2. Application to the Government and the Performance of its Functions and the Exercise of its Powers

2.004 **Application to the government and public bodies.** While all four ordinances specify that they bind the government[8] in addition to the private sector, three – the SDO, DDO and FSDO – contain separate provisions which render discrimination by the government unlawful in the performance of its functions or exercise of its powers.[9] The RDO does not include similar language which was a point of controversy during the legislative process.[10] Although Hong Kong courts have not had the opportunity to consider this issue, it appears that this omission could allow government acts which may fit the definition of discrimination on the grounds of race to fall outside the scope of the ordinance's application. In other words, some government functions and powers which are covered by the SDO, FSDO and DDO may be excluded from the scope of the RDO.

3. Discrimination in the Employment Field[11]

2.005 **Relevant provisions similar in the four ordinances.** The principal employment-related provisions are virtually identical in the four statutes – although each contains unique exceptions or defences which reflect the nature of the type of discrimination which the particular statute aims to eliminate. For example, the DDO provides for a defence which indirectly requires employers to take proactive measures to ensure equal opportunity, including the provision of reasonable accommodation.[12] This defence and implicit requirement are not included in the other three statutes. These particular exceptions are discussed in greater detail below and in Chapter 5 of this publication. Each of the statutes covers discrimination against both applicants and employees which may occur at any stage of the employment experience including the process of determining who will be offered employment, the terms and conditions of employment, when affording access to opportunities for promotion, transfer or

8 SDO s.3; DDO s.5; FSDO s.3 and RDO s.3.

9 SDO ss.21 and 38; DDO ss.21 and 36; FSDO ss.17 and 28. These provisions contain certain limited exceptions.

10 See Petersen CJ, "Hong Kong's Race Discrimination Bill: A Critique and Comparison with the Sex Discrimination and Disability Discrimination Ordinances, Submission to the Hong Kong Legislative Council's Bills Committee to Study the Race Discrimination Bill", LC Paper No. CB(2)2232/06-07(01), June 2007, available at http://www.legco.gov.hk/yr06-07/english/bc/bc52/papers/bc52cb2-2232-1-e.pdf and Loper K "One Step Forward, Two Steps Back? The Dilemma of Hong Kong's Draft Race Discrimination Legislation", (2008) 38 *HKLJ* 15. The UN Committee on the Elimination of Racial Discrimination expressed concern that the RDO may not fully implement Hong Kong's international obligations. See "Concluding Observations of the Committee on the Elimination of Racial Discrimination, People's Republic of China", paras 27 and 28, UN Doc. CERD/C/CHN/CO/10-13.

11 Portions of this section on employment discrimination were previously published in – or have been adapted from – Loper, K "Discrimination Law", in Glofsheski R and Aslam F (eds.), *Hong Kong Employment Law and Practice* (Sweet & Maxwell, 2010).

12 For example, DDO s.12(2) provides a defence to employers when a person cannot carry of the inherent requirements of the job due to a disability.

training or any other benefits, services or facilities, and at dismissal or termination of employment.[13]

2.006 **Broad understanding of employment.** The broad understanding of employment provided in the statutes, the wide range of employment activities encompassed by the legislation, and the additional coverage of situations which are similar to employment, have resulted in few disputes about whether the statutes apply to a particular employment-related act. Employment discrimination claims have instead generally involved issues about establishing the cause of the unfavourable treatment based on a determination of the facts,[14] finding an appropriate "comparator" in order to demonstrate direct discrimination,[15] the meaning and scope of the prohibited ground,[16] the appropriate test for justification as a defence for indirect discrimination,[17] and the application of certain defences and exceptions such as an employee's inability to perform the "inherent requirements of the job" without accommodation under the DDO[18] and the exception for when the prohibited ground is a "genuine occupational qualification" (in three of the statutes).[19] Respondent employers often attempt to defend their actions by claiming that an employee was dismissed for reasons of unsatisfactory work performance and not because of the proscribed ground. As a result, the courts' decisions in discrimination cases have often hinged on a determination of the facts and whether the court can infer from those facts that discrimination has occurred because of a prohibited ground – which must be at least one of the reasons for the impugned treatment.[20] The courts' assessment of the credibility of the parties' evidence has also been a decisive factor in some cases.[21]

2.007 **The meaning of employment.** All four ordinances define employment as employment under (a) a contract of service or of apprenticeship; or (b) a contract personally to execute any work or labour.[22] Employment is construed broadly in the legislation to include a number of working relationships, therefore protecting individuals who

13 SDO s.11; DDO s.11; FSDO s.8 and RDO s.10.

14 See, for example, *Sit Ka Yin Priscilla v Equal Opportunities Commission* (unrep., DCEO 11/1999, [2010] HKEC 208) citing *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337.

15 *Secretary for Justice v Chan Wah* (2000) 3 HKCFAR 459 confirmed the appropriateness of the "but for" test, based on UK authority, in the Hong Kong context. For reasoning on approaching the comparator issue see, for example, *M v Secretary for Justice* [2009] 2 HKLRD 298 and the discussion in Chapter 4 of this volume.

16 See, for example, the consideration of the meaning of "marital status" in the SDO and "family status" in the FSDO in *Wong Lai Wan Avril v The Prudential Assurance Company Ltd & Shum Wang Chiu Louis* [2010] 5 HKLRD 39. A number of disability discrimination cases have also dealt with the definition of "disability", including the meaning of discrimination on the basis of an associate's disability, a disability which may exist in the future or is imputed to a person (DDO s.2(1)). *See K v Secretary for Justice* [2000] 3 HKLRD 777. In *L v Equal Opportunities Commission* (unrep., DCEO 1 & 6/1999, [2002] HKEC 1390), Judge Muttrie observed that "the definition of disability is very wide. Just about anything will do". See discussion of the prohibited grounds of discrimination in Chapter 3 of the volume.

17 *Siu Kai Yuen v Maria College* [2005] 2 HKLRD 775 at para 59 citing *Board of Governors of St Matthias Church of England School v Crizzle* [1993] IRLR 472.

18 DDO s.12(2). See, for example, *K v Secretary for Justice* [2000] 3 HKLRD 777 and *M v Secretary for Justice* [2009] 2 HKLRD 298 and the discussion in Chapter 5 of this volume.

19 *K v Secretary for Justice* (fn 18) and *M v Secretary for Justice* (fn 15). SDO s.12, DDO s.12, RDO s.11.

20 SDO s.4; DDO s.3; FSDO s.4 and RDO s.9 clarify that an act shall be considered as being done for reasons of the prohibited ground if it is done for more than one reason, and one of the reasons is the prohibited ground (whether or not it is the dominant or a substantial reason).

21 See, for example, *Aquino Celestina Valdez v So Mei Ngor* (unrep., DCEO 3/2004, [2005] HKEC 1407).

22 SDO s.2(1); DDO s.2(1); FSDO s.2(1) and RDO s.2(1).

do not necessarily conform to the meaning of "employee" as understood in the Employment Ordinance (EO).[23] As such, the statutes place restrictions on the principle of freedom of contract to the extent that employers may not – subject to limited exceptions – directly or indirectly discriminate on any of the prohibited grounds during any stage of employment and when dismissing employees. Although there must still be a contractual relationship, the contract need not be enforceable as a matter of common law.[24]

2.008 **Employment includes temporary contracts and should be construed in general terms.** In *Tsang v Cathay Pacific Airways Ltd*, the Court of Appeal confirmed that temporary employment on short-term, yearly contracts falls within the broad meaning of employment covered by the statutes and that employment should be considered in general terms rather than confined to a particular contract.[25] The case involved a claim made by a female flight attendant under the SDO that Cathay Pacific's retirement policy discriminated on the basis of sex. When the plaintiff retired in 1992, Cathay stipulated different mandatory retirement ages for female and male cabin crew (40 for women and 55 for men). Although the plaintiff was subject to this policy before the SDO came into force – and therefore before sex discrimination in employment became unlawful – the claimant's employment relationship with Cathay was renewed according to temporary one-year contracts. The last of these began in 1996 before the SDO came into force but ended in 1997 after the relevant provisions in the SDO had taken effect. In 1993, Cathay had revised its policy so that both female and male flight attendants would retire at 45 and female staff who had already retired but were on extension contracts, such as the plaintiff, could be offered extensions until they reached the age of 45. Existing male cabin crew, however, had the option of either changing to the new terms or retaining the old terms and retiring at 55. When applying the "but for" test, the court recognised that the choice of comparator depended on whether the claimant's employment with the defendant had been continuous from the time she was hired by Cathay in 1979 or had started with her final one-year extension contract in 1996.[26]

2.009 **Purposive approach to interpretation: protection goes beyond the contractual terms.** The Court of Appeal upheld her claim accepting that Tsang's employment had been continuous and therefore the comparator should be a male flight attendant hired in 1979. It rejected Cathay Pacific's argument that the terms of employment should be determined with reference to the employment contract and that the relevant contract

[23] The Employment Ordinance (EO), Cap.57, and the Employees Compensation Ordinance (ECO) apply to employees as understood with reference to a contract of employment in s.4(1) of the EO and to a contract of service in s.5(1) of the ECO. Many of the protections and benefits conferred by the EO are only available to "employees" who are engaged under a "continuous contract" for the required period (defined in s.3 and Sch.1 to the EO which means that they have to have been employed for four weeks or more for not less than 18 hours every week).

[24] Such as in cases where the contract is tainted with illegality. See *Hall v Woolston Hall Leisure Ltd* [2001] 1 WLR 225 (the anti-discrimination Acts are not really concerned with employees' rights under their contracts of employment) and *Rhys-Harper v Relaxion Group Plc* [2003] 4 All ER 1113.

[25] See *Tsang v Cathay Pacific Airways Ltd* [2002] 2 HKLRD 677. This case involved the SDO, although given the similarity of the employment provisions in all four statutes the court's holdings in this regard would also apply to the scope and meaning of employment under the DDO, FSDO and RDO.

[26] *Ibid.*, at para 56.

was the one concluded with the claimant in 1996 which was not discriminatory and did not mention retirement benefits. In doing so, the court took a purposive approach to interpreting the statute "so that its objects could be achieved"[27] stating that it was clear that the legislation goes beyond any contractual terms which may have been concluded between the employer and the employee.

2.010 **Break in employment and waiver clause.** In a similar sex discrimination case, *Au Kwai Fun v Cathay Pacific Airways Ltd*,[28] the plaintiffs, also female flight attendants employed by Cathay Pacific, failed in their claim because there had been a *de facto* break in the employment relationship and the employees had signed a waiver clause which had operated to extinguish the claims.[29] The court chose as a comparator a male flight attendant who had joined Cathay Pacific in 1999, the year the claimants had been re-hired by Cathay in an attempt to settle outstanding discrimination claims and after gaps in employment of 1–2 years since the end of their final extension contracts with Cathay when they reached the age of 45.[30]

2.011 **Meaning of employment at an establishment in Hong Kong.** The employment provisions in all four ordinances require that the employment must be at an "establishment in Hong Kong". The statutes specify that the employment is to be regarded as being at an establishment in Hong Kong unless the employee mainly or wholly works outside Hong Kong.[31] Employment at an establishment in Hong Kong includes employment on a ship registered in Hong Kong and operated by a person who has a principle place of business, or who is ordinarily resident, in Hong Kong.[32]

2.012 **Determining who should be offered employment.** All four ordinances apply to discrimination on a prohibited ground against a person in the arrangements made for the purposes of determining who should be offered employment, in the terms by which the employment is offered, or by refusing or deliberately omitting to offer employment to a person.[33]

2.013 **Terms and conditions of employment, dismissal, or subjection to any other detriment.** It is unlawful for an employer to discriminate, on any of the prohibited grounds covered by the four ordinances, against a person employed at an establishment in Hong Kong in the way the employer affords the employee opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford the employee access to them; in the terms of employment; or by dismissing the employee or subjecting the employee to any

[27] *Ibid.*, at paras 26 and 27. The court cited s.19 of the Interpretation and General Clauses Ordinance (Cap.1), Laws of Hong Kong: "[a]n Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit".

[28] [2008] 2 HKC 507.

[29] *Ibid.*, para 22.

[30] *Ibid.*, para 52.

[31] SDO s.14; DDO s.14; FSDO s.10 and RDO s.16.

[32] *Ibid.*

[33] SDO s.11(1); DDO s.11(1); FSDO s.8(1) and RDO s.10(1).

other detriment.[34] The courts have applied these provisions in several employment discrimination cases brought under the SDO and DDO.[35]

2.014 **Any other detriment.** English courts have construed the term "detriment" broadly and have essentially equated it with the phrase "less favourable treatment" in the definition of direct discrimination.[36] "Detriment" includes any disadvantage[37] even if the claimant was not aware of it at the time it happened.[38] It does not need to be a concrete loss but could be a mere loss of opportunity as measured by the claimant. In *L v Equal Opportunities Commission*[39] the court determined that the acts complained of amounted to a "detriment" and thus fell within the scope of the employment provisions. According to the judgment, the defendant had argued that an emotional sense of grievance is not enough to meet the understanding of "detriment" under the DDO's employment provisions.[40] The District Court, however, followed *Ministry of Defence v Jeremiah* in which Brightman LJ held "that 'a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment'".[41] In *Tsang v Cathay Pacific Airway Ltd*, the court considered that the plaintiff had been subjected to a detriment which resulted from the continuing discriminatory nature of Cathay Pacific's retirement policy.[42]

2.015 **Dismissal from employment.** In addition, each of the four statutes specifies that it is unlawful to discriminate against an employee by dismissing the employee.[43] References to "dismissal" in the legislation include the termination of a person's employment or partnership at the end of any period (including a period expiring by reference to an event or circumstance) or to the termination of a person's employment or partnership by the employee or partner's own action in circumstances in which that person is entitled to terminate employment without notice by reason of the conduct of the employer.[44]

2.016 **Dismissal is construed broadly.** The case of *Aquino Celestina Valdez v So Mei Ngor*[45] involved a foreign domestic worker who claimed she had been dismissed by her employer because of a deformity in her hand and had therefore been discriminated against on the grounds of her disability. The District Court held that since the purpose of the DDO "is to eliminate as far as possible discrimination against a person on the

[34] SDO s.11(2); DDO s.11(2); FSDO s.8(2) and RDO s.10(2).

[35] Examples of cases brought under s.11(2) of the SDO include, for example, *Tsang v Cathay Pacific Airways Ltd* fn 24 above, *Au Kwai Fun v Cathay Pacific Airways Ltd, L v David Roy Burton* [2010] 5 HKLRD 397, *Sit Ka Yin Priscilla v Equal Opportunities Commission* (fn 13) above. Cases which considered s.11(2) of the DDO include, for example, *L v Equal Opportunities Commission* (unrep., DCEO 1, 6/1999, [2002] HKEC 1390), *Siu Kai Yuen v Maria College* (fn 16) above, and *Aquino Celestina Valdez v So Mei Ngor* (fn 20) above.

[36] See Monaghan K, *Equality Law* (Oxford: Oxford University Press, 2007) at para 290 and 452.

[37] *Ministry of Defence v Jeremiah* [1980] QB 87.

[38] *Garry v Ealing LBC* [2001] IRLR 681. See also *Aquino Celestina Valdez v So Mei Ngor* (fn 20) above at para 12.

[39] Fn 34.

[40] Relying on *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] 2 All ER 26 at 7; *Lord Chancellor v Coker* [2001] ICR 507 (decision by the EAT) and *Barclays Bank v Kapur (No 2)* [1995] IRLR 87.

[41] Fn 35. The court approved this broader approach since the DDO allows the court to award damages for injury to feelings (DDO s.72(5)).

[42] See fn 24 above and the discussion at paras 2.008 and 2.009.

[43] SDO s.11(2)(c); DDO s.11(2)(c); FSDO s.8(2)(c) and RDO s.10(2)(c).

[44] SDO s.2(2); DDO s.2(2); FSDO s.2(2) and RDO s.2(3).

[45] Fn 20.

ground of his disability" and the purpose of the DDO's employment provisions is to "protect employment", the terms "dismissing" and "dismissal" must be given their broadest meaning.[46] Therefore, "dismissal" would include any form of termination of employment such as termination by way of notice or wages in lieu of notice.[47] The court concluded that "it would frustrate the purpose of the Ordinance if an employee's contract of employment could be terminated by notice or wages in lieu of notice for no reason other than his disability" since the "giving of notice or payment of wages in lieu of notice only discharges an employer's obligation under the contract of employment or under the EO". These actions "do not exempt an employer from liability for discrimination if the termination is an act of discrimination for the purpose of the [DDO]".[48]

2.017 **Summary dismissal for misconduct of the employee is not discrimination.** Based on a review of the facts in *Aquino Celestina Valdez v So Mei Ngor*, the court determined that the employee had engaged in misconduct and that where summary dismissal was justified at common law or under s.9 of the EO then the dismissal may not amount to unlawful discrimination under the DDO.[49] Determining whether an employee's dismissal amounts to unlawful discrimination, however, depends on a consideration of the facts of the particular case which demonstrate the reasons for the termination and the prohibited ground does not need to be the sole reason.[50] The court distinguished between this situation and circumstances in which an employee was not at fault. If the employee had not engaged in misconduct, it would not have been difficult for the employee to demonstrate by other circumstantial evidence or by inference that the dismissal was connected with her disability.[51]

2.018 **Pregnancy-related claims in the employment field.** The Hong Kong courts have considered a number of pregnancy-related discrimination claims in the employment field which have engaged s.11(2) of the SDO.[52] In *Chang Ying Kwan v Wyeth (HK) Ltd*,[53] the District Court ruled that the defendant unlawfully discriminated against the claimant on the basis of pregnancy and by way of victimisation.[54] The defendant, a pharmaceutical company, had subjected the claimant to various forms of unfavourable treatment after she informed the company of her pregnancy and attempted to compel her to resign. In *Lam Wing Lai v YT Cheng (Chingtai) Ltd*,[55] the court ruled that the termination of an employee upon return from maternity leave had amounted to pregnancy and family status discrimination under SDO ss.8 and 11(2)(c) and FSDO ss.5(a) and 8(2)(c). *Yuen Wai Han v South Elderly Affairs*[56] involved the dismissal of a social worker and although the parties disputed the reasons for termination,

[46] *Ibid.*, at para 12.

[47] *Ibid.*

[48] *Ibid.*

[49] *Ibid.*, at para 14.

[50] SDO s.4; DDO s.3; FSDO s.4 and RDO s.9.

[51] *Ibid.*

[52] Involving treatment of an employee.

[53] [2001] 2 HKC 129.

[54] SDO s.9(1) prohibits victimisation. This concept is discussed in Chapter 6 of this volume.

[55] [2006] 1 HKLRD 639. The employer's appeal in the case was dismissed by the Court of Appeal (unrep., HCMP 718/2006, [2006] HKEC 951).

[56] [2005] 2 HKLRD 277.

the court eventually held that pregnancy was at least one of the reasons and was therefore unlawful discrimination under ss.8(a) and 11(2) of the SDO. The court upheld the plaintiff's claims of pregnancy discrimination and discrimination by way of victimisation in *Chan Choi Yin v Toppan Forms (Hong Kong) Ltd*[57] The plaintiff claimed that her colleagues had treated her less favourably after she informed the company of her pregnancy, took pregnancy-related sick-leave and again when she returned from maternity leave. She had filed complaints to the EOC and the Labour Tribunal and was eventually dismissed.

4. Discrimination in Employment-Like Situations[58]

2.019 **Discrimination against contract workers.** A person may not discriminate, on any of the prohibited grounds covered by the four ordinances, against contract workers who are not directly employed by the person, but are employed by a contractor of that person or a sub-contractor.[59] In *Leeds City Council v Woodhouse*, the English Court of Appeal held that the provisions in the 1976 Race Relations Act which protect from discrimination against contract workers should be interpreted broadly and with a focus on the facts of a particular claim.[60]

2.020 **Discrimination in relation to a position as a partner in a firm.** A firm consisting of not less than six partners may not discriminate on any of the prohibited grounds in relation to a position as a partner in the firm in (1) the arrangements the firm makes for the purposes of determining who should be offered the position; (2) in the terms on which the position is offered; or (3) when a person already holds the position, in the way the firm affords the person access to any benefits, facilities or services, or by refusing or deliberately omitting to afford the person access to them, or by expelling the person or deliberately omitting to afford the person access to them, or by expelling the person from the position or subjecting the person to any other detriment.[61] The legislation specifies that the provisions also apply to persons who are proposing to form themselves into a partnership.[62] If being (or not being) a member of a group defined by the prohibited grounds is a genuine occupational requirement then the provisions making it unlawful to discriminate in the arrangements made for determining who

[57] [2006] 3 HKC 143.

[58] Portions of this section on employment discrimination were previously published in – or have been adapted from – Loper K "Discrimination Law", in Glofsheski R and Aslam F (eds.), *Hong Kong Employment Law and Practice* (Sweet & Maxwell, 2010).

[59] SDO s.13; DDO s.13; FSDO s.9 and RDO s.15.

