sha v Tse Chi Pan* [1999] 2 HKLRD 28; *Wong Kwok Mui v Lee Yuen Tim* (unrep., DCEO 9/1999, [2001] HKEC 249); and *L v Burton* [2010] 5 HKLRD 397. In *Alice Li Miu Ling v Thomas Wong Kwok Shing* (unrep., HCA 155/2006, [2009] HKEC 1539), the Court of First Instance held that claims in respect of sexual harassment are time barred and “should only lie within the exclusive purview of the District Court by virtue of the SDO” (See para 37 of the judgment, citing *Sunny Tadjudin v Bank of America National Association* (unrep., HCA 322/2008, [2008] HKEC 1986).

(e) Vilification, serious vilification, instructions and pressure to discriminate

[Delete the text of paragraph 8.089 and replace with new text: page [333]]

The definition of vilification. The DDO and RDO prohibit vilification and make serious vilification a criminal offence. Vilification means the incitement of hatred towards, serious contempt for or severe ridicule of, a person with a disability or members of a class of persons with a disability.²¹² It is immaterial whether a person is actually incited by such an activity.²¹³ Vilification does not include (a) a fair report of an activity in public; (b) an activity in public that is a communication or the distribution or dissemination of any matter and consists of a publication which is subject to a defense of absolute privilege in proceedings for defamation; or (c) an activity in public done reasonably and in good faith, for academic, artistic, scientific or research purposes in the public interest, including discussions about and expositions of any matter.²¹⁴

8.089

[Replace notes 212, 213 and 214: page [333]]

²¹² DDO s.46(1), RDO s.45(1).

²¹³ DDO s.46(1A), RDO s.45(2).

²¹⁴ DDO s.46(2), RDO s.46(3). “An activity in public” is defined in DDO s.46(3) and RDO s.46(4).

[Insert new paragraph 8.089a after the text of paragraph 8.089: page [333]]

The meaning of “incite”. Hong Kong courts have considered one claim of vilification which was brought under the DDO. In *Tung Lai Lam v Oriental Press Group Ltd*,^{214a}

8.089A

the plaintiff, a person with a disability, claimed that an article in the Sun newspaper on mental illness contained insulting language and amounted to vilification under s.46 of the DDO. In its judgment dismissing the claim, the District Court confirmed three elements of the statutory tort of vilification^{214b} and set out principles to be applied when interpreting the meaning of “incite” in s.46 of the DDO. Relying on case law from New South Wales, Australia, the court noted that “incite” should be interpreted according to its ordinary meaning which is to “urge, spur on, stir up, animate, prompt, or to stimulate action”.^{214c} The statement must amount to more than an expression of hatred, serious contempt or severe ridicule but must stimulate that reaction in others.^{214d} The context must be judged objectively and the court should be concerned with the likely—rather than the actual—effect of the conduct.^{214e} The court applied the concept of “the ordinary reasonable person” from the law of defamation when determining who must be incited.^{214f}

[Add new notes 214a, 214b, 214c, 214d, 214e and 214f: page [333]]

^{214a}[2011] 2 HKC 294.

^{214b}*Ibid.* See discussion in para 8.089 above. The court cited *Burns v Dye* [2002] NSWADT 32 (at para 13).

^{214c}*Ibid.*, (*Tung Lai Lam*) at para 15.

^{214d}*Ibid.*, citing *Burns v Dye*, (note above), at paras 19 and 20, *Veloskey v Karagiannakis* [2002] NSWADTAP 18 at para 21, *Burns v Radio 2 UE Sydney Pty Ltd* [2004] NSWADT 267 at paras 32 and 33, *Trad v Jones* [2009] NSWADT 318 at para 161.

^{214e}*Ibid.*, at para 16 citing *Western Aboriginal Legal Service Ltd v Jones* [2000] NSWADT 102 at para 93, *Burns v Dye* (*ibid.*, at para 21, *Veloskey v Karagiannakis* (*ibid.*, at paras 24 and 25), *Burns v Radio 2 UE Sydney Pty Ltd* (*ibid.*, at paras 12 and 13).

^{214f} *Ibid.*, (*Tung Lai Lam*) at para 17. The court held that the person must be representative of “a substantial and respectable group of the community” (citing *Ibid.*, *Western Aboriginal Legal Service Ltd v Jones*, at paras 95-99, *Burns v Dye*, at para 22, and *Veloskey v Karagiannakis*, at para 26).

