Non-discrimination in the workplace

Sociology, Social Issues

1. Disabilitydiscrimination- K & Others v. Secretary for Justice (17 September 2000) K and Y's applications to be firemen were rejected because K's mother suffered from schizophrenia while Y's late father had delusional disorder. W's employment with the Customs and Excise Department (CED) was conditional upon results of a medical examination and he was dismissed shortly after the results revealed that his mother suffered from schizophrenia.

Both the Fire Services Department (FSD) and CED applied a policy of rejecting job applicants with a first degree relative suffering from mental illness of a hereditary nature on the basis hat the risk of the employee developing the illness might be a threat to the safety of fellow employees and members of the public, that safety to the public and was an inherent requirement of the employment in question. However, neither department assessed the job applicants individually for their genetic liability to develop the same illness as their parent. K, Y and W all managed to find alternative employment. Each claimed against the government for unlawful discrimination on the ground of their disability or the disability of their associates.

Held

K, Y and W were awarded damages of HK$985, 143. 28, HK$775, 742. 48 and HK$1, 061, 134. 80 respectively, including damages for injury to feelings and future loss of earnings. W's award was the highest as the court found that the injury to his feelings was prolonged as a result of having to work out his termination notice period. There must be casual connection between the disability and the inability of the person to meet the inherent requirement of

the job before the defense under the Disability Discrimination Ordinance can be established.

In this case, that connection could not be established because the report from the Task Force on Mental Requirement of Disciplinary Forces showed that the risk of people with first degree relatives who are schizophrenics developing schizophrenia themselves was an acceptable level of risk for employees of disciplinary forces. In the case of Y, there was no authoritative study to establish whether delusional disorder was hereditary. There was thus no real risk that K, Y and W would develop the same disorder as their parents, and so their employment did not present any real risk to the safety of the public or fellow employees.

2. Sex discrimination - Tsang Helen v. Cathay Pacific Airways Limited (1 December 2000) Helen was employed by Cathay Pacific as a flight attendant from 1979. Under the terms of her employment contract, her retirement age was 40. The retirement age for male flight attendants performing similar duties to Helen was 55. Helen was offered an extension of her contract when she reached retirement age of 40 in 1992. She accepted this offer and continued to receive annual offers of extension until 1997, when she reached 45. In 1993, Cathay Pacific introduced a new retirement scheme whereby the retirement age of all flight attendants, regardless of sex, was set at 45. Flight attendants were given the option to stay with their current plan or change to the new plan

. Helen chose to continue with her plan and was not offered any further extension beyond the age of 45 (in 1997). Helen sought damages and a

declaration that Cathay Pacific was in contravention of the Sex Discrimination Ordinance (which came into effect in 1996). The Court held that the Sex Discrimination Ordinance applied to Helen's contract even though it had been entered into prior to the Ordinance taking effect. The correct comparator for Helen would be a male flight attendant who had been employed over the same period of time. It concluded that a hypothetical male flight attendant who had commenced work at the same time as Helen would have been entitled to remain with Cathay until the age of 55. Discrimination on the ground of sex was therefore found. The case was adjourned for the parties to agree to costs and issue of damages.

Lessons to learn

The anti-discrimination Ordinances are still applicable to existing practice established well before they have come into effect if employment continues after the legislation is operative. Existing practices therefore have to be carefully reviewed and any loopholes rectified as soon as possible. An employee has two years to sue for discrimination and the two year limitation does not start to run until the act of discrimination complained of has discontinued.

3. Pregnancy discrimination - Chang v. Wyeth (26 February 2001) Ms. Chang was a product manager at Wyeth. She informed her employer of her pregnancy in September 1997 and shortly thereafter was informed that her work was unsatisfactory and was given an ultimatum to either resign or accept a demotion to the position of marketing assistant although at the same salary. This came as a shock to Ms. Chang as she just had a salary

increase above the industry average and nothing had been said to her in her recent performance appraisal about unsatisfactory work. When Ms. Chang asked for an explanation for the ultimatum and for specific details of her poor performance, she was refused and told that the company would not agree to a further evaluation.

Following Ms. Chang's complaint to the EOC she was not given a salary increase in 1998 and in 1999 her increase was less than other product managers. She was given an unreasonable workload, made subject to new reporting requirements and unreasonable warnings. The Court held that the employer had unlawfully discriminated against Ms Chang by reason of her pregnancy and unlawfully victimized her by reason of her complaint to the EOC. Ms. Chang was entitled to treat herself as being constructively dismissed and that she was accordingly entitled to resign as she did and claim compensation.

Ms. Yuen worked for an elderly home. The employer was well aware of Ms. Yuen's pregnancy when offering her a promotion to the post of supervisor. The promotion, however, was subsequently rescinded by the company. The employer claimed that the main reason for the rescission was Ms Yuen's inexperience in handling social welfare allowance application. Furthermore, as a supervisor, one would have to take the lead in moving tables and chairs regularly in the elderly home and that therefore, the position of a supervisor was not suitable for a pregnant woman.

Held Ms. Yuen's lack of knowledge in relation to social welfare allowance applications could not have been the only reason for the company rescinding

her contract. A supervisor only had to explain social welfare allowances to the elderly and the procedural matters would be handled by a clerk. Ms. Yuen had already shown her understanding of the procedures for making such applications. Moreover, applications for social welfare allowances were not included in the job duty list of a supervisor. The Judge found on balance that pregnancy was at least one of the reasons for the termination of the contract with Ms. Yuen. The test for discrimination is the " but for" test, i. e. whether the pregnant woman would receive the same treatment as others but for the pregnancy. The intention or motive of the company to discriminate is not a necessary condition of liability.

Lessons to learn In this case, the results may have been different if the company had had more understanding of the anti-discrimination rules in Hong Kong and had approached the matter differently. For example, the company should have compiled a list of selection criteria in accordance with the Code of Practice on Employment, issued by the Equal Opportunities Commission before undertaking anyinterview, and consistently applied such criteria to all job applicants. If undertaking physical work had genuinely been an important part of a supervisor's job, this should be one of the clearly stated selection criteria.

During the interview stage, all job applicants should have been asked to state their immediate availability to undertake all aspects (i. e. including the physical aspect) of the work. Similarly, if experience in handling social welfare allowance application was required for the job, it should also have been included in the list of selection criteria. Ms. Yuen would not have scored

well against such consistent selection criteria, and it would then have been legitimate not to offer her the post of a supervisor.

By Judith Wong, Senior Associate, Employment Group, Allen ;
Overy Retrenchment of Pregnant Employee A company is to retrench a senior staff who so happened to be pregnant. If we do so, we will compensate her with retrenchment compensation and maternity leave; or is there any ways we could handle the case smoothly? Legal Advice There was a new law passed on 12 April 2001 dealing with this matter. Under the Employment Ordinance it is not legally possible to terminate the employment of pregnant females unless for serious disciplinary reasons. In other words, under the Employment Ordinance you cannot retrench until the female employee returns to the workplace six weeks after giving birth. It is not legally possible to buy your way out of this requirement. It is a criminal offence to do so.

The Sex Discrimination Ordinance and theFamilyStatus Discrimination Ordinance make it unlawful for an employer to terminate the employment of a female by reason of her pregnancy or by reason of her havingresponsibilityfor caring for new born child. We do not see any problem under these Ordinances if 100% of your staff are to be retrenched, however if the female concerned is the only one (or one of a small group of staff) who is to be retrenched then you will have to act very carefully on this matter as the Equal Opportunities Commission is likely make you pay in the region of $200, 000 - $500, 000 to avoid civil proceedings.