[60] [2010] IRLR 625. See also *Harrods Ltd v Remick* [1998] 1 All ER 52 in which the Court of Appeal held that employees hired by a licensee under contract with a large department store to manage and operate various departments in the store were doing "work for" the store as well as the licensee. The store would therefore be liable for unlawful discrimination against those employees. Like the other employment-related provisions in the Hong Kong legislation, the relevant sections on contract workers in the four ordinances are essentially the same as their counterparts in the UK statutes.

[61] SDO s.15; DDO s.15; FSDO s.11 and RDO s.17.

[62] SDO s.15(2); DDOs.15(2);, FSDO s.11(2) and RDO s.17(2).

should be offered the position (or by refusing or deliberately omitting to offer the position) will not apply.[63]

2.021 **Discrimination by trade unions, etc.** It is unlawful for an organisation of workers or employers or professional or trade organisations to discriminate on any of the prohibited grounds in the following ways: (1) in the terms for admission to membership of the organisation; (2) by refusing or deliberately omitting to accept a person's application for membership; (3) in the way the organisation affords a member access to benefits, facilities or services; (4) by depriving a person of membership or varying the terms of membership; or (5) by subjecting a person to any other detriment.[64]

2.022 **Qualifying bodies.** An authority or body which can confer an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade may not discriminate on any of the prohibited grounds in the terms on which it is prepared to confer authorisation or qualification; by refusing or deliberately omitting to grant a person's application for authorisation or qualification; or by withdrawing or varying the terms of someone's authorisation or qualification.[65] In addition, when an authority or body is required by law to satisfy itself of a person's good character before conferring authorisation or qualification on that person, the authority or body has a duty to have regard to any evidence which tends to show that person, or any of that person's employees or agents (past or present), has practiced unlawful discrimination or engaged in unlawful harassment in connection with carrying out any profession or trade. The term "profession" includes any vocation or occupation.[66] English courts have considered the scope of these provisions in several cases. For example, in *Patterson v Legal Services Commission*, the English Court of Appeal held that the Legal Services Commission, in granting a franchise to a solicitor's firm to enable the firm to use public money for the provision of legal services, acted as a body which conferred an authorisation on the firm.[67] Other cases have interpreted the meaning of qualification bodies in the UK statutes more narrowly.[68]

2.023 **Provision of vocational training.** A person who provides, or makes arrangements for the provision of, facilities for vocational training may not discriminate in the terms on which access to training courses or other associated facilities is afforded; by refusing

[63] SDO s.15(3); DDO s.15(3) and RDO s.17(3). See the discussion of the genuine occupational qualification defence in Chapter 5 of this volume.

[64] SDO s.16; DDO s.16; FSDO s.12 and RDO s.18.

[65] SDO s.17; DDO s.17; FSDO s.13 and RDO s.19.

[66] SDO s.2(1); DDO s.2(1); FSDO s.2(1) and RDO s.2(1).

[67] [2004] ICR 312.

[68] See, for example, *Tattari v Private Patients Plan Ltd* [1998] ICR 106 in which the Court of Appeal held that qualifications bodies are bodies which are empowered to grant qualifications for recognition for the purpose of practicing a profession, calling, trade or activity and do not include providers of medical insurance which stipulate that doctors on their accepted list of specialists must have obtained a certain qualification. In *Arthur v Attorney-General* [1999] ICR 631 the Employment Appeal Tribunal held that a committee established to advise the Lord Chancellor on the appointment of justices of the peace was not a qualifying body. It concluded that a justice of the peace was not an "occupation" within the definition of "profession" and distinguished between a panel which was sifting applications and therefore merely performing a filtering function and a qualifying body conferring an approval. In *Triesman v Ali* [2002] ICR 1026 the Court of Appeal held that a political party, in selecting a candidate for local elections, is not a body which can confer an authorisation or qualification as intended by the statute.

or deliberately omitting to afford such access; by terminating the training; or by subjecting someone to any other detriment during the course of the training.[69]

2.024 **Employment agencies.** An employment agency may not discriminate on any of the prohibited grounds in the terms on which it offers its services, by refusing or deliberately omitting to provide any of its services, or in the way it provides its services.[70] "Services" includes guidance on careers and any other employment-related services. It is lawful, however, to discriminate under these provisions concerning employment which the employer could lawfully refuse to offer to the person.[71] An agency shall not be subject to any liability if it proves that it acted in reliance on a statement made to it by an employer to that effect and that it was reasonable for the agency to rely on such a statement.[72] A person who knowingly or recklessly makes such a statement which is false or misleading commits an offence.[73]

2.025 **Discrimination against commission agents.** A person (the "principal") who hires individuals (commission agents) who are remunerated in whole or in part by commission may not discriminate against such agents in relation to work done for the principal (1) in the terms on which the principal allows the agent to do the work; (2) by not allowing the agent to do (or continue to do) the work; (3) in the way the principal affords the agent access to any benefits, facilities or services, or by refusing or deliberately omitting to afford the agent access to them; or (4) by subjecting the agent to any other detriment.[74] The SDO, DDO and RDO contain genuine occupational qualification exceptions.[75] All four ordinances specify that it is not unlawful for a principal to discriminate by affording (or refusing or deliberately omitting to afford) the agent access to benefits, facilities or services of the same description to the public, or to the section of the public to which the agent belongs.[76]

2.026 **Discrimination by barristers or barristers' clerks.** It is unlawful for a barrister or barrister's clerk to discriminate against a person in the arrangements made for the purposes of determining who should be offered a pupilage or tenancy, in respect of the terms on which the pupilage or tenancy is offered, by refusing or deliberately omitting to offer the pupilage or tenancy to the person; in respect of any terms applicable to a pupil or tenant; in opportunities for training or gaining experience; in benefits, facilities or services; termination of a person's pupilage or subjecting a person to pressure to leave the chambers. It is also unlawful for a person to discriminate when giving, withholding or accepting instructions to a barrister.[77]

2.027 **Constructive dismissal.** In *Chang Ying Kwan,* a case involving pregnancy discrimination and discrimination by way of victimisation, an employee's resignation

[69] SDO s.18; DDO s.18; FSDO s.14 and RDO s.20. The provisions in the ordinances which protect against discrimination in the provision of goods, services and facilities may also cover some vocational training activities. See SDO s.28; DDO s.26; FSDO s.19 and RDO s.27.
[70] SDO s.19(1); DDO s.19(1); FSDO s.15(1) and RDO s.21(1).
[71] SDO s.19(3); DDO s.19(3); FSDO s.15(3) and RDO s.21(3).
[72] SDO s.19(4); DDO s.19(4); FSDO s.15(4) and RDO s.21(4).
[73] SDO s.19(5); DDO s.19(5); FSDO s.15(5) and RDO s.21(5).
[74] SDO s.20; DDO s.20; FSDO s.16 and RDO s.22.
[75] SDO s.20(3); DDO s.20(3) and RDO s.22(3).
[76] SDO s.20(4); DDO s.20(5); FSDO s.16(3) and RDO s.22(4).
[77] SDO s.36; DDO s.33; FSDO s.26 and RDO s.35.

amounted to constructive dismissal in light of the discriminatory treatment she received from her employer.[78]

2.028 **Vicarious liability.** The four ordinances all provide that an employer is vicariously liable for the actions of its employees, whether or not the employer knew about the action or it was done with the employer's approval.[79] In proceedings brought under any of the four ordinances, it is a defence for an employer to prove that it took such steps as were reasonably practicable to prevent the employee from doing an unlawful act.[80] In *Chen v Tamara Rus*, the District Court held that deciding whether an employer has taken all steps as were reasonably practicable involves a determination of fact.[81] It held that the defendant company had discharged its burden since it had provided guidelines on sexual harassment and required employees to sign a declaration stating that they had read and understood the guidelines. The court also considered evidence which indicated that the employer had a zero tolerance policy towards harassment.[82]

2.029 **Discriminatory advertisements.** All four ordinances make it unlawful to publish advertisements which indicate or might reasonably be understood to indicate an intention to do any act which is or might be unlawful under the ordinances in relation to the arrangements made for the purposes of determining who should be offered employment or by refusing or deliberately omitting to offer employment.[83] This does not apply, however, if the intended act would not in fact be unlawful.[84] Under the SDO, FSDO, and RDO, the use of a job description which is specific to sex, race or having or not having family status shall be taken to signify an intention to discriminate, unless the advertisement contains an indication to the contrary.[85] In *Equal Opportunities Commission v Apple Daily*, the Court of Appeal considered whether advertisements published by Apple Daily seeking "beautiful female reporters to report on balls and parties" breached these provisions in the SDO. The court held that this was not unlawful since the advertisement was capable of two meanings and the original Chinese text was ambiguous.[86]

5. Discrimination in Education

2.030 **Overview of discrimination in the education field.** Although most discrimination claims conciliated by the EOC or resolved by the courts relate to the employment context, there have been three cases considered by Hong Kong courts concerning

[78] See fn 53 above.
[79] SDO s.46; DDO s.48; FSDO s.34 and RDO s.47.
[80] SDO s.46(3); DDO s.48(3); FSDO s.34(3) and RDO s.47(3).
[81] *Chen v Tamara Rus* (unrep., DCEO 2/1999, [2000] HKEC 649) citing *Balgobin v Tower Hamlets LBC* [1987] ICR 829. *Miss L Carter v Westcliff Hall Sidmouth Ltd* (unrep., Exeter IT, Case No 31165/90). In the latter case, it was decided that taking action after discovering a sexual harassment complaint was insufficient and an employer must take measures to prevent harassment in the first place by instructing staff that sexual harassment was unlawful and unacceptable.
[82] For example, the claimant's supervisor had lectured him after becoming aware of an email sent by the claimant to the defendant in which he had referred to her as "Tamara baby".
[83] SDO s.43(1); DDO s.43(1); FSDO s.31(1) and RDO s.42(2).
[84] SDO s.43(2); DDO s.43(2); FSDO s.31(2) and RDO s.42(2).
[85] SDO s.43(3); DDO s.43(2); FSDO s.31(2) and RDO s.42(2).
[86] [1999] 1 HKLRD 188.

discrimination in education. One case involved sexual harassment of a university student by another student.[87] The other two challenged Hong Kong Government education policies on the basis of the education provisions under the SDO and the DDO.

2.031 **Scope of the education provisions.** All four statutes prohibit discrimination in the area of education[88] which includes "any form of training or instruction".[89] The SDO, FSDO and RDO make it unlawful for the "responsible body" for an "educational establishment" to discriminate on a prohibited ground under those statutes and the SDO and FSDO include schedules which list the relevant establishments and responsible bodies.[90] The DDO provides that it is unlawful for an "educational establishment" to discriminate against a person with a disability and does not specify "responsible bodies."[91] These terms are defined broadly: educational establishments include universities, post-secondary colleges, technical colleges and institutes, industrial training centres, the Hong Kong Academy for Performing Arts, and all schools which are registered or provisionally registered under the Education Ordinance. "Responsible bodies" include, for example, Councils and Boards of universities and the management committees of the schools, depending on the relevant ordinance governing the institution.[92]

2.032 **Broad application.** Like employment, the education provisions in all four ordinances are broad and cover most aspects of the educational experience. They protect individuals from discrimination during the admissions process, when enrolled as a student, and from expulsion or exclusion.

2.033 **Refusing or deliberately omitting to accept an application for admission.** According to the SDO, FSDO, and the RDO it is unlawful for the responsible body for an educational establishment to discriminate against a person on a prohibited ground by refusing or deliberately omitting to accept an application for the person's admission as a student or in the terms of admission as a student.[93] The DDO makes it unlawful for an educational establishment to discriminate by refusing or *failing to accept* a person's application for admission as a student or in the terms or conditions on which it is prepared to admit that person as a student.[94]

2.034 **Sex discrimination in secondary school admissions.** The Court of First Instance applied the SDO's education provisions in relation to the admissions process in a judicial review brought by the EOC against the Director of Education challenging the Education Department's centrally-administered Secondary School Placement

87 *Yuen Sha Sha v Tse Chi Pan* [1999] 2 HKLRD 28.
88 SDO s.25; DDO s.24; FSDO s.18; and RDO s.26.
89 SDO s.2(1); DDO s.2(1); FSDO s.2(1) and RDO s.2(1).
90 SDO s.25; DDO s.24; FSDO s.18 and RDO s.26(1).
91 DDO s.24(1).
92 The SDO and FSDO both list the educational establishments and responsible bodies in Sch.1. Educational establishments include all universities in Hong Kong registered under the relevant ordinances, any post-secondary college, and all schools in Hong Kong registered under the Education Ordinance (Cap.279).
93 SDO s.25(a) and (b); FSDO s.18(1)(a) and (b) and RDO s.26(1)(a) and (b).
94 DDO s.24(1). Emphasis added. The language in the DDO's education provisions closely follow the 1992 Australian Disability Discrimination Act (s.22), while the SDO, FSDO and RDO have been modeled on UK legislation (see Sex Discrimination Act of 1975 s.22).

Allocation (SSPA) System.[95] After receiving complaints from parents and students that the SSPA System discriminated on the basis of sex, the EOC launched a formal investigation[96] which revealed that three aspects of the system contravened the SDO.[97] The system employed (1) a gender-based scaling mechanism "which scaled the scores of all primary students in their school assessments to ensure that they could be fairly compared with scores given by other primary schools";[98] (2) a gender-based "banding mechanism, which banded all students into broad orders of academic merit"; and (3) a gender quota "to ensure that a fixed ratio of boys and girls were admitted to individual co-educational secondary schools". After a failure to conciliate with the Director of Education, the EOC applied for judicial review of the policy and the Court of First Instance handed down its judgment in favor of the EOC in 2001. The court applied s.25(1)(a) of the SDO – as well as s.5(a) which defines direct discrimination – and declared that the three gender-based mechanisms constituted unlawful discrimination and therefore contravened the statute.[99] This case was one of the first challenges to government policy brought under the anti-discrimination statutes and also considered the nature of the general exception for special measures in s.48 of the SDO.[100]

2.035 **Discrimination against students.** The scope of the education provisions in the SDO, FSDO and RDO include discrimination against a student – on the relevant prohibited ground – by denying or limiting the student's access to any benefit, service or facility provided by the educational establishment; by excluding the student[101] or subjecting the student to any other detriment.[102] The DDO similarly makes it unlawful for an educational establishment to discriminate against a student on a prohibited ground by denying that student's access, or limiting that student's access, to any benefit, service or facility provided by the educational establishment; by expelling that student; or by subjecting that student to any other detriment.[103]

2.036 **Availability of discretionary school places and the duration of education in special schools.** The Court of First Instance considered these provisions in *Tong Wai Ting by Choi Wai Chu (his next friend) v Secretary for Education*,[104] a case involving

95 *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690. For landmark sex and race discrimination cases considered under equivalent provisions in the UK Sex Discrimination Act and Race Relations Act see *EOC v Birmingham City Council* [1989] AC 1155 and *Mandla v Dowell Lee* [1983] 2 AC 548.
96 SDO s.70 empowers the Commission to conduct a formal investigation if it thinks fit for any purpose connected with the carrying out of any of its functions (in s.64).
97 See Equal Opportunities Commission "Formal Investigation Report: Secondary School Places Allocation (SSPA) System", 1999
98 *Equal Opportunities Commission v Director of Education* (fn 95) at para 19.
99 *Ibid.*, at para 142. For a discussion of this case see, for example, Carole J Petersen, "The Right to Equality in the Public Sector: An Assessment of Post-Colonial Hong Kong", 32 *Hong Kong Law Journal* 103-34 (2002).
100 Hartmann J relied on provisions in the International Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) – a core human rights treaty which applies to Hong Kong – for guidance when interpreting the special measures provision.
101 The SDO and FSDO use the term "excluding" while the RDO uses "expelling". See SDO s.25(c)(ii); FSDO s.18(1)(c)(ii) and RDO s.26(1)(c)(ii).
102 SDO s.25(c); FSDO s.18(1) and RDO s.(1)(c).
103 DDO s.24(2). A key comparative case which applied similar provisions in the Australian DDA is *Purvis v State of New South Wales* (2003) 217 CLR 92 (HCA).
104 (Unrep., HCAL 73/2009, [2009] HKEC 1367).

an 18-year-old student with a mild intellectual disability who had completed 12 years of free education in a special school for students with intellectual disabilities. Twelve years was the usual maximum duration of free education for such students unless a student had obtained the approval of the Permanent Secretary for Education to extend the period of enrollment as a student for special reasons specified by the government, and there were vacancies at the relevant school to accommodate the application. If not, then a student with intellectual disabilities attending a special school would normally be required to leave at the age of 18 – since students usually begin their primary education at the age of six. The applicant wished to extend his studies by one more year, and his application to do so was supported by the school, but there were insufficient places available. He claimed that the government's policy – which in practice meant most students with intellectual disabilities were required to leave school at the age of 18 – discriminated on the basis of disability. Although the court accepted that the issue fell within the scope of application of the DDO, the applicant lost the case based on the determination of a comparator for the purposes of proving direct disability discrimination.[105]

2.037 **Exception for same-sex educational establishments.** The SDO provides an exception to the general prohibition against sex discrimination in the education context for same-sex educational establishments. This exception applies if an educational establishment only admits students of one sex or admits students of another sex on an exceptional basis or in comparatively small numbers and confines their participation to particular courses of instruction or classes.[106]

2.038 **Exceptions in the DDO's education provisions.** The DDO contains a greater number of broad exceptions in its application to the education field than the other three statutes. Although Hong Kong courts have not yet tested these provisions, they appear to limit the scope of activities covered and to allow a degree of flexibility for educational establishments to exclude students with disabilities.[107] The decision in favor of the defendant in *Tong Wai Ting* hinged on the identification of an appropriate comparator, and not on an application of the exceptions and defences in the DDO.[108]

2.039 **Unjustifiable hardship defence in disability discrimination claims.** Similar to the employment context, an educational establishment would not discriminate unlawfully when refusing to admit a student on the basis of disability if such admission would require services or facilities that are not required by students who do not have a disability and these services or facilities would impose an unjustifiable hardship

[105] The issue of identifying an appropriate comparator is particularly difficult in disability discrimination cases since the material circumstances of the claimant and the non-disabled comparator are seldom similar enough to compare. See Chapter 4 of this volume. For a general discussion of the comparator problem in anti-discrimination legislation, see Aileen McColgan. "Cracking the Comparator Problem: Discrimination, 'Equal' Treatment, and the Role of Comparisons", 6 *EHRLR* 650–677 (2006).

[106] SDO s.26. Section 27 provides a temporary exception for single-sex educational establishments which become co-educational.

[107] Loper K "Equality and Inclusion in Education for Persons with Disabilities: Article 24 of the Convention on the Rights of Persons with Disabilities and its Implementation in Hong Kong" (2010) 40 *HKLJ* 419.

[108] *Tong Wai Ting v Secretary for Education* (fn 104).

on the establishment.[109] However, as with employment, this exception, when read alongside the definition of unjustifiable hardship in s.4[110] appears indirectly to impose an obligation on educational establishments to provide accommodation at least up to the level of unjustifiable hardship for students with disabilities. [See Chapter 5 of this volume].

As a result, the DDO, unlike the SDO, FSDO and RDO, apparently requires educational establishments (as well as employers) to undertake proactive measures. Notably, the unjustifiable defence does not apply beyond the admissions stage. Therefore, once a student is admitted, an educational establishment can no longer rely on this defence in order to expel or subject a student to any other detriment.[111]

2.040 **Exception if not reasonably capable of performing the actions reasonably required.** Another exception in the DDO allows for disability discrimination in the education context if the claimant is not reasonably capable of performing the actions or activities reasonably required by the educational establishment in relation to students at that educational establishment; or if the students who are participating in – or will be participating in – those actions or activities are selected by a method which is reasonable on the basis of their skills and abilities relevant to those actions and relative to each other.[112] Although the education provisions in the DDO largely duplicate their counterparts in Australian federal anti-discrimination legislation, the Australian Disability Discrimination Act does not include this exception in the education context, which has instead been copied from provisions related to discrimination in sports which appear in both the Hong Kong and Australian legislation.[113] The Australian Act also contains additional language, not incorporated into the Hong Kong legislation, which widens the protection afforded to persons with disabilities against discrimination in education.[114]

[109] DDO s.24(4). This section provides for an exception for educational establishments which do not accept a person's application for admission where that person, if admitted, would require services or facilities that are not required by students who do not have a disability and the provision of such services would impose unjustifiable hardship on the educational establishment. The unjustifiable hardship defence in the DDO will be discussed in more detail in Chapter 5 (as well as inherent requirements of the job and genuine occupational qualifications).

[110] DDO s.4: "For the purposes of this Ordinance, in determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including (a) the reasonableness of any accommodation to be made available to a person with a disability; (b) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; (c) the effect of the disability of a person concerned; and (d) the financial circumstances of and the estimated amount of expenditure (including recurrent expenditure) required to be made by the person claiming unjustifiable hardship.

[111] In this regard, the Hong Kong statute duplicates the education provisions in the original 1992 Australian Disability Discrimination Act which also excluded the unjustifiable hardship defence only applied to the admission's process. The Australian Act was amended, however, partly in response to *Purvis v New South Wales (Department of Education and Training)* (fn 103). For a discussion of this case, including the comparator issue, see Elizabeth Dickson, "Disability Discrimination in Education: *Purvis v New South Wales (Department of Education and Training)*, amendment of the education provisions of the Disability Discrimination Act 1992 (Cth) and the formulation of Disability Standards for Education", *UQLJ* (2005).