[Insert new paragraph 8.089b after the text of paragraph 8.089a: page [333]]

8.089B

The meanings of “hatred”, “serious contempt” and “severe ridicule”. According to the District Court in *Tung Lai Lam v Oriental Press Group Ltd*, the terms “hatred”, “serious contempt” and “severe ridicule” in the definition of vilification under the DDO should be given their ordinary dictionary meanings.^{214g} Hatred means “intense dislike; detestation, a feeling of hostility or strong aversion towards a person or thing; and active and violent dislike”.^{214h} “Serious” means “important, grave, or weighty”. Contempt means “scorning or despising”, “the mental attitude in which something or someone is considered as worthless or of little account”, or “the feeling with which one regards anything considered mean, vile or worthless”.²¹⁴ⁱ The court further elaborated that “Severe” means rigorous, strict, harsh or extreme. “Ridicule” means subject to ridicule or mockery; make fun of, deride, laugh at; or words or actions intended to excite contemptuous laughter at a person or thing. “Severe ridicule” means “harsh or extreme mockery or derision”.^{214j}

[Add new notes 214g, 214h, 214i and 214j: page [333]]

^{214g}*Ibid.*, (*Tung Lai Lam*) at para 19.

^{214h}*Ibid.*, at para 20 citing *Kazak v John Fairfax Publications Ltd* [2002] NSWADTAP 35 at para 40, *Western Aboriginal Legal Service Ltd v Jones*, (*ibid.*, at para 100), *Burns v Dye*, (*ibid.*, at para 23).

²¹⁴ⁱ*Ibid.*, (*Tung Lai Lam*) at para 21.

^{214j}*Ibid.*, at para 22.

[Insert new paragraph 8.089c after the text of paragraph 8.089b: page [333]]

8.089C

Content, style and context of the public activity. When the vilification claim involves a written public statement, such as a newspaper article, then the content, style

of communication and context of the statement are relevant considerations.^{214k} The context in which the statement was made is as important as what was actually said.^{214l} In relation to the publication of an article, the court accepted three relevant contexts: (1) the particular offending words in the context of the entire article; (2) the context of the article in the publication where it appears; and (3) the social context.^{214m}

[Add new notes 214k, 214l and 214m: page [333]]

^{214k}*Ibid.*, at para 23 citing *Kazak v John Fairfax Publications Ltd*, (Note above at para 71).

^{214l}*Ibid.*, at para 24 citing *Trad v Jones* (Note above at para 161).

^{214m}*Ibid.*, at para 24 citing *Kazak v John Fairfax Publications Ltd* (Note above at paras 45 and 46).

7. ENFORCEMENT AND REMEDIES

(b) Remedies

[Delete the text of paragraph 8.177 and replace with new text: page [358]]

Considerations for determining damages in sexual harassment cases. Although the District Court dismissed the plaintiff’s claim of sexual harassment and discrimination by way of victimisation in *Chen v Tamara Rus*, the court nevertheless considered the damages it would have awarded had the claim been successful. In considering the award of damages for injury to feelings, the court stated it would have taken into consideration the plaintiff’s deliberate choice not to take advantage of the facilities provided by the company’s sexual harassment guidelines. It also noted it would be entitled to consider the character of the plaintiff in assessing the amount to award in damages.⁴⁰⁰ It would have also considered the salary of the defendant and the award granted in two other sexual harassment cases in Hong Kong. The judge assessed the award for damages for injury of feelings at HK\$15,000 and determined that she would not have granted exemplary damages given the conduct of the plaintiff in the case which she had held was deliberately malicious and frivolous in engaging in material non-disclosure. In *L v Burton*,^{400a} the District Court upheld the plaintiff’s claim as a clear case of sexual harassment and awarded HK\$100,000 for injury to feelings, HK\$77,039 for loss of earnings, and HK\$20,000 for loss of damages under s.76 of the SDO. The court applied the principles adopted in *Yuen Sha Sha v Tse Chi Pan*.^{400b} The court also cited the three broad bands of compensation for injury to feelings set out in *Vento v Chief Constable of West Yorkshire Police*^{400c} as applied in *Yuen Wai Han v South Elderly Affairs Ltd* (discussed in para 8-176 above). The court held that claims of sexual harassment are distinct from other discrimination claims and that the special circumstances warranted an award of costs against the defendant.^{400d} Evidence from the plaintiff about how he or she or the audience has been affected by the statement is irrelevant.^{400e}

8.177

[Replace note 400: page [358]]

⁴⁰⁰*Chen v Tamara Rus* (fn 79) citing *Snowball v Gardner Merchant Ltd* [1987] IRLR 397.

[Add new notes 400a, 400b, 400c, 400d and 400e: page [358]]

^{400a}Fn 166 above.

^{400b}Fn 166 above citing *Prison Service v Johnson* [1999] ICR 275. These principles include: (1) awards of damages for injury to feeling should be just to both parties, are compensatory and should not be aimed at punishing or inflated due to feelings of indignation; (2) awards should not be too low to ensure respect for anti-discrimination policy