[112] DDO s.24(5).

[113] DDO s.35 and 1992 Australian Disability Discrimination Act (DDA) s.28(3).

[114] The Australian Act makes it unlawful for an education provider to discriminate against a person on the ground of the person's disability: by developing curricula or training courses having a content that will either exclude the person from participation, or subject the person to any other detriment; or by accrediting curricula or training courses having such a content. See 1992 Australian Disability Discrimination Act (DDA) s.22(2A).

2.041 **Exceptions in the FSDO for admission of students.** The FSDO declares that the education provisions do not apply to any acts done by a responsible body for an educational establishment in order to comply with the Primary One Admission System, the Secondary School Places Allocation System (or systems or programmes which replace those systems in whole or in part), or any provision of any law which relates to the admission of students.[115]

2.042 **Exceptions in the RDO regarding public holidays and the medium of instruction in education and vocational training.** The RDO provides for exceptions for modification of or the arrangements made for public holidays and the medium of instruction.[116] Educational establishments and vocational training bodies are not required to modify or make different arrangements for persons of any racial group regarding the medium of instructions or holidays.[117] Although language is not included in the definition of "race" in s.8, it may be possible that the use or failure to use a language could have a disproportionate impact on a particular racial group without justification and therefore amount to indirect racial discrimination.

6. Provision of Goods, Facilities and Services

2.043 **Unlawful discrimination in the provision of goods, facilities and services.** The SDO, FSDO and RDO render it unlawful for a person concerned with the provision of goods facilities or services to the public or a section of the public – whether those services are for payment or not – to discriminate against another person who seeks to use those goods, facilities or services on the basis of one of the prohibited grounds covered by the legislation.[118] Unlawful acts include discrimination (1) by refusing or deliberately omitting to provide the person with any of the goods facilities or services; or (2) by refusing or deliberately omitting to provide the person with goods, facilities or services of the like quality, in the like manner and on the like terms as are normal in relation to members of the comparator group (ie in relation to male members of the public in the case of a sex discrimination claim brought by a woman).

2.044 **Unlawful discrimination in the provision of goods, facilities and services in the DDO.** The provisions in the DDO similarly prohibit discrimination in the provision of goods, facilities and services. The relevant sections of the DDO, however, are based largely on the Australian DDA, and therefore use somewhat different language than the comparable sections of the SDO, FSDO and RDO which are based on UK statutes. The DDO makes it unlawful for a person who, whether for payment or not, provides goods, services or facilities, to discriminate against another person with a disability (a) by refusing to provide that other person with those goods, services or facilities; (b) in the terms or conditions on which the first-mentioned person provides that other

[115] FSDO s.18(2).

[116] The Bills Committee for the Race Discrimination Bill proposed an amendment to limit the effect of this exception during the legislative process.

[117] RDO s.26(2) (education) and s.20(2) (vocational training).

[118] SDO s.28; FSDO s.19 and RDO s.27.

person with those goods, services, or facilities; or (c) in the manner in which the first-mentioned person provides that other person with those goods, services or facilities.[119]

2.045 **Unjustifiable hardship defence in the DDO.** If the provision of the goods, services or facilities in question would impose an unjustifiable hardship on the person who would have to provide those goods, services or facilities then s.26(1) of the DDO would not apply.[120]

2.046 **Examples of facilities and services including government services and undertakings.** The four ordinances list a broad range of examples of facilities and services including (a) access to and use of any place which members of the public or a section of the public are permitted to enter; (b) accommodation in a hotel, guesthouse or other similar establishment; (c) facilities by way of banking or insurance or for grants, loans, credit or finance; (d) facilities for education;[121] (e) facilities for entertainment, recreation or refreshment; facilities for transport or travel; (f) the services of any profession or trade; and (g) the services of any department of the government or any undertaking by or of the government.[122] The DDO adds two more examples not explicitly contained in the other three statues: the services relating to transport or travel and the services related to telecommunications.[123] Hong Kong courts have considered a limited number of claims of discrimination in the provision of goods, facilities and services including the termination by a fitness centre of a person's membership[124] and the refusal of a taxi driver to assist a woman in a wheelchair.[125] Whether the challenged activities in these cases fell within the scope of the legislations' application was not a significant issue in the proceedings possibly due to the broad scope of coverage provided by the statutes.

2.047 **Examples of discrimination claims brought under the goods, facilities or services provisions in UK legislation.** Since the Hong Kong statutes (apart from the DDO) largely duplicate the comparable UK provisions in this area, it is useful to consider relevant UK jurisprudence. Examples include cases involving

[119] DDO s.26(1).

[120] DDO s.26(2)(a).

[121] The DDO adds "including the conduct of public examinations".

[122] SDO s.28(2)(a)-(h); DDO s.27(a)-(f), (i) and (j); FSDO s.19(2)(a)-(h) and RDO s.27(2)(a)-(h). It is worth noting that subs.(g) regarding government services is not contained in the UK legislation on which this list is based. In a controversial judgment, the House of Lords limited the application of the UK goods, facilities, and services provisions to public sector activities which were similar to those conducted by private actors. See *R. v Entry Clearance Officer (Bombay) Ex p. Amin* [1983] 2 AC 818. Clause 3 of the original draft race discrimination legislation tabled before the Hong Kong Legislative Council in Dec 2006 attempted to incorporate this judicial interpretation into the text of the Hong Kong RDO. It read: the "Ordinance applies to an act done by or for the purposes of the government that is of a kind similar to an act done by a private person." After significant opposition, however, the government amended this to read: "this ordinance binds the government" which is the same formulation used in the SDO, DDO and FSDO.

[123] DDO s.27(1)(g) and (h).

[124] *Chen Raymond v Lo San* (unrep., DCEO 1, 4/2003, [2007] HKEC 1489). In this case the plaintiff unsuccessfully claimed that a fitness centre's termination of his membership amounted to direct disability discrimination and discrimination by way of victimisation.

[125] *Ma Bik Yung v Ko Chuen* [1999] 2 HKLRD 263 (DC) and *Ma Bik Yung v Ko Chuen* [2000] 1 HKLRD 514 (CA). The District Court held that the taxi driver had directly discriminated and harassed the plaintiff on the basis of disability. While the Court of Appeal reaffirmed the lower court's finding of disability harassment, it accepted the taxi driver's appeal regarding direct disability discrimination on the basis that the Court of First Instance had failed to correctly analyze its chosen comparator.

(1) Part VI of each ADO, which sets out a number of general exceptions in which otherwise discriminatory acts are lawful notwithstanding the previous provisions of the relevant ADO. Where these are applicable to one or more of the ADOs we have set these out below in the General Exceptions section. If the exception is specific to only one of the ADOs we have referred to this in the discussion of exceptions specific to that ordinance only; and

(2) exceptions contained in the parts of the ADO which proscribe the circumstances in which discriminatory acts will be unlawful in respect of employment, fields other than employment, education or in the provision of goods, services and facilities (including premises). Whilst some of these are also common to each of the ADOs (for example, the exception relating to small premises), for ease of reference these are referred to in the section discussing specific exceptions to the relevant ADO below.

(a) General exceptions

5.005 Each of the ADOs contain a Part VI which sets out general exceptions, which provide that certain discriminatory acts are lawful notwithstanding the preceding provisions of the ADO. For the most part, these relate to acts that assist or benefit persons who are protected under the ADO or to acts done in order to comply with statutory provisions. General exceptions that are common to most of the ADOs are discussed below. General exceptions that are specific to only one of the ADOs, such as the exception for sport in relation to the SDO, are discussed in the section relating to that particular ADO.

(i) *Acts done wholly or mainly outside Hong Kong*

5.006 **Acts done wholly or mainly outside Hong Kong.** The ADOs apply to acts done within Hong Kong but specifically exclude acts done wholly or mainly outside Hong Kong unless there is a sufficient connection to Hong Kong.

5.007 *Employment* provisions prohibiting discrimination by employers or principals in employment do not apply where the employee or contractor does his or her work wholly or mainly outside Hong Kong.[6] In determining whether a person works wholly or mainly outside Hong Kong, the whole period of employment should be taken into account.[7] A person works mainly outside Hong Kong if the person has in fact spent more time working outside Hong Kong in the whole period of employment than in Hong Kong.[8] If the person works mainly in Hong Kong, the ADOs will apply even if the discriminatory act takes place outside Hong Kong.

5.008 Unless the employee does his work wholly outside Hong Kong, the ADOs continue to apply to employment on board:

(1) a ship registered in Hong Kong; or

[6] SDO s.14; DDO s.14; FSDO s.10; RDO s.16.
[7] *Saggar v Ministry of Defence* [2005] IRLR 618 (UK).
[8] *Carver v Saudi Arabian Airlines* [1999] 3 All ER 61 (UK).

(2) an aircraft or dynamically supported craft registered in Hong Kong and operated by a person whose principal place of business is in Hong Kong or is ordinarily resident in Hong Kong;

in which case the employment is regarded as being at an establishment in Hong Kong.[9]

5.009 *Goods, facilities or services* provisions prohibiting discrimination in the provision of goods, facilities or services do not apply to the provision of goods, facilities or services if outside Hong Kong unless:[10]

(1) Facilities are being provided for travel outside Hong Kong but the refusal or omission occurs in Hong Kong or on a ship, aircraft or dynamically supported craft which falls within (b) below; or

(2) The provision of goods, facilities or services is on and in relation to:

(a) any ship registered in Hong Kong; or

(b) an aircraft or dynamically supported craft registered in Hong Kong and operated by a person whose principal place of business is in Hong Kong or is ordinarily resident in Hong Kong unless they work wholly outside Hong Kong; or

(c) any ship, aircraft or dynamically supported craft belonging to or possessed by the Government,

even if the ship or craft is outside Hong Kong, unless the act is done in or over a place outside Hong Kong or in or over that place's territorial waters for the purpose of complying with the laws of that place.[11]

5.010 Provisions prohibiting discrimination in the provision of goods, facilities or services also do not apply to the provision of facilities by way of banking or insurance or for grants, loans, credit or finance, where the facilities are for a purpose to be carried out, or in connection with risks wholly or mainly arising, outside Hong Kong.[12]

(ii) *Acts of positive discrimination*

5.011 Positive discrimination is a term used to describe acts of preferential treatment of a person of a particular sex, disability, family status or race, which effectively discriminate against others not of that sex, disability, family status or race. ADOs contain a number of exceptions that authorise limited acts of positive discrimination to be taken to assist persons who may be otherwise disadvantaged and provide them with equal opportunities. Acts of positive discrimination which do not fall within the

[9] SDO s.14(2); DDO s.14(2); RDO s.16(2).
[10] SDO ss.41(1)–(3); DDO s.40.
[11] SDO s.41(4); DDO s.40(4); FSDO s.29(4); RDO s.40(4).
[12] SDO s.41(1)(b); DDO s.40(1)(b); FSDO s.29(1)(b); RDO s.40(1)(b).

permitted exceptions under the ADOs are unlawful no matter how well-intended they may have been.[13]

5.012 **Special measures to provide equal opportunities or meet special needs.** Acts that are reasonably intended to provide persons of a particular sex, family status, disability or race with equal opportunities or to meet their special needs in relation to employment, education, clubs, sport or the provision of premises, goods, services or facilities are lawful if the acts are reasonably intended to:[14]

(1) ensure that those persons have equal opportunities with others in circumstances covered under the ADOs;

(2) afford them goods or access to services, facilities or opportunities to meet their special needs in relation to employment, education, welfare or clubs or the provision of premises, goods, services or facilities; or

(3) afford them grants, benefits or programmes, direct or indirect, to meet their special needs in relation to employment, education, welfare or clubs or the provision of premises, goods, services or facilities.

In the case of persons with a disability, this includes any act reasonably intended to afford that person the capacity to live independently.[15]

5.013 The special measures exception permits restrictions on the fundamental right of equality of treatment free of discrimination but is not intended to undermine the very purpose of the ADOs, namely the prevention of discrimination.[16] As such, the test of proportionality must be applied and the burden rests on the person relying on the special measures exception to justify its use. It must be demonstrated that:

(1) the acts undertaken to provide equal opportunities or meet special needs were demonstrably necessary;

(2) they were rational in the sense that they were not arbitrary, unfair or based on irrational considerations; and

(3) they were no more than was necessary to accomplish the legitimate objective (and so were a proportionate response).

[13] *James v Eastleigh Borough Council* [1990] 2 AC 751 where Lord Bridge said "the purity of the discriminator's subjective motive, intention or reason for discriminating cannot save the criterion applied from the objective taint of discrimination on the ground of sex". Cited in *Equal Opportunities Commission v Director of Education* (fn 4) at 698; Balcombe LJ in *London Borough of Lambeth v Commission for Racial Equality* [1990] ICR 768 (UK) at para 22 (The Council had advertised for applicants of Afro-Caribbean or Asian ethnic origin to work in a housing department for which over half the tenants were of Afro-Caribbean or Asian ethnic origin. The Council asserted that this was a positive action to meet the special needs of that particular group. The Court of Appeal dismissed this argument and noted that if it had been intended to provide for positive action in that particular area, they would have expected to find it grouped with the sections that allowed for limited acts of positive discrimination).

[14] SDO s.48; FSDO s.36; DDO s.50; RDO s.49.

[15] DDO s.50(b)(iii) and (c)(iii).

[16] *Equal Opportunities Commission v Director of Education* (fn 4) at 731. See pages 732–737 for a detailed consideration of the legal principles relevant to interpreting this section.

Special measures taken to bring about equality should be temporary and should not entail the maintenance of unequal standards. Settled regimes or policies are likely to fall outside the ambit of this exception.[17]

5.014 In *Equal Opportunities Commission v Director of Education*[18] the Court considered whether a system used by the Director of Education for managing the system for transfer and admission of students from primary to secondary school (the SSPA system) was a "special measure" reasonably intended to provide students with equal opportunities. Under the SSPA system, a student received a SSPA score based on internal assessments (IAs) and centrally administered academic aptitude tests (AATs). The SSPA score was used to place students into three separate bands, with students in the top band having a better chance of being allocated one of their top choices for secondary school. As studies showed that girls scored higher on IAs and boys on AATs, a system was introduced in which girls and boys scored separately. The result was that the final SSPA score was boosted for boys and reduced for girls. Band cutting scores were also different and girls required a higher score to get into the preferred top band. The Court held that the SSPA system, which had been in place since 1978, caused direct discrimination against individual pupils and was a settled regime, which did not fall within the "special measures" exception.

5.015 **Charities.** Discriminatory provisions contained in charitable instruments[19] for conferring benefits on persons of a particular sex, family status, disability or racial group (disregarding any benefits to others which are exceptional or relatively insignificant)[20] are lawful as are any acts done in order to give effect to such provisions. A similar exception under the UK Sex Discrimination Act was upheld in *Hugh-Jones v St John's College (Cambridge)*.[21] Ms Hugh-Jones had complained of unlawful sex discrimination by a university college after she was told that she would not be granted a research fellowship because women were excluded from membership by the college statute. The UK Employment Appeal Tribunal held that the college statutes were for the advancement of learning and research and were for charitable purposes so were excluded from the Sex Discrimination Act under its equivalent exception for charities.

5.016 **Insurance.** It is lawful for a person to be treated differently on the basis that they are of a particular sex, family status or have a particular disability in relation to any class of insurance business, or similar matter involving the assessment of risk, where the treatment was effected by reference to actuarial or other data from a source on which

[17] *Ibid.*, *Equal Opportunities Commission v Director of Education* in which Hartmann J accepted that the words in SDO s.48 should be construed as intended to carry out Hong Kong's obligations under the Convention on the Elimination of Discrimination Against Women (CEDAW), which it cites at page 731 and which refers to the adoption of "temporary special measures" aimed at accelerating equality between men and women "… but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objective of equality of opportunity and treatment have been achieved".

[18] Fn 4.

[19] "Charitable instrument" means an enactment or other instrument so far as it relates to charitable purposes; "charitable purposes" means purposes which are exclusively charitable according to any enactment or rule of law: SDO s.49(4); FSDO s.37(4); DDO s.51(4); RDO s.50(3).

[20] SDO s.49; DDO s.51; FSDO s.37; In applying these sections account shall be taken of s.88 of the Inland Revenue Ordinance (Cap.112); RDO s.50.

[21] [1979] ICR 848 (UK Employment Appeal Tribunal).

it was reasonable to rely and was reasonable having regard to the data and any other relevant factors.[22] This general exception does not appear in the RDO.

5.017 **Discriminatory training by certain bodies.** Discriminatory training by certain bodies (other than employers)[23] is lawful where the acts done are in relation to particular work by any person, in, or in connection with:

(1) affording persons of a particular sex, disability or racial group only access to facilities for training to help to fit them for that work; or

(2) encouraging persons of a particular sex, disability or racial group only to take advantage of opportunities for doing that work or holding such posts;

where it reasonably appears to that person that at any time within the 12 months immediately preceding the doing of the act there were no persons of the particular sex, disability or racial group concerned doing that work in Hong Kong or the number of persons of the particular sex, disability or racial group doing the work in Hong Kong was comparatively small.[24] This general exception does not appear in the FSDO.

5.018 The SDO and FSDO do provide for an exception for acts done in connection with affording people access to facilities for training which would help to fit them for employment, where they are in special need of training by reason because they have been discharging domestic or family responsibilities to the exclusion of regular full-time employment. This includes any act which confines training to persons who have been discharging domestic or family responsibilities or from the way persons are selected for training.[25]

5.019 The above exceptions do not apply to discriminatory acts which are unlawful under the provisions of the ADOs which prohibit discrimination by employers against applicants and employees.[26]

5.020 **Discriminatory training by employers.** An employer may discriminate in relation to particular work when providing training facilities or opportunities for its employees if the act is done in, or in connection with:[27]

(1) affording employees of a particular sex, racial group or who is with or without a disability only, access to facilities for training which would help to fit them for that work;

(2) encouraging employees of a particular sex, racial group, or who is with or without a disability only to take advantage of opportunities for doing that work;

[22] SDO s.51; FSDO s.38; DDO s.52; *Pinder v The Friends Provident Life Office* (1986) 5 EOR 31 (UK).
[23] SDO s.53; FSDO s.39; DDO s.53.
[24] SDO s.53(1); DDO s.53, RDO s.51.
[25] SDO s.53(2); FSDO s.39.
[26] SDO s.53(4); FSDO s.39(3); DDO s.53(2); RDO s.51(2).
[27] SDO s.54(1); DDO s.54(1); RDO s.54(1).

where at any time within the 12 months immediately preceding the act there were no persons of that particular sex, racial group or who is with or without a disability among those doing that work or the number of such persons was comparatively small. This general exception is not contained in the FSDO.

5.021 **Discrimination by Trade Unions etc., elective bodies.** A trade union, organisation of workers or employers or whose members carry on a particular profession or trade, may discriminate when providing training facilities or opportunities for its members if the act is done in connection with:[28]

(1) affording members of a particular sex, racial group or who is with or without a disability only, access to facilities for training which would help to fit them for holding a post of any kind in the organisation;

(2) encouraging members of a particular sex, racial group or who is with or without a disability only to take advantage of opportunities for holding such posts in the organisation;

where at any time within the 12 months immediately preceding the act there were no members of the particular sex, racial group or who is with or without a disability only among persons holding such posts in the organisation or the number of such persons holding such posts was comparatively small. This general exception is not contained in the FSDO.

5.022 Such organisations may lawfully undertake acts to encourage persons of a particular sex, racial group, or who is with or without a disability only to become members of the organisation where at any time within the 12 months immediately preceding the doing of the act there were no such persons among those members or the proportion of such persons among members of that organisation was comparatively small.[29] This general exception is not contained in the FSDO.

5.023 Where the organisation[30] comprises a body whose membership is mainly elected, it may lawfully provide that a minimum number of persons of one sex or with or without a disability are members of the body by: (a) reserving seats on the body for persons for that sex or persons with or without a disability; or (b) by making extra seats on the body available (by election or co-option or otherwise) for such persons on occasions when the number of persons of that particular sex or with or without a disability in the other seats is below the minimum; where in the opinion of the organisation the provision is in the circumstances needed to secure a reasonable lower limit to the number of members of that sex or with or without a disability serving on the body.[31] Because this exception makes express reference to the opinion of the organisation, the organisation should ensure that it keeps a record of its opinion at the time any

[28] SDO s.54(2); DDO s.54(2); RDO s.52(2).
[29] SDO s.54(3); DDO s.54(3); RDO s.52(3).
[30] Being "an organisation of workers, an organisation of employers, or any other organisation whose members carry on a particular profession or trade for the purposes of which the organisation exists". SDO s.16(1); DDO s.16(1); RDO s.18 (which also includes organisations of both workers and employers).
[31] SDO s.55(1); DDO s.55(1).

provision is introduced and explain the basis for its inclusion. This exception does not render lawful discrimination in the arrangements for determining the persons entitled to vote in an election of members of the body, or otherwise to choose the persons to serve on the body or discrimination in any arrangements concerning membership of the organisation itself.[32] This exception also does not appear in the FSDO or RDO (although a similar exception does apply to certain clubs under the RDO).[33]

5.024 **Indirect access to benefits etc.** References to a person affording any person access to benefits, facilities or services include not only benefits, facilities or services provided by that person himself, but also include any means by which it is in that person's power to facilitate access to benefits, facilities or services provided by any other person (the "actual provider"). Similarly, any provisions which provide that affording a person access to benefits, facilities or services in a discriminatory way in certain circumstances is not unlawful also extend to the actual provider.[34]

(iii) *Acts done under statutory authority*

5.025 **Government acts.** The Hong Kong Government is bound by each of the ADOs. It is also bound by the Hong Kong Bill of Rights Ordinance,[35] as are any public authorities and any person acting on behalf of the Government or a public authority. Notwithstanding this, the Government may lawfully discriminate against a person on the basis that he or she is of a particular sex, family status, disability or racial group as regards any acts done under any immigration legislation governing entry into, stay in and departure from Hong Kong[36] or any act done if it was necessary for that act to be done to comply with a requirement of an existing statutory provision.[37]

5.026 **Acts done under statutory authority** are exempt from certain provisions of the anti-discrimination ordinances. Any act done by a person because it was necessary to comply with a requirement of an existing statutory provision will not be considered unlawful for the purposes of the ADOs[38] provided the discriminatory act falls within the parts for which acts done under statutory authority are exempt. These differ between the ordinances. The exemption under the SDO and DDO does not apply to the provisions relating to vocational training[39] or sexual harassment.

5.027 In *Greater London Council v Farrar*,[40] a woman wrestler was refused employment by a promotions company because the licence issued to the company by the local authority contained a restriction prohibiting women's wrestling. Ms Farrar sought a declaration that the local authority had discriminated against her on the ground of her

[32] SDO s.55(2); DDO s.55(2).
[33] See para 5.0147.
[34] SDO s.56; FSDO s.40; DDO s.56; RDO s.53.
[35] Cap.383, s.8, Art.22.
[36] SDO ss.21(2)(a) and 38(2)(a); FSDO ss.17(2)(a) and 28(2)(a); DDO ss.21(2)(a) and 36(2)(a); RDO s.55.
[37] SDO ss.21(2)(b) and 38(2)(b); FSDO ss.17(2)(b) and 28(2)(b); DDO ss.21(2)(b) and 36(2)(b); RDO s.56.
[38] SDO and DDO s.58; FSDO s.41; RDO s.56; For example, *Page v Freighthire Tank Haulage* [1981] 1 All ER 394 (UK) (A direction that a female goods driver not be used when hauling toxic chemicals because manufacturers directed that a woman of child-bearing age could not safely transport chemicals was held to be lawful as complying with the Health and Safety Act).
[39] "Vocational training" includes retraining and vocational guidance: SDO s.60.
[40] [1980] 1 WLR 608.

sex by prohibiting women's wrestling. The Court held in favour of the local authority that the licence was an instrument made or approved under a statutory provision. The relevant question was not whether the condition in the licence was unlawful but whether it was within the legal power of the Act under which it was made.[41] Similarly in *Hugh-Jones v St John's College (Cambridge)*,[42] a refusal by a university college to grant a woman a research fellowship because women were excluded from membership under college statutes was held to be lawful because the statutes were enacted under a statutory provision.

5.028 **New Territories land.** Discriminatory acts done by any person in or in connection with the operation of any of the provisions of the New Territories Ordinance (Cap.97) or the New Territories Leases (Extension) Ordinance (Cap.150) will not be a breach of the SDO or FSDO.[43] For instance, it is lawful that only a male but not female descendant of the common ancestor automatically becomes entitled at birth to an interest in the Tso or Tong[44] property for his life-time. Distribution of income can be made merely to male descendants by the manager in the Tso or Tong. Acts done on the ground that the person is or is not an indigenous inhabitant of the New Territories[45] will also not be a breach of the RDO. This exception does not apply to the DDO.

2. Sex Discrimination

5.029 The following paragraphs set out the special exceptions provided under the SDO in which a person may lawfully discriminate against a man or woman[46] on the basis of that person's sex.

(a) Employment

5.030 **Genuine Occupational Qualification.** An employer or principal[47] may discriminate against a man or woman in its arrangements for determining to whom to offer employment, transfer, training or promotion if being of a particular sex is a genuine occupational qualification (GOQ) for the job.

[41] *Ibid.*, at 271.
[42] Fn 21.
[43] SDO s.61; FSDO s.42.
[44] "*Tso* may be shortly described as an ancient Chinese institution of ancestral land-holding whereby land derived from a common ancestor is enjoyed by his male descendants for the time being living for their lifetimes and so from generation to generation indefinitely." See *Tang Kai-Chung v Tang Chik-Shang* [1970] HKLR 276 at 279–80. The principal object of Tong and Tso is to facilitate the continued worship of the common ancestors and proper maintenance of the ancestral halls and graves. The Tong has substantial land holdings, some of which generate rental income to finance the above activities. See also *Tang Che Tai v Tang On Kwai* (unrep., HCA 331/2002, [2007] HKEC 674) at para 14.
[45] RDO s.8(3)(a); "indigenous inhabitant" is defined in the Village Representative Election Ordinance (Cap.576); "established village" is defined in the Government Rent (Assessment and Collection) Ordinance (Cap.515).
[46] SDO s.6 provides that s.5 and the provisions in Part III (Discrimination and Sexual Harassment in Employment Field) and Part IV (Discrimination and Sexual Harassment in Other Fields) relating to sex discrimination against women shall be read as equally applying to men and for that purpose shall have effect with such modifications as are necessary.
[47] See para 5.036.

5.031 The GOQ defence is only available under the SDO if the job falls within one of the following nine categories:[48]

(1) *Essential nature or authenticity.* Where the essential nature of the job calls for a man or woman or for reasons of physiology (excluding physical strength or stamina) or in dramatic performances or other entertainment for reasons of authenticity, the essential nature of the job would be materially different if carried out by a person of the other sex.[49] The recruitment of male or female models or actors for particular roles falls within this exception in some circumstances. An employer may not rely on a requirement of physical strength or stamina as a GOQ to discriminate between a man or woman but may lawfully refuse to hire an applicant on grounds of physiology if the physical requirements are essential to the job and are applied irrespective of sex.[50]

(2) *Preservation of decency or privacy*. Where the job needs to be held by a person of a particular sex to preserve decency or privacy because it is likely to involve physical contact in circumstances where the person might reasonably object to the job being carried out by a person of the other sex or is likely to be undertaken in circumstances where a man or woman might reasonably object to the presence of a person of the other sex because they are in a state of undress or using sanitary facilities.[51] Examples referred to in overseas cases include the refusal to hire a man as an operator of a security control station where other operators were women and was usual to work long shifts and rest at station and reasonably incidental to rest for women to remove outer clothing so be in a state of undress;[52] refusal to hire a man for a sales post where the job involved showing prospective female members around the club, including changing rooms where female clients may be in a state of undress;[53] an employer's selection of a female rather than male supervisor to be retained following a reorganisation because additional duties for the post required dealing with personal problems of female workers, female sanitary facilities and assisting in taking urine samples from women working with toxic materials;[54] refusal to hire a man for a job which involved entering ladies toilets and cubicles to access sanitary product equipment;[55] and refusal to hire a woman as a men's lavatory attendant.[56]

[48] SDO s.12(2); SDO s.2 "genuine occupational qualification" means genuine occupational qualification as construed in accordance with s.12(2); "man" includes a male of any age.

[49] SDO s.12(2)(a); *Cropper v UK Express Limited* (unrep., Birmingham IT, Case No. 25757/91) (UK) (Man lawfully refused a job as a chat-line operator which advertised "livegirls 24 hours -1-2-1chat" as held that essential nature of job would have been materially different if carried out by a man).

[50] *Thorn v Meggitt Engineering Ltd* [1976] IRLR 241 (UK Industrial Tribunal) (Refusal to hire woman for radial drill operator job not considered unlawful discrimination as she did not meet requirement of strength and height required to operate drill safely and requirements applied irrespective of sex.)

[51] SDO s.12(2)(b).

[52] *Sisley v Britannia Security Systems Ltd* [1983] ICR 628 (UK).

[53] *Lasertop Ltd v Webster* [1997] ICR 828 (UK).

[54] *Timex Corp v Hodgson* [1982] ICR 63 (UK).

[55] *Carlton v Personnel Hygiene Services Ltd* (unrep., Bedford IT, Case No. 16327/89) (UK).

[56] *Lowthorpe v Atlas Trailer Co Ltd* (unrep., Hull IT, Case No. 24949/89) (UK).

(3) *Working in a private home.* Where the job is likely to involve working or living in a private home an objection might reasonably be taken to allowing a person of that sex the degree of physical or social contact with a person living in the home or the knowledge of intimate details of such person's life given the nature and circumstances of that job or of the home.[57] This will depend on the individual circumstances of the job or home.[58] An example would be requiring a female nurse to look after a woman who requires 24-hour care;

(4) *Employer-provided accommodation.* Where the nature or location of the establishment makes it impracticable for the employee to live elsewhere other than in premises provided by the employer and the only premises available are not equipped with separate sleeping accommodation for persons of that sex and sanitary facilities which would be used by persons of that sex in privacy and it is not reasonable to expect the employer to equip premises with such accommodation and facilities or provide other premises for persons of that sex.[59] This exception only applies if employees are required to reside at the premises to some degree.[60] For example, a female warden or housekeeping lady may be preferred for managing an all-female dormitory;

(5) *Hospitals, prisons and special care facilities.* Where the nature of the establishment and part of it within which work is done requires the job be held by a person of a particular sex because it is or is part of a hospital, prison or other establishment for persons requiring special care, supervision or attention, those occupants are all of that sex (disregarding any person of the opposite sex whose presence is exceptional) and it is reasonable given the essential character of the establishment or that part that the job not be held by a person of the other sex;[61]

(6) *Provision of personal services.* If the employee provides individuals with personal services[62] promoting their welfare or education or similar personal services and those services can most effectively be provided by a person of

[57] SDO s.12(2)(c).

[58] *Neal v Watts* (unrep., Exeter IT, Case No. 9324/89) (UK) (Man lawfully refused job as nanny where female employer liked to bath with baby and nanny expected to come into bathroom.)

[59] SDO s.12(2)(d); An employer should consider whether it can adapt or provide other accommodation so it is suitable for both men and women and be prepared to justify any decision that this is not feasible if it wishes to rely on this exception: see *Wallace v Peninsular and Oriental Steam Navigation Company Ltd* (unrep., London Central IT, Case No. 31000/79/a) (UK) (Female cinema projectionist refused job on ship as cabin allocated to projectionist was in all-male quarters. Tribunal held "arrangements" included provision of adequate flexible crew accommodation to allow for women to be appointed and company should provide, on a phased basis, accommodation suitable for male and female crew).

[60] *Sisley v Brittania Security Systems Ltd* (fn 52) (UK).

[61] SDO s.12(2)(e); This defence was rejected in *Fanders v Mary St Convent Preparatory School* (unrep., Bury St Edmunds IT, Case No. 19043/89) (UK) Mr Fanders was held to have been unlawfully refused employment as a teacher in the infant's department for a girls' school. School alleged that nature of establishment required job to be held by a woman and that job involved providing individuals with personal services promoting welfare and education, which could most effectively be provided by a woman. Both defences were rejected).

[62] For a discussion of what is meant by personal services in the context of race discrimination see discussion at paras 5.0124–5.0125 and *London Borough of Lambeth v Commission for Racial Equality* (fn 13)(UK).

a particular sex.[63] For example, a female interpreter may be more effective when dealing with women in certain cultures where the welfare services provided involve discussing delicate social or medical problems the client may not be prepared to discuss with a male interpreter.[64] An employer relying on this exception must establish that the personal services could most effectively be provided by a woman or man as the case may be.[65] The correct test is whether with the right personality and qualifications the work could be done as effectively by a woman or man.[66] This exception does not entitle an employer to hire a man or woman simply because the employer wishes to hire a person of that sex to address an imbalance of sexes amongst the providers of personal services for which that person is being employed.[67]

(7) *Safety Regulations.* Where the job needed to be held by a man due to restrictions imposed by safety regulations listed in Sch.3 to the SDO and the duties were undertaken before 14 October 2000.[68]

(8) *Role outside Hong Kong.* Where the job needs to be held by a person of a particular sex because it is likely to involve the performance of duties outside Hong Kong in a place the laws or customs of which are such that the duties could not or could not effectively be performed by a person of the other sex.[69] For example, this exemption may apply to jobs that require a person to undertake duties in countries in which those duties may not be undertaken by women.[70]

(9) *Married Couples.* Where the job is one of two to be held by a married couple.[71]

63 SDO s.12(2)(f).

64 *Buckinghamshire County v Ahmed* (unrep., 18 June 1998, EAT/124/98) (UK) (Case remitted back to Tribunal so no final determination made).

65 This defence was rejected in *Fanders v Mary St Convent Preparatory School* (fn 61).

66 *Greenwich Homeworkers Project v Mavrou* (unrep., Employment Appeal Tribunal, EAT 161/89) (Mr Mavrou applied for a position as a development/information worker for GHP which involved identifying, contacting and assisting homeworkers, the majority of whom were women. The EAT was not satisfied that the role could necessarily be done more effectively by a woman and remitted the matter back to the lower tribunal). EAT adopted the statement approved by the Court of Appeal in *London Borough of Lambeth v Commission for Racial Equality* (fn 13) (UK) and adopted in *Tottenham Green Under Fives Centre v Marshall* [1989] ICR 214 (UK) that "it is important not to give too wide a construction to the exception … which would enable it to provide an excuse or cloak for undesirable discrimination: on the other hand where genuine attempts are being made to integrate ethnic groups into society, too narrow a construction might stifle such initiative".

67 *Roadburg v Lothian Regional Council* [1976] IRLR 283 (Scottish Industrial tribunal) (UK).

68 SDO s.12(2)(g); Sch.3 contains a list of provisions contained in the (former) Women and Young Persons (Industry) Regulations (Cap.57 Sub.Leg.); Factories and Industrial Undertakings Regulations (Cap.59, Sub.Leg.A); Constructions Sites (Safety) Regulations (Cap.59 Sub.Leg.I); Dutiable Commodities (Liquor) Regulations (Cap.109 Sub.Leg.B). Under SDO s.57(3), Sch.3 was to expire on the second anniversary of the day the SDO was enacted i.e. on 14 Oct 1999 but was extended for one year by the Commission pursuant to s.66 i.e. to 14 Oct 2000. Schedule 3 has now expired and the regulations listed no longer require women to be discriminated against due to safety requirements.

69 SDO s.12(2)(h).

70 This defence may not apply if duties to be undertaken can still be undertaken in the relevant place. See *O'Connor v Contiki Travel Ltd* (unrep., London IT, 13674/76/3) (UK) (Being a male was not a GOQ for a bus driver where job involved travel to Turkey, a Muslim country, as women are not barred from driving in that country).

71 SDO s.12(2)(i).

The GOQ exceptions apply where only some of the duties fall within those exceptions as well as where all of them do.[72] 5.032

GOQ exception not available in some circumstances. The GOQ exceptions only apply to applications for employment and opportunities for promotion, transfer or training and cannot be used to oust or dismiss an existing employee.[73] These exceptions provide a defence for an employer or principal against a claim of discrimination but do not form a ground for an applicant to claim that being of a particular sex is a GOQ.[74] A GOQ defence may not be able to be established if the employer or principal already has a person of the same sex employed in the same role.[75] 5.033

An employer is unable to rely on the GOQ except if at the time of filling the vacancy the employer already has employees of the other sex capable of carrying out the duties, whom it would be reasonable to employ on those duties and whose numbers are sufficient to meet the employer's likely requirements without undue inconvenience.[76] In *Wylie v Dee & Co (Menswear) Ltd*,[77] W was rejected for a job as shop assistant in a menswear store on the ground the job was unsuitable for women because assistants had to take the inside-leg measurements of male customers. It was held that the exception did not apply as the need to take the inside-leg measurement of male customers did not arise frequently and the duties she could not do could easily be done by one of the other seven male assistants in the shop.[78] 5.034

Death and retirement provisions made before 15 October 1997. It is lawful for an employer to have discriminated against a woman in the provisions in relation to death and retirement[79] made for her before 15 October 1997 (when the SDO commenced) and for those provisions to continue to apply after 15 October 1997,[80] provided the provisions do not involve the dismissal, promotion or transfer of the employee.[81] 5.035

72 SDO s.12(3).

73 *Bell v Home Office et al/ Equal Opportunities Commission v Leeds Branch of Prison Officers Association (POA) et al* (unrep., Leeds IT, Case No. 12622/80) (UK) (Female instructor discriminated against in all-male prison after prison officers refused to escort prisoners to her workshop or staff it so she was unable to do her job. GOQ defence raised on basis of lack of toilet facilities and type of inmates but rejected as B was existing employee); Length of time in employment is also not a factor. See *Equal Opportunities Commission v Prison Officers Association (POA)* (unrep., Birmingham IT, Case No, 18054/83) (UK) (Female disciplinary prison officer employed at all-male prison before POA took industrial action and alleged being male was a GOQ for post. GOQ defence rejected as she had been in post for one day so defence could not apply).

74 *Williams v Dyfed County Council* [1986] ICR 449 (UK) (D applied for job as a residential child care officer and unsuccessfully claimed post was one which should have been restricted to men as involved care of number of disturbed children of varying ages. Tribunal held that it was for an employer to decide whether the post was one for which a GOQ should be claimed).

75 *Secretary of State for Scotland v Henley* (unrep., Employment Appeal Tribunal, EAT Case No. 95/83) (UK) (Female applied for post of assistant governor in all-male prison where female hall governor already employed).

76 SDO s.12(4).

77 [1978] IRLR 103.

78 See also *Etam v Rowan* [1989] IRLR 150 (UK) (Refusal to employ male sales assistant in women's clothing store unlawful as could carry out duties without personal contact with female customers in a state of undress and the work for which gender may be an issue could be done by other female assistants without inconvenience).

79 "Provision in relation to death or retirement" means provision "about" death or retirement, per *Roberts v Cleveland Area Health Authority* [1978] ICR 370, *Garland v British Rail Engineering Ltd* [1979] 2 All ER 1163 (UK) cited with approval in *Au Kwai Fun Judy v Cathay Pacific Airways Ltd* [2008] 2 HKC 507.

80 SDO s.11(4).

81 SDO s.11(5). *Au Kwai Fun v Cathay Pacific Airways Ltd* (fn 79), which contains a useful discussion of the background and rationale for this exception.

"Dismissal" has been broadly interpreted to include retirement of an employee. Thus a policy or retirement scheme that provides for differential retirement ages for males and females after 15 October 1997 will be unlawful and fall outside the exception.[82] A provision that provides for different retirement benefits for male and female employees that do not involve dismissal, promotion or transfer, for example different travel concessions,[83] may fall within this exception.

5.036 **Contract workers[84] and commission agents.**[85] A principal may lawfully discriminate against a person of a particular sex who is a contract worker or commission agent[86] in the terms on which he allows the worker to do that work, by not allowing the worker or agent to do or continue the work, in the way in which he affords access to benefits, facilities or services or by subjecting the worker or agent to other detriment if at the time the work was to be done by a person taken into the principal's employment being of the other sex would be a GOQ.[87]

(b) Fields other than employment

5.037 **Partnership.** A partnership of not less than six partners may discriminate against a person of a particular sex in the arrangements the firm makes for determining who should be offered a position as a partner or by refusing or omitting to offer the candidate that position where, if it were employment, being of the opposite sex would be a GOQ.[88]

5.038 Where the partnership has put in place provisions in relation to death and retirement which provide for differential treatment of women and men before 15 October 1997 (when the SDO commenced), these provisions will not be unlawful if they continue after 15 October 1997,[89] provided the provision does not involve expulsion from the partnership or subject the woman to detriment which results in expulsion.[90]

5.039 **Employment agencies.** An employment agency may discriminate against a person on the basis of that person's sex if the discrimination relates to employment which the employer may lawfully refuse to offer a person of that sex,[91] whether because it is a

[82] *Tsang v Cathay Pacific Airways Ltd* [2002] 2 HKLRD 677 (CA) (Female employee unlawfully discriminated against because retirement policy provided for retirement of female employees at age of 40 and male employees at age of 55). Although the exception in ss.11(4) and (5) were not expressly discussed, Judge Lok in *Au Kwai Fun v Cathay Pacific Airways Ltd* (fn 79) noted this must be the case or Ms Tsang would not have succeeded with her claim.

[83] This example was referred to by Judge Lok in *Au Kwai Fun v Cathay Pacific Airways Ltd* (fn 79).

[84] SDO s.13.

[85] SDO s.20.

[86] SDO s.20(3) and 20 applies to any work for a person (the principal) which is available to be done by individuals (commission agents) as agents of the principal and who are remunerated, whether in whole or in part, by commission.

[87] SDO s.13(2) (contract workers); SDO s.20(3) (commission agents); "Genuine occupational qualification" has the same meaning as for employers under SDO s.12(2). See discussion at [5.030–5.034] above.

[88] SDO s.15(3).

[89] SDO s.11(4).

[90] As with SDO s.11(5). *Au Kwai Fun v Cathay Pacific Airways Airways Ltd* (fn 79), which also contains a useful discussion of the background and rationale for this exception.

[91] SDO s.19(3); "Genuine occupational qualification" has the same meaning as for employers under SDO s.12(2). See discussion at paras 5.030–5.034 above.

GOQ that the person be of the opposite sex or for any other reason permitted under the SDO. An employment agency is not liable for breach of the SDO if it proves that it acted in reliance on a statement made to it by the employer to the effect that its action would not be unlawful and that it was reasonable to rely on that statement.[92] This requires both the employer and the employment agency to consider carefully whether the acts comply with the SDO. An employer who knowingly or recklessly makes such a statement, if false or misleading in a material respect, commits an offence.[93]

5.040 **Employment for Organised Religion.** An organised religion may lawfully limit employment to one sex if this is required to comply with the doctrines of the religion or to avoid offending the religious susceptibilities common to its followers.[94] It is also exempt from the provisions relating to qualifying bodies under the SDO if the authorisation or qualification is limited to one sex so as to comply with the doctrines of the religion or to avoid offending the religious susceptibilities common to its followers.[95] In *R v Secretary of State for Trade and Industry*,[96] the English Court when considering a similar exception under the English Employment Equality (Sexual Orientation) Regulations 2003 observed that this exception was intended to be very narrow and should be construed strictly since it is a derogation from the principle of equal treatment. It held that this exception only applies to employment "for purposes of an organised religion" and that the employer must apply the requirement "so as to comply with the doctrines of the religion". An objective test should be applied concerning the motivation of the employer and it must be shown that employment of a person not meeting the requirement would be incompatible with the doctrines of the religion.[97] The term "organised religion" is not defined in the SDO.[98]

(c) Education

5.041 **Single-sex schools.** An educational establishment[99] may lawfully discriminate on the basis of sex in relation to the admission of students if it is a single-sex establishment or only admits students of the opposite sex in exceptional circumstances or in comparatively small numbers and whose admission is confined to particular courses of instruction or teaching classes.[100] Such establishments may lawfully confine students

[92] SDO s.19(4); Must be by reason of the operation of SDO s.19(3).

[93] SDO s.19(5).

[94] SDO s.22(1).

[95] SDO s.22(2).

[96] [2007] ICR 1176.

[97] *Ibid*., at 1210.

[98] The definition of "religion" was considered in the English case *R (on the application of Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246. Religion was considered as a belief which must: (1) satisfy some modest, objective minimum requirements; (2) be consistent with basic standards of human dignity or integrity; (3) relate to matters more than merely trivial; (4) possess an adequate degree of seriousness and importance; (5) be a belief on a fundamental problem; and (6) be coherent in the sense of being intelligible and capable of being understood.

[99] "Educational establishment" means an educational establishment specified in column 1 of Sch.1 to the SDO. This list includes schools, polytechnics, vocational training centres and universities registered and established in Hong Kong.

[100] SDO s.26. This exception applies to the admission of students only and does not apply to discriminatory policies which may affect the number of places available for male or female students in a particular area: *Birmingham City Council v Equal Opportunities Commission* [1989] AC 1155.

of one sex to particular courses of instruction or teaching classes.[101] These provisions also apply to single-sex establishments which turn co-educational for a three-year period provided the requisite notice has been given.[102]

5.042 **Boarders.** An educational establishment which is not a single-sex establishment and has some students as boarders but admits boarders of one sex only may lawfully discriminate when admitting student boarders or providing boarding facilities.[103]

(d) Goods, services, facilities and premises

5.043 A person may discriminate against a person on the basis of their sex when providing goods, services, facilities or disposing or managing premises in the following circumstances:

(1) *Skills exercised differently for different sexes.* Where a particular skill is commonly exercised in a different way for men and for women, it is not a breach of the SDO for a person who does not normally exercise that skill for a person of that particular sex to insist on exercising it for that person only in accordance with the provider's normal practice, or if the provider reasonably considers it impracticable to do that, to refuse or deliberately omit to exercise that skill.[104] An example of a service which may lawfully be offered at a different price for men and women is hairdressing.

(2) *Health and safety considerations* if the discriminatory act or requirement is imposed against a pregnant woman to comply with health and safety considerations which are reasonable in the circumstances.[105]

5.044 **Clubs.** A club[106] may discriminate against a person of a particular sex if the discrimination occurs in relation to the use or enjoyment of any benefit provided by the club where it is:

(1) not practicable for the benefit to be used or enjoyed simultaneously or to the same extent by both men and women; and

(2) either the same or an equivalent benefit is provided for the use of men and women separately from each other or men and women are each entitled to a fair and reasonable proportion of use and enjoyment of the benefit.[107]

[101] SDO s.26(3).
[102] SDO s.27.
[103] SDO s.26(2); This provision also applies to establishments which alter admission arrangements to admit boarders of both sexes for a three-year period provided the requisite notice has been given under SDO s.27(1)(b).
[104] SDO s.28(3).
[105] SDO s.32 provides an express exception from compliance with SDO s.28(1) for health and safety considerations.
[106] Includes the committee of management of a club or a member of the committee of management of a club. "Club" means an association, incorporate or unincorporate, of not less than 30 persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes and which provides and maintains its facilities, in whole or in part, from the funds of the association: SDO s.2(1).
[107] SDO s.37(3).

5.045 **Owner-occupiers of premises.** A person who owns the premises and wholly occupies them may discriminate on the basis of sex when disposing of the premises unless he uses the services of an estate agent for the purposes of disposing of the premises or publishes or causes to be published an advertisement in connection with the disposal.[108]

5.046 **Small Dwellings.** A landlord or occupier may discriminate against a person of a particular sex in relation to the provision of accommodation or the disposal of premises if that person or a near relative[109] (the relevant occupier) resides on the premises, the premises contain separate accommodation shared by the relevant occupier with other persons residing on the premises who are not members of his household and the premises are "small premises".[110] Premises shall be treated as "small premises" if:

(1) the premises comprise residential accommodation which would not normally accommodate more than two households (under separate letting or similar agreements) and only the occupier and any member of his household resides in the accommodation occupied by him;

(2) in the case of any other premises, they do not normally have residential accommodation for more than six people in addition to the relevant occupier and any members of his household.[111]

5.047 **Communal accommodation.** A person may lawfully discriminate on the ground of sex in the admission of persons to communal accommodation if the accommodation is managed in a way which, given the exigencies of the situation, comes as near as may be to fair and equitable treatment of men and women.[112] Factors to be taken into account are whether and how far it is reasonable to expect that the accommodation should be altered or extended, or that further alternative accommodation should be provided;[113] and the frequency of the demand or need for use of the accommodation by men as compared with women.[114] It is also lawful for a person to discriminate against a woman or man in relation to the provision of benefits, facilities or services if these cannot be provided except for those using communal accommodation and in

[108] SDO s.29(3) "Power to dispose" in the SDO includes the power to sell, rent, let, sub-let or otherwise part with possession of those premises.
[109] A person is a "near relative" of another if that person is person's spouse, a parent or child of the person or spouse, a grandparent or grandchild of the parent or spouse, or a brother or sister of the other (whether of full blood or half-blood). In determining these relationships, children born out of wedlock are to be included, an adopted child is regarded as a child of both the natural and adoptive parent(s) and a step child as the child of both the natural parents and any step parent: SDO s.2(1).
[110] SDO s.31. Disposal of premises includes giving a licence or consent for assignment or sub-letting of a tenancy: s.30(2). "Tenancy" means a tenancy created by a lease, sub-lease, agreement for lease or sub-lease, tenancy agreement or pursuant to any enactment: SDO s.30(4).
[111] SDO s.31(2)(b).
[112] SDO s.52(3). This exception also applies to the provision of any benefit, facility or service if it cannot properly and effectively be provided except for those using communal accommodation and in the relevant circumstances the woman or man, as the case may be, could lawfully be refused the use of the communal accommodation under SDO s.52(2): SDO s.52(5).
[113] SDO s.52(4)(a).
[114] SDO s.52(4)(b).

the circumstances the woman or man, as the case may be, could lawfully be refused admission to the communal accommodation.[115]

5.048 "Communal accommodation" means residential accommodation including dormitories or other shared sleeping accommodation which for reasons of privacy or decency should be used by men only or women only (but which may include some shared sleeping accommodation for men, some for women, or some ordinary sleeping accommodation).[116] It also includes residential accommodation all or part of which should be used by men or women only because of the nature of the sanitary facilities serving the accommodation.[117] This exception is not a defence to an act of sex discrimination relating to employees or contract workers unless reasonably practicable arrangements are made to compensate for the detriment caused by the discrimination.[118]

5.049 **Voluntary bodies.** A voluntary body may lawfully restrict its membership to persons of a particular sex (disregarding any minor exceptions) and provide benefits, facilities, or services to members of that voluntary body where membership is so restricted even though membership of the body is open to the public or a section of the public.[119] This exception applies to a provision for conferring benefits on persons of one sex only (disregarding any benefits to persons of the opposite sex which are exceptional or relatively significant) if the provision constitutes the main object of the voluntary body.[120] Voluntary bodies are bodies whose activities are carried on otherwise than for profit.[121]

5.050 **Further Exceptions for Facilities or Services.** A person who provides facilities or services to the public at any place may lawfully provide facilities or services restricted to persons of a particular sex in the following circumstances:[122]

(1) *Special care facilities.* If the place is or, is part of, a hospital, reception centre or other establishment for persons requiring special care, supervision or attention;

(2) *Facilities used for organised religion.* If the place is (permanently or for the time being) occupied or used for the purposes of an organised religion and the facilities are restricted to persons of a particular sex so as to comply with the doctrines of that religion or to avoid offending the religious susceptibilities common to its followers;

(3) *Decency and privacy.* If the facilities or services are provided for or likely to be used by two or more persons at the same time and are such that those users are likely to suffer serious embarrassment at the presence of a person of the

[115] SDO s.52(5).
[116] SDO s.52(1).
[117] SDO s.52(2).
[118] SDO s.52(6).
[119] SDO s.33.
[120] SDO s.33(4).
[121] SDO s.33.
[122] SDO s.34(1).

opposite sex or likely to be in a state of undress and the user might reasonably object to the presence of a user of the opposite sex.[123] For example, a spa that provides separate areas for men and women. Also if the services or facilities are such that physical contact between the user and any other person is likely and that other person might reasonably object if the user were a person of the opposite sex.[124]

(e) Other exceptions

5.051 **Sport.** It is lawful to discriminate against competitors on the basis of sex in relation to their participation in events involving any sport, game or activity of a competitive nature where the physical strength, stamina or physique of the average woman puts her at a disadvantage to the average man and the activity involved is confined to competitors of one sex only.[125] This exception deals with the situation in which men and women might both be playing in the same game or taking part in the same event. In *Bennett v Football Association Ltd*[126] the UK Court of Appeal accepted that it was lawful to exclude a 12-year old girl from playing in mixed teams or from playing in teams against other boys or men. This exception applies to acts related to the participation of a person as a competitor only and does not extend to other roles within the sport, game or activity, such as referees.[127]

5.052 **Double benefits for married persons.** A person may lawfully refuse or omit to provide a benefit or allowance, wholly or partly, relating to housing, education, air-conditioning, passage or baggage to a married person if the married person's spouse received or has received the same or a similar benefit or allowance, whether from that person or another.[128] This exception applies only to the benefits and allowances listed and does not apply, for instance, to the provision of medical or life insurance benefits.

5.053 **Reproductive technology and adoption.** It is lawful to discriminate between persons of different marital status arising from:

(1) the provision of any reproductive technology procedure;[129] and

(2) the provision of any facilities or services relating to the adoption of any infant within the meaning of s.2 of the Adoption Ordinance (Cap.290).[130]

5.054 **Acts done for purposes of protection of women.**[131] An act done by a person in relation to a woman, which was necessary in order to comply with a requirement of an

[123] SDO s.34(1)(c).
[124] SDO s.34(2).
[125] SDO s.50.
[126] (Unrep., Court of Appeal, CA Transcript 491/7/1978)(UK).
[127] *British Judo Association v Petty* [1981] ICR 660 (UK) (Unlawful to prohibit a woman holding a national referee's certificate from refereeing men's national competitions).
[128] SDO s.56A.
[129] SDO s.56B "reproductive technology procedure" has the meaning assigned to it by s.2(1) of Human Reproductive Technology Ordinance (Cap.561); see also s.62 of SDO Sch.5, Part 2, Exception 4.
[130] SDO s.56C; see also SDO s.62, Sch.5, Part 2, Exception 5.
[131] SDO s.57.

existing statutory provision concerning the protection of women or, before 14 October 2000, a provision specified in Sch.3[132] and done for the purpose of the protection of a woman or class of woman will be lawful. Existing statutory provisions concerning the protection of women refers to any provision that has the effect of protecting women in relation to pregnancy or maternity or other circumstances giving rise to risks specifically affecting women whether the provision relates only to such protection or to the protection of any other class of persons as well.[133]

5.055 **Acts safeguarding security of Hong Kong.** Acts which discriminate against a person on the basis of sex will be lawful if done for the purpose of safeguarding the security of Hong Kong.[134] A certificate purporting to be signed by or on behalf of the Chief Secretary for Administration and certifying that an act specified in the certificate was done for the purpose of safeguarding the security of Hong Kong shall be conclusive evidence that it was done for that purpose. A document purporting to be a certificate can be received in evidence and in the absence of evidence to the contrary, shall be deemed to be such a certificate.[135]

5.056 **Further Exceptions.** Acts undertaken in connection with and for the purposes of any permitted discrimination specified in Part 2 Sch.5 of the SDO will be lawful notwithstanding the preceding provisions of the SDO.[136] Permitted areas of discrimination that have not already been discussed above are:

(1) *Police etc.* Discrimination between men and women seeking to hold or holding any relevant office[137] of the police force, Hong Kong Auxiliary Police Force, Immigration Service, Fire Services Department, Correctional Services Department or Customs and Excise Service. Such discrimination may be in relation to height, uniform, weight or equipment; in relation to the number of persons of each sex recruited to such office; insofar as any office which falls within the Police Tactical Unit is reserved for men; and insofar as training in the use of weapons is concerned, in relation to any office of the police force, Hong Kong Auxiliary Police Force, Correctional Services Department or Customs and Excise Service;

(2) *Small House Policy.* Discrimination between men and women arising from the Government's small house policy and pursuant to which benefits relating to land in the New Territories are granted to indigenous villagers who are men;

(3) *Benefits and Allowances.* Discrimination between persons of different marital status (but excluding discrimination against a person who is not single compared with a person who is single) relating to the provision of benefits

[132] See discussion of Sch.3 (fn 57).
[133] SDO s.57. SDO ss.57(1)(ii) and 2(b) no longer apply as they expired on the 2nd anniversary of the SDO.
[134] SDO s.59.
[135] SDO s.59(2) and (3). These subsections have no effect in relation to the determination of the question of whether any act is rendered unlawful by Part III (Discrimination and Sexual Harassment in Employment Field), Part IV (Discrimination and Sexual Harassment in Other Fields) insofar as it applies to vocational training or Part V (Other Unlawful Acts).
[136] SDO s.62 Sch.5.
[137] "Relevant office" is defined in SDO Part 1 of Sch.5 to include the offices listed.

or allowances relating to housing, education, air-conditioning, passage or baggage arising from a provision of the Civil Service Regulations or any contract of service or apprenticeship or to personally execute work;

(4) *Home Ownership Scheme.* Discrimination between persons of different marital status arising from the Home Ownership Scheme or Private Sector Participation Scheme;

(5) *Pensions.* Discrimination between men and women arising from various Ordinances relating to pensions.[138]

3. Family Status Discrimination

5.057 The following paragraphs set out the special exceptions provided under the FSDO in which a person may lawfully discriminate against a person who has family status, being a person who has responsibility for the care of an immediate family member.[139] Discrimination on the basis of "family status" also includes circumstances where discrimination results from the particular identity of the complainant's spouse. In *Wong Lai Wan Avril v Prudential Assurance Company Ltd*,[140] the District Court accepted that "marital status" (under the SDO) and "family status" (under the FSDO) should be based on a wide and broad interpretation as adopted by the Canadian Supreme Court in *B v Ontario (Human Rights Commission)*.[141]

(a) Employment

5.058 **Where risk of damage to business due to immediate family member.** An employer may restrict the employment of a person if that person is an immediate family member of either an employee of the employer or an employee of another employer and there is a significant likelihood of collusion between the person and that employee, which would result in damage to the employer's business.[142] To justify the exemption, the employer must be able to demonstrate, after making reasonable enquiries, that there is a real risk of collusion and damage. The word "restrict" is not defined but may include refusing to offer the person the job or placing restrictions on the terms or conditions on which the person will be or continues to be employed.[143]

5.059 **Benefits and allowances.** A person may discriminate against a person who has family status in relation to the provision of benefits or allowances relating to housing,

[138] Surviving Spouses' and Children's Pensions Ordinance (Cap.79) s.2(5)(a); Pensions Ordinance (Cap.89) s.18(1A); Widows and Orphans Pension Ordinance (Cap.94) s.19; Pension Benefits Ordinance (Cap.99) s.19(4); Pension Benefits (Judicial Officers) Ordinance (Cap.401) s.20(4).
[139] "Immediate family member" means a person who is related to the person by blood, marriage, adoption or affinity: FSDO s.2. "Marriage" means lawfully married and does not include a de facto spouse: *Wong Lai Wan Avril v Prudential Assurance Company Ltd* [2010] 5 HKLRD 39. A relationship of affinity is one created by marriage e.g. mother-in-law and father-in-law.
[140] [2010] 5 HKLRD 39. See also paras 4.018–4.020 and 4.022.
[141] [2002] 3 SCR 403.
[142] FSDO s.8(4).
[143] *Code of Practice on Employment under the Family Status Discrimination Ordinance* at para 5.5.

education, air-conditioning, passage or baggage arising from a provision of the Civil Service Regulations or any contract of service or apprenticeship or to personally execute work.[144]

5.060 **Benefits, facilities or services provided by employer to the public.** An employer may discriminate against an employee who has family status in the way he affords that person access to benefits, facilities or services if the employer provides benefits, facilities or services of that type to the public (for payment or not) including the person concerned, unless:

(1) that provision differs in a material respect from the provision of benefits, facilities or services by the employer to his employees; or

(2) the benefits, facilities or services relate to training.[145]

5.061 **Benefits, facilities or services provided by employer to immediate family members.** An employer may discriminate against an employee who has family status in the terms or arrangements under which the employer affords or omits to afford direct or indirect access to benefits, facilities or services to any immediate family member of the employee.[146]

5.062 **Benefits, facilities or services provided by principal to the public.** A principal may discriminate against a contract worker or commission agent who has family status in the way the principal affords that person access to benefits, facilities or services if the principal provides (for payment or not) benefits, facilities or services of that type to the public including the person concerned *unless* that provision differs in a material respect from the provision of benefits, facilities or services by the principal to his contract workers or commission agents.[147]

5.063 **Benefits, facilities or services provided by principal to immediate family members.** A principal may discriminate against a contract worker or commission agent who has family status in the terms or arrangements under which the principal affords or omits to afford direct or indirect access to benefits, facilities or services to any immediate family member of the contract worker or commission agent.[148]

5.064 **Employment Agencies.** An employment agency may discriminate against a person who has family status if the discrimination only concerns employment which the employer could lawfully refuse to offer the person concerned.[149] If acting under the employer's instructions, the employment agency may rely on a statement by the employer to the effect that its actions would not be unlawful but only if the agency is also able to prove that it was reasonable for it to rely on the statement.[150]

144 FSDO s.43 Sch.2.
145 FSDO s.8(5).
146 FSDO s.8(9) and (10) (Applicants/Employees).
147 FSDO s.9(3) (Contract Workers); FSDO s.16(3) (Commission Agents).
148 FSDO s.9(4) and (5) (Contract Workers); FSDO s.16(4) and (5) (Commission Agents).
149 FSDO s.15(3).
150 FSDO s.15(4).

(b) Education

5.065 **School Admission.** The responsible body for an educational establishment may discriminate against a person who has family status if the discriminatory act is done in order to comply with the Primary One Admission System, the Secondary School Places Allocation System (or any scheme, system or programme that replaces either System in whole or in part) or any provision of law relating to the admission of students.[151]

(c) Goods, facilities, services and premises

5.066 **Owner-occupier of Premises.** A person who owns an estate or interest in premises, wholly occupies them and has power to dispose of the premises[152] may discriminate against a person who has family status when disposing of the premises unless he uses the services of an estate agent to dispose of the premises or publishes or causes to be published an advertisement in connection with the disposal.[153]

5.067 **Small Dwellings.** A person who provides accommodation in any premises, disposes of premises or has power to consent to the assignment or sub-letting of a tenancy may discriminate against a person with family status in relation to the disposal of those premises or by withholding his licence or consent if: (i) that person or a near relative[154] of his resides and continues to reside on the premises; (ii) on the premises, in addition to accommodation occupied by that person, is accommodation shared by that person with other persons residing on the premises who are not members of his household; and (iii) the premises are "small premises".[155] Premises shall be treated as "small premises" if:

(1) the premises comprise residential accommodation which would not normally accommodate more than two households (under separate letting or similar agreements) and only the occupier and any member of his household reside in the accommodation occupied by him;

(2) in the case of any other premises, they do not normally have residential accommodation for more than six people in addition to the relevant occupier and any members of his household.[156]

5.068 **Reception Centre or Care Establishment.** A person who provides facilities or services to the public at any place may provide facilities or services restricted with

151 FSDO s.18(2).
152 "Power to dispose" includes the power to sell, rent, let, sub-let or otherwise part with possession of the premises: FSDO s.20(4).
153 FSDO s.20(3).
154 A person is a "near relative" of another if that person is the person's spouse, a parent or child of the person or spouse, a grandparent or grandchild of the parent or spouse, or a brother or sister of the other (whether of full blood or half-blood). In determining these relationships, children born out of wedlock are to be included, an adopted child is regarded as a child of both the natural and adoptive parent(s) and a step child as the child of both the natural parents and any step parent: FSDO s.2(1).
155 FSDO s.21(2); FSDO s.22.
156 FSDO s.22(2).

reference to family status or a particular family status if the place is, or is part of a reception centre, or an establishment for persons requiring special care, supervision or attention.[157]

5.069 **Voluntary bodies.** A voluntary body whose activities are carried on other than for profit may, even though membership of the body is open to the public or to a section of the public: (i) restrict membership of that body with reference to family status or a particular family status; (ii) provide benefits, facilities or services to members of that body where membership is so restricted; or (iii) make a provision to confer benefits on persons of a particular family status (disregarding any benefits to others which are exceptional or relatively insignificant) if the provision constitutes the main object of the body.[158]

5.070 **Clubs.** A club[159] may discriminate against a person who has family status if the discrimination occurs in relation to the use or enjoyment of any benefit provided by the club where it is not practicable for the benefit to be used or enjoyed simultaneously or to the same extent by people who do not have family status or a particular family status and those who do not have family status or that particular status.

4. Disability Discrimination

5.071 The following paragraphs set out the special exceptions provided under the DDO in which a person may lawfully discriminate against a person who has a disability.[160]

5.072 **Unjustifiable hardship.** A number of the exceptions discussed below permit discrimination against persons with a disability where that person may require additional services and facilities not required by persons without a disability and it would impose an unjustifiable hardship on an employer, principal or provider of services and facilities if they were required to provide them. The DDO provides that in determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including:

(1) the reasonableness of any accommodation to be made available to the person with a disability;

(2) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned;

(3) the effect of the disability of a person concerned; and

[157] FSDO s.24(2).
[158] FSDO s.23(2) and (4).
[159] Includes the committee of management of a club or a member of the committee of management of a club. "Club" means an association, incorporate or unincorporate, of not less than 30 persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes and which provides and maintains its facilities, in whole or in part, from the funds of the association: FSDO s.2(1).
[160] "Disability" is broadly defined in s.2 of the DDO.

(4) the financial circumstances or estimated amount of expenditure (including recurrent expenditure) required to be made by the person claiming unjustifiable hardship.[161]

(a) Exceptions in employment field

5.073 An employer or principal may discriminate against a person with a disability in relation to a particular job in the following circumstances:

(1) If the absence of a particular disability is a GOQ for the job;

(2) If the person because of his or her disability would be unable to carry out the *inherent requirements* of the job or would only be able to do so if provided with services or facilities, the provision of which would impose an *unjustifiable hardship* on the employer or principal;[162]

(3) If the person has an infectious disease and the act is reasonably necessary to protect public health;[163]

(4) If the person has a disability that impairs his or her productivity and has elected to undergo a productivity assessment under the Minimum Wage Ordinance (Cap.608) to determine whether he or she should be paid at not lower than the statutory minimum wage or at a lower rate commensurate with their productivity;[164] or

(5) If the work is to be done wholly or mainly outside Hong Kong.[165]

5.074 The exceptions in (1) and (2) above recognise that there are some disabilities that will render a person with that disability unable to carry out certain jobs. The inherent requirements exception in (2) also recognises, however, that in many cases a disability that limits a person's ability to carry out the inherent requirements of a job may be able to be overcome if certain workplace adjustments are made and the employer is able to provide reasonable accommodation without incurring unjustifiable hardship. If services or facilities can be provided without the employer suffering unjustifiable hardship, this exception will not apply. The Courts recognise, however, that this may be a balancing act and that there is not:

> "…an easy way of achieving a sensible, workable and fair balance between the different interests of disabled person, of employers and of able-bodied workers, in harmony with the wider public interests in an economically efficient workforce,

[161] DDO s.4.
[162] DDO s.12(2). For discussion of "unjustifiable hardship" see para 5.072.
[163] DDO s.61.
[164] Minimum Wage Ordinance (MWO) s.9(1)(a); Paragraphs 2 and 3 of Sch.5 of the MWO. See [5.093].
[165] See discussion at [5.006–5.010]. Although the discrimination may not be unlawful for the purposes of the Hong Kong anti-discrimination ordinances, it may still be unlawful under applicable laws in the jurisdiction in which the employee is actually working.

in access to employment, in equal treatment of workers and in standards of fairness at work…"[166]

5.075 **Genuine Occupational Qualification (GOQ).** An employer may discriminate against a person with a disability when hiring, promoting, transferring or training someone for a particular job if being a person without a particular disability is a GOQ for the job.[167] The absence of a disability is deemed to be a GOQ for a job in the following situations:[168]

(1) *Due to essential nature of job, physiology or authenticity.* Where the essential nature of the job requires a person without a disability[169] or for reasons of physiology or authenticity in dramatic performance or other entertainment.[170] For example, for a role requiring a person to portray a runner or gymnast, the employer or principal is likely to be able to justify a requirement that the person not have a serious mobility disability. In Australia, it was held that the essential duties of a firefighter required a person without a serious colour vision deficiency.[171]

(2) *Employer-provided accommodation.* Where the nature or location of the job makes it impracticable for the employee to live elsewhere other than in premises provided by the employer and: (i) the only premises available are not equipped with accommodation and facilities for persons with a disability; and (ii) it would impose an unjustifiable hardship on the employer to alter the premises to equip them with accommodation and facilities for persons with a disability.[172]

This exception does not apply if the applicant offers to make the alternations to the part of the premises to be occupied by him at his cost and undertakes to restore the premises to their original condition on leaving employment provided that: (i) the alterations do not involve alteration of other premises occupied by another person; (ii) the alterations required to restore the premises to prior condition are reasonably practicable; and (iii), in all the circumstances, it is likely that the applicant will perform the undertaking.[173]

5.076 An employer may discriminate against a person with a disability when determining who should be offered the job if some of the duties of the job fall within these

[166] Mummery LJ in *Clark v TDG Ltd t/a Novacold Ltd* [1999] 2 All ER 977 cited with approval by Hon Tang VP in *M v Secretary for Justice* [2009] 2 HKLRD 298.

[167] DDO s.12(1); In *K v Secretary for Justice* [2000] 3 HKLRD 777, Christie J noted that the language of DDO s.12(1) and s.12(2) suggests it is broadly based on the "bona fide occupational requirement" (BFOR) test contained in human rights legislation in Canada but that the requirement in s.12(2) does not carry the same meaning as in BFOR. Section 12(2) of the DDO is virtually the same as s.15(4) of the (Australian) Disability Discrimination Act 1992.

[168] DDO s.12(3).

[169] Inherent duties of firefighting required person without serious colour vision deficiency.

[170] DDO s.12(3)(a); This wording is identical to that under s.12(2)(a) of the SDO save that the words "excluding physical strength or stamina" are omitted.

[171] *Van Der Kooij v Fire and Emergency Services Authority of Western Australia* [2009] WASAT 221 (Aus).

[172] DDO s.12(3)(b). Unjustifiable hardship has the same meaning as set out in para 5.072 above.

[173] DDO s.12(5).

categories as well as where all of them do.[174] An employer may not rely on the GOQ exception, however, if at the time of filling the vacancy the employer already has employees without a disability who are capable of carrying out the duties for which being without a disability is a GOQ, whom it would be reasonable to employ on those duties and whose numbers are sufficient to meet the employer's likely requirements without undue inconvenience.[175]

5.077 **Inherent Requirements.** An employer may discriminate against an applicant or employee with a disability when determining who to hire, train, transfer or promote for a particular job or when determining whether a person's existing employment in that role should be terminated if the person because of his or her disability:

(1) would be unable to carry out the *inherent requirements* of the particular job;[176] or

(2) would require services or facilities to carry out the inherent requirements of the job that are not required by persons without a disability and the provision of those services or facilities impose an unjustifiable hardship on the employer.[177]

5.078 If an existing employee with a disability is no longer able to carry out the inherent requirements of the job without unjustifiable hardship being imposed on the employer, an employer may dismiss the employee or subject the employee to other detriment, notwithstanding that that person is already employed.[178] This situation may arise where an existing employee either develops a disability that they did not have previously or symptoms of an existing disability manifest, which had not previously impaired the employee's ability to do the job in question.[179] Note, however, that an employer must first consider the factors set out below before determining whether the employee is unable to carry out the inherent requirements of the job.

5.079 In assessing whether an employer is entitled to rely on the inherent requirements defence, the following factors must be taken into account:

(1) the person's past training, qualifications and experience relevant to the particular job;

(2) the person's performance as an employee (if already employed by the employer); and

(3) all other relevant factors that it is reasonable to take into account.[180]

[174] DDO s.12(4).

[175] DDO s.12(6).

[176] DDO s.12(2)(i); *M v Secretary for Justice* (fn 166).

[177] DDO s.12(2)(ii). Unjustifiable hardship has the same meaning as set out in [5.072] above.

[178] DDO s.12(2). But employer must first take into account factors discussed below in [5.078].

[179] Note that it is not necessary that an employer knows of the existence of a disability, it is enough if an employer is shown to have discriminated because of a manifestation of a disability: *M v Secretary for Justice* (fn 166) approving statement at para 194 of *X v McHugh, Auditor-General for the State of Tasmania* (1994) 56 IR 248 (Australian Human Rights and Equal Opportunity Commission) (Aus).

[180] *Toganivalu v Brown & Department of Corrective Services* [2006] QADT 13 (18 Apr 2006) (Aus).

2. Statutory Vicarious Liability

9.005 **Statutory imposition of vicarious liability.** Vicarious liability for unlawful acts of discrimination against employers, principals and persons who knowingly aid others to discriminate is provided in the anti-discrimination legislation in Hong Kong in materially identical terms,[8] namely the Sex Discrimination Ordinance, Cap.480 (SDO), the Disability Discrimination Ordnance, Cap.487 (DDO), the Family Status Discrimination Ordnance, Cap.527 (FSDO) and the Race Discrimination Ordinance, Cap.602 (RDO). These provisions impose a positive duty on employers and principals, making them liable for discriminatory acts of their employees and agents whether the acts were done with or without their knowledge or approval.[9]

9.006 Likewise, under the common law, liability arises vicariously if the court is able to find a relationship between the tortfeasor and the person made liable.[10] However, the person made liable need not have breached any duty of care or obligation to the injured party and may be wholly innocent. The liability arises due to the existence of that relationship. Therefore the Court of Final Appeal has held an employer vicariously liable for a road accident caused by its employee despite the fact that employee was at the time of accident performing an unauthorised errand.[11] It is for this reason that common law vicarious liability is often described in tort textbooks as a form of strict secondary liability.[12]

9.007 **Primary versus secondary liability.** The anti-discrimination provisions deem that an employer or principal is liable for a discriminatory act performed by employee or agent as if the employer or principal had committed the discrimination himself.[13] For relationships of employment, the anti-discrimination legislations expanded the concept of employment[14] but nonetheless, due to policy reasons and to preserve the concept of "employer innocence", provide that employers who can prove that they took reasonably practicable steps to prevent acts of discrimination are not liable for their employee's discriminatory acts.[15] Similarly, the statutory provisions have codified the

8 SDO ss.46 and 47, DDO ss.48 and 49, FSDO ss.34 and 35, RDO ss.47 and 48. The vicarious liability provisions in Hong Kong are drafted in almost identical terms as those in the main anti-discrimination enactments in the UK.

9 However, such secondary liabilities do not apply for the purposes of any criminal proceedings. See SDO s.46(4), DDO s.48(4), FSDO s.34(4), RDO s.47(4).

10 Vicarious liability at common law is attributed only to relationships of employment, agency and in limited circumstances, to independent contractors. Liability by way of "knowingly aid" is therefore unique to discrimination law.

11 *Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd* (fn 6).

12 Fn 7 at para 20-1.

13 SDO s.46; DDO s.48; FSDO s.34; RDO s.47.

14 See para 9.010 below.

15 SDO s.46(3), DDO s.48(3), FSDO s.34(3), RDO s.47(3). See *Pearce v Mayfield School Secondary School Governing Body* [2001] EWCA Civ 1347. See also *King v The Great Britain-China Centre* [1992] ICR 516. The employment tribunal found that the employer who discriminated against Chinese applicants for a prospective job was directly liable. Therefore, it has been held that a potential employer who only shortlisted Caucasian candidates was an act of discrimination even though the candidate had yet to be hired as an employee of the company. See *Nahhas v Pier House Management (Cheyne Walk) Ltd* (1984) 270 EG 328; *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273. Both cases on vicarious liability.

common law relationship between principal and agent. There are no statutory defences for a principal, and he is liable for all acts of discrimination by an agent performed under both actual and implied authority.[16]

9.008 The facts of the case *Lana v Positive Action Training in Housing (London) Ltd*[17] helpfully illustrate how direct primary liability may be attributed in a case where an agent acted in a discriminatory manner on the authority of a principal. Lana was employed as an employee by Positive Action and was seconded as a trainee to WM, a company. Shortly after Lana informed WM that she was pregnant, WM terminated her internship. Positive Action was subsequently unable to find work for the claimant and terminated her services. The Employment Appeal Tribunal (EAT) found that, on the facts, Lana was not an employee of WM, but WM, although wholly innocent, was Positive Action's agent and the latter was therefore liable even though no fault could be attributed to Positive Action under any circumstance. While the case was decided on the basis of a relationship of agency, we are of the view that the development of the common law on joint-employer liability may have significantly changed the outcome of the decision in regard to Positive Action's liability. Had counsel persuaded the tribunal that Positive Action and WM were joint-employers[18] of Lana, perhaps Positive Action could have raised the reasonable steps defence that is open only to employers.

3. Liability of Employer

9.009 **Relationship of employment.** The institution of vicarious liability at common law has been justified on grounds ranging from the simple observation that it is a search for a solvent defendant[19] to a theory of economic distributive risk allocation reflected in the cost of goods and services provided by corporations.[20] Whatever the justification, common law vicarious liability arises usually where a relationship of employment is found.[21] Under discrimination law, an employer will only be liable for discriminatory acts performed by its employees if there is a relationship of employment, and that the acts were performed in the course of their employment.[22]

16 See Agency Relationship, para 9.049.

17 [2001] IRLR 501.

18 See Joint-vicarious Liability, para 9.039.

19 Willes J in *Limpus v London General Omnibus Co* (1862)158 ER 993 at 539.

20 Fn 7.

21 Those that fall outside the scope of employment such as independent contractors and principals can only be labeled as vicariously liable in very limited circumstances. See *Wong Wai Hing v Hui Wei Lee* [2001] 1 HKLRD 736; *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Company of Australia Ltd* (1931) 46 CLR 41. A principal might be liable for the torts of his agent where the agent was not acting in an independent capacity but in a representative one standing in the place of his principal and the very service to be performed consisted in standing in the principal's place. The liability was therefore personal to the principal, rather than vicarious. The function entrusted was that of representing the person who requested its performance, not merely in a transaction with others but was an activity where others could be seen to be closely affected. That act which gave rise to liability must be done for and on behalf of another, which was not the same as saying simply that it was for his benefit or at his request.

22 SDO s.46(1), DDO s.48(1), FSDO s.34(1), RDO s.47(1).

(a) A relationship of employment

9.010 **Statutory meaning of employment.** The anti-discrimination legislation has provided a wide definition of "employment". "Employment" means employment under "a contract of service or of apprenticeship" or "a contract personally to execute any work or labour".[23] The wording of the legislation suggests that employment relationships in discrimination law arise in contracts *of* service as well as contracts *for* service, the latter type being normally associated with independent contractors and between principals and agents. It is clear that by expressly defining a relationship of employment in such wide terms, the legislature intended that employers would not be able to avoid liability by simply "out-sourcing" to independent contractors when the relationship is in reality, one of a traditional master-servant. Nonetheless, we are of the view that there must be some necessary limitation imposed on the scope of an employment relationship as the legislation also separately provides that relationships of agency as well as those who knowingly aid a discriminator are also liable.[24]

9.011 **Common law test for employment.** Unlike the statutory provisions in discrimination legislation, the common law has only found relationships of employment where "[a] person employed by another to do work for him on the terms that he, the servant, is to be subject to the control and directions of his employer in respect of the manner in which his work is to be done."[25] It follows that relationships of employment in common law are regularly found under contracts *of* service as opposed to contracts *for* service as independent contractors are not "employees". However, we are of the view that the leading case of *Poon Chau Nam v Yim Siu Cheung*[26] determined on common law principles is highly instructive and provides a useful guide for cases concerning discrimination. The Court of Final Appeal held that the modern approach of the courts to the question whether one person is another's employee is to take a nuanced and not a mechanical approach, to examine all features of their relationship against a non-exhaustive list of indications such as remuneration, control, contractual features, whether the service was on behalf of his own business of his account and decide, as a matter of overall impression, whether the relationship is one of employment.

(b) In the course of employment

9.012 **Discrimination committed in the course of employment.** Once a relationship of employment is shown to exist, a plaintiff in all employment disputes is required to prove that the act of negligence or discrimination was performed "in the course of employment" before vicarious liability may be attributed. The terminology employed in both English discrimination legislation and Hong Kong discrimination legislation

[23] SDO s.2, DDO s.2, FSDO s.2, RDO s.2.

[24] The definition of "employment" cannot be construed so wide as to negate the effect of other statutory provisions. See also Greenberg, *Craies on Legislation* (9th ed., 2008).

[25] Heuston and Buckley, *Salmond & Heuston on the Law of Torts* (21st ed., 1996) at 448.

[26] (2007) 10 HKCFAR 156 Bohkary PJ at para 18. See also *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497; *Davis v New England College of Arundel* [1977] ICR 6; *Lane v Shire Roofing Co (Oxford) Ltd* [1995] IRLR 493; *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173; *Lee Ting Sang v Chung Chi Keung* [1990] 2 AC 374 (PC).

in this respect is identical. The English Court of Appeal has now made clear since the case of *Jones v Tower Boot Co Ltd*[27] that while the expression "in the course of employment" is similar to the common law vicarious liability principle, the expression must be necessarily construed wider under discrimination cases.

(i) *What is "in the course?"*

9.013 **The common law test.** The classic exposition of the common law test is set out in the well-known passage in Salmond & Heuston on the Law of Torts which sets out the test as follows:[28]

> "A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorised by the master or (2) a wrongful and unauthorised mode of doing some act authorised by the master. It is clear that the master is responsible for the acts actually authorised by him … But a master, as oppose to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised, that they may rightly be regarded as modes - although improper modes - of doing them. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it. If a servant does negligently that which he was authorised to do carefully or if he does fraudulently that which he was authorised to do honestly or if he does mistakenly that which he was authorised to do correctly, his master will answer for that negligence, fraud, or mistake. On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment but has gone outside of it.[29] The essential question to ask is how closely the wrongful act was connected with the employees' scope of authority and work. If the wrongful act was not a mode of doing the work, vicarious liability cannot be attributed."

9.014 The narrowness of the common law test was exemplified by a series of cases that followed the leading authority prior to *Jones v Tower Boot Co Ltd*[30] which resulted in highly unsatisfactory results for the claimants who had suffered detriment. In the case of *Irving v Post Office*,[31] the Irvings, who were black, lived next to a postman, Mr Edwards who was white. Their neighbourly relationship was tepid at best. During work, Edwards saw an envelope addressed to the Irvings and wrote racially discriminatory comments on the back of the envelope.[32] The Irvings brought

[27] [1997] 2 All ER 406.

[28] Fn 25 at 443. See also *Lloyd v Grace, Smith & Co* [1912] AC 716.

[29] *Canadian Pacific Railway Co v Lockhart* [1942] AC 591; *Aldred v Nacanco* [1987] IRLR 292; *Kimmy Suen King On v A-G* [1986] HKLR 1081.

[30] Fn 27.

[31] [1987] IRLR 289.

[32] The message used the derogatory term "sambo" to describe the plaintiffs in *Jones v Tower Boot* of their Afro-Carribean origins and using the term to urge them to go "home".

proceedings against the Post Office claiming unlawful discrimination contrary to the Race Relations Act. The employment tribunal and the English Court of Appeal applying the common law test dismissed the vicarious liability claim on the basis that Edwards was not "acting in the course of employment". Edwards was only authorised to write on mail to ensure they were administratively dealt with but not to otherwise write on the mail at all. Since the comments were written out of personal spite and not as an unauthorised mode of dealing with mail, the Post Office could not be said to be vicariously liable.

9.015 **The wider approach in discrimination law.** Judicial sentiment in England soon began to shift[33] in favour of interpreting "in the course of employment in wider terms" culminating in the judgment in *Jones v Tower Boot Co Ltd*. The facts arising in *Jones v Tower Boot Co Ltd* are sobering. The English Court of Appeal was concerned with a horrific case of physical and verbal racial abuse. In addition to racial name-calling, co-workers had burned the complainant's arm with a hot screwdriver, thrown bolts at him and whipped his legs with a belt. In one incident, they attempted to put his arm in a lasting machine.[34] The EAT in adopting the common law test held that horrendous as the acts were, they were not caused in the course of employment as they were not an unauthorised mode of performing an authorised task. The English Court of Appeal recognised the absurdity of the result and the implied assumption that the more severe and unlawful the harassment, the less likelihood of finding the employer liable in discrimination. Waite LJ unequivocally stated:

> "[The] underlying policy of [discrimination legislation] … is to deter racial and sexual harassment in the workplace through a widening of the net of responsibility beyond the guilty employees themselves, by making all employers additionally liable for such harassment, and then supplying them with the reasonable steps defence … which will exonerate the conscientious employer who has used his best endeavours to prevent such harassment, and will encourage all employers who have not yet undertaken such endeavours to take the steps necessary to make the same defence available in their own workplace."[35]

9.016 The English Court of Appeal held in *Jones v Tower Boot Co Ltd*, and it was since followed by subsequent cases, that the expression "in the course of employment" was to be construed as the ordinary meaning of the words as a layman would understand them without reference to the law of vicarious liability in tort. The application of the phrase is now a question of fact for each industrial tribunal to resolve based on the factual circumstances of each individual case. It therefore follows from *Jones v Tower Boot Co Ltd* that the employer is now liable for a wide range of discriminatory

[33] *Yaseen v Strathclyde Regional Council* (unrep., EAT 6/90, 15 May 1990), the EAT sitting in Scotland considered that there was a distinction between the common law principle of vicarious liability and the "wide terms" which parliament has chosen to express vicarious liability in the discrimination legislation. The employer there was liable for acts of its employees which might be said to be reasonably incidental to Yaseen's employment. *Cf Cobham v Forest Healthcare NHS Trust* (unrep., EAT 916/93, 6 November 1994) which held that the tribunal was bound by the Court of Appeal decision in *Irving* and the common law test ought to have been applied.

[34] A machine used to stitch shoes together.

[35] Fn 27 at para 38.

actions even if those actions did not strictly arise in the course of an employee's official responsibilities or even in the context of the working environment.

No discrimination after termination of employment allowed. In *Ray Chen v IBM*,[36] Judge Saunders (as he was then) held that an employer is prohibited under the SDO from discriminating against an ex-employee. Among other complaints, the plaintiff complained that his former employer discriminated against him because he refused to issue a reference letter to prospective employers after he was terminated. 9.017

(ii) *Status*

Status of employee. The status of the employee carrying out the discriminatory act is not material and in particular there is no requirement that he should be of managerial status or be senior to the "victim".[37] 9.018

(iii) *Outside place of employment*

Act of discrimination outside place of employment. Since the expression "in the course of employment" ought to be given a wider meaning under discrimination law, it necessarily follows that there must be a limit to the scope of vicarious liability. After all, it is one thing to make an employer vicariously liable for his servants if he engages in a certain type of activity but it is another matter to make him liable for persons over whom he has no control.[38] 9.019

In *HM Prison Service v Davis*,[39] it was held that the employer was not vicariously liable for sexual harassment which took place at the claimant's home, even though employer had power to discipline employees for misconduct committed outside the place of employment. In *H M Prison Service*, the Prison Service appealed against a finding of the employment tribunal that the claimant, a female prison officer, had been unlawfully sexually discriminated following unwanted sexual advances made by a male prison officer. The EAT held that the male prison officer had been off-duty and his visit to the claimant's home had been social and no evidence had been adduced to prove that the male prison officer had obtained the claimant's address from records held by the Prison Service. Although the Prison Service could complain about their employees' off-duty behaviour pursuant to the disciplinary code, it could not be concluded that all off-duty acts of employees were carried out in the course of employment. 9.020

In *Chief Constable of the Lincolnshire Police v Stubbs*,[40] several incidents of inappropriate sexual behaviour at social gatherings immediately after work were made by a male police officer against the claimant and she claimed *inter alia*, that the Chief Constable was vicariously liable. In one incident, the male officer in question had touched her hair and arranged her shirt-collar in the presence of other officers at a pub and in another, made offensive and sexist comments at a police awards ceremony. The 9.021

[36] (Unrep., DCEO 3/2000, 15 December 2000).

[37] *De Souza v The Automobile Association* [1986] ICR 514. See also *Jones v Tower Boot Co Ltd* (fn 30) where co-workers were responsible for the act of discrimination.

[38] Lord Pearce in *Sweet v Parsley* [1970] AC 132, at 156.

[39] (Unrep., EAT 1294/98, 29 March 2000).

[40] [1999] IRLR 81.

issue concerning the EAT was whether the male police officer was acting in the course of his employment for his actions under the Sex Discrimination Act. The appellate tribunal held that discriminatory acts which occurred during chance meetings wholly unrelated to work would not fall within the expression "in the course of employment". On the facts of the case, even though the social events were held outside police premises and outside normal working hours, they were not chance meetings but organised by management. As such, they were extensions of the workplace which came within the definition of "in the course of employment" as described by the Court of Appeal in *Jones v Tower Boot Co Ltd*.

9.022 However, a review of the authorities makes clear that there is no bright-line rule. Whether an act of discrimination took place "in the course of employment" turns on the facts of each individual case. The relationship between employees, the location and time of the alleged discriminatory acts, the purpose of the event are but a list of inexhaustive factors for a court's consideration.

9.023 In *Sidhu v Aerospace Composite Technology Ltd*,[41] an applicant and co-workers were dismissed by the employer for violence against a fellow employee in accordance with company policy arising from a dispute that occurred during a corporate family event. The applicant who was a Sikh and his family were subject to racial abuse and physical attacks by Caucasian co-workers. In response, he wielded a chair in a manner which some witnesses described as "aggressive" and others as "defensive". The employment tribunal (ET) found that he was unfairly dismissed but dismissed the complaint of racial discrimination as the unlawful acts of discrimination were not "in the scope" of his employment. The applicant succeeded on the claim of race discrimination on appeal to the EAT but the EAT's decision was reversed by the English Court of Appeal. The court held that although the term "scope" was used incorrectly, the ET had properly applied the correct test of "in the course of employment" and therefore because it was not impossible on the facts for the primary tribunal to find that the event was not in the course of employment, an appellate court should be slow to disturb its findings. Further, the employer's policy to dismiss all employees who committed violence was not race specific and excluded all considerations of provocation.

9.024 In *Waters v Commissioner of Police of the Metropolis*[42] a female officer claimed *inter alia*, against her employer for vicarious liability arising from a rape and sexual assault by a male police officer under the Sex Discrimination Act. When the alleged incidents took place, both officers were off-duty but in the female officer's police-provided quarters. The ET had struck out the case on the basis that it disclosed no reasonable cause of action and/or was frivolous and vexatious. On appeal the Court of Appeal upheld the tribunal's decision on the basis that the assault had not been committed at the place of employment nor in the course of her colleague's employment, hence the employer could not be vicariously liable for it. While the House of Lords allowed the claimant's appeal, Lord Slynn who gave the majority decision held that the plaintiff's

[41] [2001] ICR 167.
[42] [1995] ICR 510 (Eng CA), [2000] 1 WLR 1607 (HL).

case on vicarious liability was "tenuous" since it was difficult on the facts to see how the acts could have caused the psychiatric injury alleged.[43]

(iv) *Third Parties*

Third-party wrongs. Prior to the decision of the House of Lords in *Pearce v Governing Body of Mayfield School*,[44] there was a state of ambiguity at law as to whether an employer was vicariously liable for the acts of third parties (such as clients and guests) which were discriminatory and caused their employees detriment for the purpose of discrimination legislation.[45] In *Burton and Rhule v De vere Hotels*[46] and subsequent cases that relied upon it, it seemed as though the fact that an employee was discriminated against was sufficient for a finding of liability.[47] In *Burton*, the EAT held that the hotel employer was vicariously liable for the harassment of two black waitresses by a speaker and other guests at a dinner hosted on their premises. Bernard Manning made remarks about the sexual prowess and sexual organs of black men and upon noticing the waitresses, made additional sexist and racist remarks about them. Despite the harassment, the waitresses duly attempted to carry out their duties but were subjected to further racist and sexist remarks by a number of guests, including one attempt to grab hold of the first claimant. Subsequently, the manager who was on duty that night apologised to them and offered them work in another part of the hotel for the remainder of the evening. **9.025**

The tribunal found that the claimants had suffered a "detriment" within the meaning of the Race Relations Act 1975 but held that since the detriment was caused by third parties and not employees, the employer could not be vicariously liable. Further, the tribunal found that the manager's failure to act promptly did not amount to less favourable treatment on racial grounds because the failure to act was not related to the employees' ethnic origins. On appeal, the appeal tribunal re-iterated that "control" being the test for liability under discrimination law is distinct from the law of tort and courts should be slow to import concepts of forseeability or causation. On the facts, the appeal tribunal further held that (1) an employer subjects an employee to the detriment of racial harassment if he causes or permits the discriminatory harassment to occur in circumstances under his control which includes acts of third parties whether it happens or not, (2) there was no need for claimants to prove that their employers treated them less favourably than other employees of a different racial group as long as they were discriminated against, and (3) it was not necessary to show that the discriminator had any intention or motive to discriminate as it was sufficient for the claimants to **9.026**

[43] Fn 55 at para 25. Unfortunately, the claim was subsequently settled out of court after the House of Lords ruling. Lord Slynn's proposition in *obiter* that "knowledge" and "control" of the employer (which increased the foreseeability of harm) as relevant factors whether certain acts performed outside work hours or the work place constituted "in the course of employment" remains ambiguous.
[44] [2001] EWCA Civ 1347.
[45] For an extensive discussion on the position of third-party liabilities in tort in the common law context, see McIvor, *Third Party Liability in Tort* (1st ed., 2006).
[46] [1996] IRLR 596.
[47] See *Chessington World of Adventures Ltd v Reed* [1997] IRLR 556 (EAT), following *Burton and Rule v De vere Hotels* (fn 46) where it was held in *obiter* that even if the tribunal was wrong in its finding as to direct liability, the tribunal would affirm vicarious liability for the acts of harassment of the employer's employees under the Sex Discrimination Act.

prove that the employer had caused or permitted the employee to suffer discriminatory harassment.

9.027 The *Burton and Rhule v De vere Hotels* decision was commendable in its robust approach to defending the spirit of anti-discrimination legislation but in our opinion went too far as regards to stretching vicarious liability against acts of third parties and going beyond the plain and ordinary meaning of the statutory provisions[48] and indeed the maxim of *respondeat superior*. Under *Burton and Rhule v De vere Hotels*, an employer in a vicarious relationship would be directly liable for acts of discrimination against its employees by third parties as long as a court was satisfied that such an employer permitted the situation to arise.[49]

9.028 In *Pearce v Governing Body of Mayfield School*,[50] Lord Nicholls clarified once and for all the nature of vicarious liability and specifically held that "the harassment in *Burton* was committed by third parties for whose conduct the employer was not vicariously responsible".[51] The House of Lords further held that the *Burton and Rhule v De vere Hotels* decision was wrong in treating an employer's inadvertent failure to take reasonable steps to protect employees from racial or sexual abuse by third parties as discrimination by the employer, even though the failure was not attributed to the sex or race of the employees. As the law now stands, it will be very difficult to bring a successful claim in England against an employer on the basis of vicarious liability for discriminatory acts performed by third parties against employees during the employees' course of employment.[52]

(c) Employer's knowledge or approval

9.029 **Employer's knowledge or approval not required.** The vicarious liability provisions in all anti-discrimination legislation state that anything done by a person in the course of his employment shall be treated for the purposes of the ordinances as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.[53] That is, employer's knowledge or approval is not required to establish vicarious liability of the employer.

[48] *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224 where the House of Lords held that the Protection from the Harrasment Act 1997 applied to harassment of all types and that employers and principals may be held vicariously liable for the acts of their employees and agents insofar as there is a sufficiently clear link between the work and the harassment.

[49] *Home Office v Coyne* [2000] ICR 1443 (Eng CA). The employment tribunal held that even though there was no direct liability or vicarious liability, there was discrimination against the claimant on the grounds of sex as the Home Office had allowed the investigation of the claim to take an unreasonably long period of time. The Court of Appeal (majority decision) overruled the employment tribunal only on the basis that the claimant had failed to demonstrate that, in handling her complaint, the Home Office treated her less favourably than it would have treated a man in similar circumstances.

[50] Fn 44. See also *Advocate General for Scotland v MacDonald* [2004] 1 All ER 339. The claimant was subjected to abuse by other pupils for being a lesbian. She applied to the employment tribunal seeking compensation from the school for failing to prevent the harassment and claimed that the school was vicariously liable for its pupils' campaign of verbal abuse against her and the injury it caused. The House of Lords held that the school's failure to protect the claimant from harassment did not constitute sex discrimination as the acts were not done by the school's employees nor were the pupils acting as agents of the school.

[51] Lord Nicholls in *Pearce v Governing Body of Mayfield School* (fn 44) at para 31.

[52] However, a failure to follow up and investigate a complaint or to take reasonably practicable steps to avoid further discrimination may be acts of direct discrimination by an employer. See para 9.029 below.

[53] SDO s.46(1), DDO s.48(1), FSDO s.34(1), RDO s.47(1).

(i) *Monitor and supervise*

9.030 **Failure to monitor.** An employer's failure to monitor its employees' activities may also incur vicarious liability even if the discriminatory activity was not authorised or in any relevant sense, "in the course of employment". It has been held that the downloading of pornographic images on a computer screen in sight of a female employee amounted to harassment and sex discrimination for which an employer is vicariously liable.[54] It is clear from the authorities that the mere fact that an employee suffers harassment by a co-worker regarding a protected status does not of itself conclusively establish the harassment amounts to discrimination.[55] The EAT therefore held that the Ministry of Defence was not liable for an instructor's indiscriminate use of obscene and gender-related abusive language in a training course as the obscenities and abuse were targeted at both males and females.[56] Nonetheless, even if discriminatory harassment by co-workers can be established, an employer will not be liable if it can be shown that it took steps that were reasonably practicable to prevent its employees from doing the particular act or from doing acts of that description in the course of its employees' employment. In *Chan Choi Yin Janice v Toppan Forms (Hong Kong) Ltd*[57] the District Court held that the senior management had failed to explain the difference in treatment between the plaintiff and her co-workers. The Court further found that the senior management had taken no steps to protect the plaintiff from discrimination.

(ii) *Intentional wrongs*

9.031 **Intentional wrongs.** Under discrimination law as stated by *Jones v Tower Boot Co Ltd*, an employer is vicariously liable for an intentional act of discrimination against its employees no matter how severe or unforeseen the act was insofar as it can be shown that the wrongdoing was committed in the course of employment. After all, the purpose of enacting anti-discrimination legislation is to encourage equality values. The more severe the discrimination, the more the employer should be called to account.

9.032 The common law has, however, struggled with the concept of attributing secondary liability against intentional, as opposed to, negligent wrongdoing.[58] At one stage,

[54] *Moonsar v Fiveways Express Transport Ltd* [2005] IRLR 9 (EAT). The employers were barred from the appeal hearing and the EAT substituted a finding that there was sexual discrimination. See also *Morse v Future Reality Ltd* (unrep., ET 5457/95, 1996); *Spencer v Primetime Recruitment Ltd* (unrep., UKEAT 445/05, 2 Mar 2006). *Cf Stewart v Cleveland Guest* [1994] IRLR 440 (EAT) where the EAT held that since a man could equally be offended by nude calendars, it was not an act of discrimination for the company to allow its male employees to display "pin-ups" in the workplace.

[55] *Advocate General for Scotland v MacDonald* (fn 50); Lord Hobhouse in *Pearce v Governing Body of Mayfield Secondary School* (fn 44) at para 110. See also Chapter 6 on "Victimization".

[56] *Brumfitt v Ministry of Defence* [2005] IRLR 4 (EAT) where no direct or vicariously liable was found in a case where an instructor abused all trainees with offensive and obscene language because the treatment was indiscriminate rather than relating to one single sex only.

[57] [2006] 3 HKC 143. See also *Yeung Chung Wai v St. Paul's Hospital* [2006] 3 HKC 521; *Lam Wing Tai v YT Cheng* [2006] 1 HKLRD 639; *Spencer v Primetime Recruitment Ltd* (unrep., UKEAT 445/05, 2 Mar 2006) at para 24, per Judge Reid QC; *Driskel v Peninsula Business Services* [2000] IRLR 151 (EAT) where the EAT had found that although an employee was discriminated against, the employer had attempted all reasonable endeavours to accommodate the employee but was put into an impossible position by the employee's demands and her subsequent termination was justified and not as a pretext for discrimination. See also *Ray Chen v IBM* (fn. 36).

[58] Until the House of Lords decided *Lloyd v Grace, Smith & Co* (fn 28), no vicarious liability could be attributed unless the employee acted, or at least intended to act, for the employer's benefit.

almost all intentional wrongdoings were incapable of vicarious liability as they were not likely authorised by the master.[59]

9.033 The common law is however an important weapon in the arsenal of practitioners advising on cases of discrimination that feature both discrimination and common law torts such as assault or harassment. After all, an employer under discrimination law discharges all vicarious liability if it can show that it took reasonably practicable steps to prevent discrimination whereas no such defence exists under common law.[60] It is therefore relevant to briefly examine the common law position as to intentional wrongs.

9.034 In *Trotman v North Yorkshire County Council*,[61] a mentally challenged schoolboy brought a claim against the council for damages in tort on grounds that he was sexually assaulted by the deputy headmaster on a school trip in Spain. The English Court of Appeal held that the acts of indecent assault were outside the course of employment as it was not an authorised mode of supervising students even though the alleged assault took place during an official school trip and it was the deputy headmaster's duty to supervise the pupils' well-being.

9.035 The principle underlying *Trotman v North Yorkshire County Council* was emphatically reversed in the House of Lords decision in *Lister v Hesley Hall*.[62] The warden of a boarders' house who was employed by the school sexually abused a number of pupils who brought a county court action some years later. On appeal, the House of Lords held that school was vicariously liable for the warden's actions. The proper approach was not to concentrate on whether the act was an unauthorised mode for an otherwise authorised act, but to concentrate on the relative closeness of the connection between the nature of the employment and the wrongdoing and then ask if it would be fair and just to find the employer vicariously liable. The Lords held that the school was liable for the warden's unlawful conduct as the indecent assaults were committed on the premises of the employer and while he was on duty caring for the children. However, the Lords remained divided and left open the question as to the precise nature of liability.

9.036 It is not clear from the respective judgments by the Lords whether the employer was vicariously liable as the warden had breached the duty he owed to the children in his care, or whether the employer was vicariously liable as it had failed itself to protect the children from the warden's harm.[63] The question of the precise nature of the tort

[59] Fn 25 at page 443; *Canadian Pacific Railway Co v Lockhart* (fn 29); *Racz v Home Office* [1994] 2 AC 45.

[60] See statutory defence at para 9.064.

[61] [1999] LGR 584.

[62] [2002] 1 AC 215.

[63] Lord Hobhouse at para 62 held that the school was vicariously liable as the warden owed a duty of care to the children and breached such duty. Lord Millet at para 82–84 found that the school was not vicariously liable for the warden's breach of duty but the school was vicariously liable for the warden's assaults and seemed to embrace a "masters tort" reasoning. Lords Steyn, Clyde and Hutton expressed no clear views. Following *Lister*, the Court of Appeal in *Mattis v Pollock* [2003] 1 WLR 2158 held the employer of a bouncer vicariously liable for the injuries he inflicted against a customer. The bouncer in question had returned home, retrieved a knife and then assaulted the customer outside the club premises. The court nonetheless held that he had acted "in the course of employment" as the chain of causation was not broken because there was evidence that the employer had encouraged and rewarded the bouncer to be aggressive against non-complying patrons of the club.

raised in *Lister v Hesley Hall* came again before the Court of Appeal in *KR v Bryn Alyn Community Holdings Ltd*[64] where the court preferred the judgment of Lord Millet in *Lister* and found that the employer there was vicariously liable for the breach by its employees to its customers, as opposed to directly liable for breach of the duty of care delegated to the employee.

9.037 Nonetheless, the Court of Final Appeal in Hong Kong has taken a robust approach to *Lister* and has affirmatively held that the question of whether liability should lie against the employer in cases of intentional wrongdoing should be openly confronted by the test of "close connection" and not obscured by semantic discussions concerning the "scope of employment" and "mode of conduct".[65]

9.038 Despite the lack of clarity as to the precise nature of the tort raised in *Lister*, in cases where more than one cause of action is relief upon, "questions of vicarious liability which arise under the main anti-discrimination legislation and at common law are likely to be determined on similar principles".[66]

(d) Joint-vicarious liability

9.039 **Borrowed employees.** The category of a "borrowed" employee that sits between an employee and an independent contractor or agent has caused considerable judicial consternation without any satisfactory resolution.

9.040 It is not uncommon for an employer to loan or assign his employees to work elsewhere and temporarily relinquishing direct control over such employees. For example, an employer may loan his employees to another company requiring their professional services,[67] for training purposes[68] or as part of a sub-contract.[69] When this occurs, the general employer remains *prima facie* responsible and liable for acts performed by those employees. Whether the employee is employed by his main employer or the temporary employer for the purpose of vicarious liability is a question of fact and will depend on (1) the construction of the contract made between the general and temporary employer,[70] (2) whether the duty of care breached was non-delegable,[71] (3)

[64] [2003] QB 1441. *Cf Bernard v Attorney General of Jamaica* [2005] IRLR 398 (PC) where Lord Steyn giving judgment and applying *Lister* held that a policeman attempting to coerce another individual resulting in a shooting and unlawful arrest was nonetheless in the course of his employment, acting in the execution of his duty as a police officer. The correct test was whether the unlawful shooting was so closely connected with the officer's employment that it would be fair and just to hold the Attorney General vicariously liable.

[65] *Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd* (fn 6).

[66] Karen Monaghan, *Equality Law* (2007 ed.) OUP at 13.45.

[67] *John Young & Co (Kelvinhaugh) Ltd v O'Donnell* 1958 SLT (Notes) 46 the employers of a crane driver who was found guilty of negligence while loaned to another company were themselves vicariously liable as they retained sufficient control over the crane driver and that they failed to shift the *prima facie* responsibility on to the temporary employers.

[68] Fn 1.

[69] *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2006] QB 510 (Eng CA); *Cf Hawley v Luminar Leisure* [2006] EWCA Civ 18 (CA), where bouncers under the employ of a security company and assigned to a club were found to be employed by the club *pro hac vice* due to the extent of control exercised by the club over the bouncers.

[70] *Arthur White (Contractors) Ltd v Tarmac Civil Engineering Ltd* [1967] 1 WLR 1508.

[71] *Morris v Breaveglen Ltd* [1993] ICR 766; *Sulakhan Singh v Federal Securities Ltd* (unrep., DCPI 231/2007, [2008] HKEC 954).

the right to control the employee[72] and (4) whether the employee or merely the use or benefit of his work was transferred.

9.041 **Joint vicarious liability for borrowed employees.** For 200 odd years, it was assumed at Common Law that vicarious liability could only be attributed towards a single employer for it has been said that "no one can serve two masters".[73] This view was reversed in a significant decision concerning a personal injury case by the English Court of Appeal in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*[74] which suggested that more than a single employer is capable of being jointly held vicarious liable for the negligence of its "employees".

9.042 While *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* was concerned with the law of negligence and personal injury, there is no reason why it is not equally applicable to other wrongs including discrimination.[75] It is significant in discrimination law context in that the claimant in *Lana v Positive Action Training in Housing (London) Ltd* for example was in our view and for all purposes a "borrowed" employee, although the tribunal made a finding of fact that *Lana* was terminated by an "agent" as opposed to a "joint-employer".

9.043 In *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd,* the court held that when company A assigned an employee to company B and the employee in the course of his employment committed a tort, both companies were jointly vicariously liable for the tort of the employee. This concept of holding parties severally and jointly liable for the tort of an employee (as opposed to mere joint-tortfeasors[76]) is a radical departure from the previous position where vicarious liability was limited to one party only and then only if a relationship of employment was shown.[77] On the facts, the claimants had engaged the first defendants to install certain air-conditioning system in the factory. The first defendants in turn sub-contracted ducting work to the second defendants. The second defendants contracted with the third defendants to provide fitters on a labour-only basis. The fitters were installing the ductwork under the instructions of a self-employed foreman contracted to the second defendants when one of the fitters caused a flood due to his negligence.

9.044 Despite the finding that the foreman was an independent contractor, or that the third defendants were contractors of the second defendant, the court held that both the

[72] *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] AC 1.

[73] *Bible*, New International Version, Matthew 6:24. See also Wilhem and Baines, *The I Ching or Book of Changes* (3rd ed., 1983) Taylor & Francis, at page 383, where the same concept was explained by Confucius to the effect that when one man serves two masters, nothing good can come out of it. See also *Laugher v Pointer* (1826) 108 ER 204.

[74] Fn 69. The Court of Appeal held that the decision at first instance was based on the assumption that vicarious liability was an entire liability, i.e. two distinct legal entities that could not be vicariously liable for the same act. This assumption was based on *Laugher v Pointer* (1826) (fn 73) where Littledale J held, at page 558, that the coachman or postillion cannot be the servant of both the owner of the horses and the traveller: "He is the servant of one or the other, but not the servant of one and the other; the law does not recognise a several liability in two principals who are unconnected."

[75] The discrimination legislation does not expressly limit an employee to be employed by only a single employer. See Joint-vicarious liability at para 9.039 above.

[76] *Sulakhan Singh v Federal Securities Limited* (fn 71).

[77] *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* (fn 72).

second and third defendants were vicariously liable for the negligence of the third defendant's employee on the basis that both parties were entitled to control the fitters and that both the general and temporary employer bore responsibility. Rix LJ who also agreed with the majority view on joint vicarious liability held that joint vicarious liability may arise on a different premise than dual control. He held that such joint vicarious liability may arise if "the employee in question, at any rate for relevant purposes, is so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence".[78]

9.045 While we are of the view that the principle of multiple vicarious liability is correct, we are of the opinion that *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* was wrongly decided on the facts. Even based on the English Court of Appeal's own reasoning and findings, there was no common law vicarious relationship to complain of in the first place. The court's finding that the foreman was an independent contractor ought to have precluded any vicarious liability against the second defendant. It is rare for any person who is described as an employee to himself employ employees. Such persons are usually described as independent contractors. For example, 'A' contracts with 'B' to provide security. 'B' is for all purposes an independent contractor of 'A'. Since 'B' is not an employee, 'A' is not vicariously liable for torts caused by 'B' or B's servants.[79] In *Australian Mutual Provident Society v Chaplin*,[80] the Privy Council held that the power of "unlimited delegation" was almost conclusive against finding a contract for employment.

9.046 In a subsequent case, the English Court of Appeal in *Hawley v Luminar Leisure*[81] attempted to apply the test set out *in Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* but found that Luminar was the sole party liable. By a contract, the second defendant ASE agreed to provide Luminar with doormen for Luminar's nightclub. The claimant suffered serious and permanent brain damage after one such doorman assaulted him outside the club. At first instance, the court held that Luminar had sufficient control to displace the *prima facie* liability of ASE and was solely liable. On appeal, Luminar argued that following *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*, the court should at the very least find ASE jointly vicarious liable. The Court of Appeal held that there is no general rule as to joint vicarious liability in cases where an employee is lent, borrowed or transferred. Instead the inquiry should concentrate on the relevant negligent act and then ask whose responsibility it was to prevent it. On the facts, it was found that Luminar who was on site was entitled to and in theory obliged to control the doorman's act and there was evidence showing that the club manager would instruct the doormen from time to time.

9.047 The contrasting results of *Hawley* and *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* are difficult if not impossible to reconcile. The test employed by May

[78] Rix LJ in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* (fn 69) at 483.

[79] *Stevens v Brodribb Sawmilling Co* (1986) 160 CLR 16. Mason J noted that the power to delegate work is an important factor in deciding whether a worker is a servant or an independent contractor.

[80] (1978) 18 ALR 385. See also *Australian Air Express Pty Ltd v Langford* [2005] NSWCA 96 where the New South Wales Court of Appeal held that it would be rare to find people in a position to employ another were themselves employees.

[81] Fn 69. See also *Whitehouse Properties t/as Beach Road Hotel v McInerney* [2005] NSWCA 436 (13 Dec 2005).

LJ in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* of "entitlement to control" could have been applied to *Hawley* in that the second defendant provided a door supervisor as part of its team of doormen. Likewise, the "organisational test" propounded by Rix LJ is similarly applicable in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* as in *Hawley* in that assigning a temporary doorman to a club is an integral part of the security business of the second defendant as was ensuring proper crowd control as part of the business of operating a club for Luminar. Whatever the implications for the common law,[82] the implicit recognition by the Court of Appeal that an independent contractor may also be "vicariously liable" brings the common law definition of vicarious liability concept closer to the position under discrimination law.

4. Liability of Principal

9.048 **Statutory imposition of liability.** Anything done by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of the anti-discrimination legislation as done by that other person as well as by him.[83]

9.049 **Agency.** Unlike the term "employment", agency is not specifically defined in the context of the anti-discrimination statutes. In this regard, the wording of the discrimination statutes is similar to the wording used by courts in describing the common law test[84] and courts have thus applied the common law tests of agency in construing the relevant statutes.[85]

9.050 Under anti-discrimination legislation, the basis of liability arises if it can be established that the agent was acting under actual or implied authority, whether that authority was obtained prior to or subsequent to the act of discrimination.[86]

9.051 At common law, the principal of an agent is rarely[87] vicariously liable due to a tort caused by his agent even where the tort was committed in the course of the principal's business. Atiyah, in his seminal work, "Vicarious Liability in the Law of Torts" summed up the difficulties of attributing general liability caused by an agent as the basis of vicarious liability against the principal by stating:[88]

> "There is no more settled doctrine in the law of tort than that a master is liable for the torts of a servant committed in the course of his employment, but there is no more controverted proposition than that a principal is generally liable for the torts of an agent committed within the scope of his authority."

9.052 Instead the principal is normally held directly liable as the primary tortfeasor not in the sense that the principal has insured against any breach or has committed wrong by delegating the task, but simply that the principal is accountable for the tort caused by the agent due to the non-delegable nature of the duty so breached or that the agent's actions are so intimately representative of the principal that the principal cannot be divorced from them.[89]

9.053 **Authority.** A principal-agent relationship in the discrimination context can be established in law in two ways.[90] First, by actual authority and second, by implied[91] authority. Actual authority, the simpler of the two, means that the agent is expressly granted a mandate to perform a certain act. Implied authority has been described by Lord Denning MR in the case *Hely-Hutchinson v Brayhead Ltd*[92] as "the authority of an agent as it appears to others" and that sometimes it "exceeds actual authority".[93] An agent's authority therefore stems from his relationship with the principal in relation to third parties who deal with the principal through the agent as opposed to whether the wrong was committed in the course of employment.

9.054 **Lawful authority used in discriminatory fashion.** Where an agent has actual or implied authority and whether given before or after the discriminating act in question, both principal and agent will be liable for the discriminatory acts of the agent. Further, whether the authority conferred was lawful is not a defence against an agent's act of discrimination. In *Lana v Positive Action Training in Housing (London) Ltd*,[94] the EAT held that the exercise of an otherwise lawful authority but in a discriminatory manner does not afford the principal conferring such lawful authority any comfort. In *Lana,* the tribunal found that the temporary employer was an agent of Positive Action Training. The agent was conferred with actual authority to terminate the claimant's internship contract on their own terms. Such power ought to be exercised in a non-discriminatory manner. Having exercised the power in a discriminatory manner by dismissing the claimant on the basis that she was pregnant, Positive Action as principal was held to be directly liable.[95]

---

82 cf *Sweeney v Boylan Nominees Pty Ltd* (2005) 227 ALR 46, where the High Court of Australia in a majority judgment (Kirkby J dissenting) rejected the concept of a general intermediary category of "representative agent" who were independent contractors for all purposes but whose principals were nonetheless vicariously liable.

83 SDO s.46(2), DDO s.48(2), FSDO s.34(2), RDO s.47(2).

84 *Wong Wai Hing v Hui Wei Lee* [2001] 1 HKLRD 736; *Armagas Ltd v Mundogas SA* [1986] AC 717 (HL) at 781E–782E.

85 Fn 17.

86 SDO s.46(2), DDO s.48(2), FSDO s.34(2), RDO s.47(2).

87 *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (193) 46 CLR 41, at 48, per Dixon J "In most cases in which a tort is committed in the course of the performance of work for the benefit of another person, he cannot be vicariously responsible if the actual tortfeasor is not his servant and he has not directly authorized the doing of the act which amounts to a tort. The work, although done at his request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance."

88 (1967 ed.) Cambridge University Press, at page 99.

89 *Wong Wai Hing v Hui Wei Lee* (fn 84).

90 Reynolds and Watts, *Bowstead & Reynolds on Agency* (18th ed., 2009). Sweet & Maxwell

91 Also known as ostensible, and usual authority.

92 [1968] 1 QB 549, 583D A.

93 *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194, at 201–204, per Steyn LJ and 206, per Lord Evans LJ. Authority can be implied to persons whom from a third party's perspective, the agent is someone with whom to deal.

94 Fn 17.

95 See Joint-vicarious liability at para 9.039 above.

5. Liability of Persons Who Knowingly Aid

9.055 **Aiding unlawful acts.** The anti-discrimination legislation provides that any person who knowingly aids another person in an unlawful discriminatory act shall be treated as himself doing an unlawful act of the like description.[96] Further, an employee or agent will be deemed to be aiding the unlawful act performed by the employer or principal.[97] Liability can therefore be attributed against any person if it is shown that the act done by the other person was unlawful and the act in question aided the other person to do that act.[98]

(a) Meaning of "aid"

9.056 The House of Lords held that a person is said to "aid" another if he helps, or assists him and that the statutory language points towards a relationship of co-operation or collaboration.[99] It does not matter who instigates or initiates this relationship of assistance.[100] However, "aiding" is a very different concept from encouraging or inducing on the one hand and causing or procuring on the other as it requires a much closer involvement in the act of the principal concerned.[101] Further, a person "aids" provided the help rendered is not so insignificant as to be negligible although it does not need to be substantive or productive.[102]

9.057 In *Anyanwu v South Bank Students' Union*, a university expelled two students and prevented them from entering the student union building where they were employed as full-time salaried officers. The union subsequently terminated their employment. The students complained that the union had discriminated against them on the ground of race when it terminated their employment and that the university knowingly aided the union to dismiss them by suspending and expelling them. The Court of Appeal overturned the EAT decision in favour of the students.[103] The Court of Appeal found that the definition "aid" can only be defined narrowly as in "help". On this basis, the university argued that they did not "help" the union fire the students but that the university was a prime mover and that it could not be knowingly aiding the union to commit discrimination. The House of Lords held that the word "aid" should be given its ordinary meaning. Moreover, "aids" is to be contrasted with "cause" and is different from "procure" or "induce" and that the classification of "prime movers" and

96 SDO s.47(1), DDO s.49(1), FSDO s.35(1), RDO s.48(1).
97 SDO s.47(2), DDO s.49(2), FSDO s.35(2), RDO s.48(2).
98 *Shepherd v North Yorkshire County Council* [2006] IRLR 190.
99 *Anyanwu v South Bank Students' Union* [2001] 1 WLR 638 (HL) at para 5, per Lord Bingham. See also *Gilbank v Miles* [2006] IRLR 538.
100 *Shestak v Royal College of Nursing* (unrep., UKEAT, (2008) 152(37) S.J.L.B. 30). A person can only be said to have knowingly aided an unlawful discriminatory act if the other respondent party to the act can be properly identified. In *Shestak v Royal College of Nursing*, the claim was dismissed as the claimant was unable to identify which respondent was alleged to have performed the primary act that the Royal College of Nursing was said to have knowingly aided.
101 Fn 99, per Lord Millett at 653 *Cf Shepherd v North Yorkshire County Council* (fn 98), where Lord Millett's narrower definition of "aiding" was not followed.
102 *Lerica v British Telecommunications Plc* (unrep., UKEAT, EAT/1492/01/ST), where the EAT held that the employer's failure to discipline could not amount to an act of "knowingly aided" an unlawful act of discrimination.
103 [2000] 1 All ER 1(Eng CA).

"secondary parties" was not useful. The students' case was not to be struck out as it was capable of conveying their allegations that the university had assisted the student union to terminate the students' employment by making allegations to expel them.[104]

9.058 **Identifying the unlawful act.** Lord Millet in *Hallam v Avery*[105] emphasised the importance of correctly identifying the act of the principal which the accessory was alleged to have aided. In *Hallam v Avery*, the appellant, who was of Romany gipsy origin, rented the local borough council facilities to host her daughter's wedding reception with plans to invite around 150 guests. The contract was completed well in advance on the council's standard terms. The local constabulary who had experienced public disorder troubles with gipsies communicated their concerns to the council about the risk of potential disorder at the reception. The council acting on that information unilaterally imposed conditions on the appellants. The appellant treated the act as repudiatory and hosted the reception at another facility. The issue before the House of Lords was whether the police in providing information to the council had "aided" the council's act of discrimination. The House of Lords held that the information which the police provided did nothing to help the council to carry out their decision, whether to cancel the reservation of the Pump Rooms for the wedding reception or to impose conditions on entry which were the actual acts of discrimination. The unilateral cancellation of a contract was not an act in which the council required the aid of the police.[106]

9.059 **Advise, encourage, incite or induce not aid.** The House of Lords in *Hallam v Avery* decided that the act of providing information that may be interpreted as discriminatory is not sufficient to amount to "aiding" an unlawful act of discrimination. In doing so the courts have interpreted the word "aid" narrowly. Lord Millet in *Hallam v Avery* said that "a man who helps another to make up his mind does not thereby and without more help the other to do that which he decides to do. He may advise, encourage, incite or induct him to do the act; but he does not aid him to do it".[107]

9.060 **Discriminatory environment.** A person must have done more than merely create an environment in which discrimination can occur in order to "aid" an act of unlawful discrimination.[108] The English Court of Appeal in *Gilbank v Miles*[109] has held that to aid, there must be something more such as the fostering and encouragement of a discriminatory culture. In *Gilbank v Miles*, Gilbank was the senior hair designer of a salon in which Miles was the manager and majority shareholder. When Gilbank

104 The case was eventually dismissed on substantive grounds. See *Anyanwu v South Bank Students' Union (No. 2)* (unrep., UKEAT, 11 Aug 2003).
105 [2001] 1 WLR 655.
106 See also *Gilbank v Miles* (fn 99), where the Court of Appeal stated that the acts of unlawful discrimination must be first identified before assessing if the alleged "aider" had in fact aided the identified unlawful discriminatory acts.
107 *Hallam v Avery* (fn 105), at para 18. See also *Bird v Sylvester* [2008] ICR 208 (Eng CA). The court in *Bird* held that a solicitor who confines himself to giving objective legal advice in good faith as to the proper protection of his client's interest, and acts strictly upon his client's instructions (such as advising that disciplinary proceedings should be taken against the employee and executing letters on their behalf), is not normally held liable for knowingly aiding his client's potential discriminatory acts arising out of such advice.
108 *Gilbank v Miles* (fn 99).
109 *Ibid.*

became pregnant, Miles did not allow her to alter her working habits to accommodate the pregnancy (such as the taking of breaks advised by the doctor, the handling of hair treatment substances that pose a health risk to the unborn baby and the payment of salary for half the statutory maternity period). The court found that Miles had not only created an environment in which discrimination could occur, but had aided the salon in the unlawful acts of discrimination as she had fostered an "inhumane … sustained campaign of bullying and discrimination" which was "targeted, deliberate, repeated and consciously inflicted."

9.061 Interestingly, Chadwick and Arden LJ in *Gilbank v Miles* expressly mentioned but without further comment that Miles was a director and major shareholder of the salon. While we are of the view that it would be very difficult to find directors and shareholders who are not in charge of the day-to-day running of a business liable for knowing assistance, it remains undecided whether directors or shareholders who knowingly turn a blind eye or encourage discriminatory practices in a company may be culpable of "fostering" a discriminatory environment and thereby be liable for knowingly aiding an unlawful act of discrimination.

(b) Meaning of "Knowingly"

9.062 **Knowledge.** Even if a tribunal is satisfied that a person has "aided" for the purpose of the anti-discrimination ordinances, inadvertent aid is not sufficient to trigger liability.[110] The aid must be given "knowingly". Being helpful and co-operative will not be sufficient. Even recklessly aiding the commission of an unlawful discriminatory act when the unlawful act was reasonably foreseeable may not attract liability under the ordinance.[111] An aider must know or have reason to know that the person he is aiding is performing or about to, or is thinking of doing an unlawful act.[112] However, if a tribunal was satisfied that aid was given, it would be very rare and unusual for aid to be given unknowingly.[113] An employee for whose act the employer is vicariously liable or would be so liable but for establishing a "reasonably practicable steps" defence[114] is deemed to aid the doing of the act by the employer.[115]

9.063 **Level of knowledge required.** The threshold of knowledge is relatively low. In *Allaway v Reilly*,[116] a male firefighter sued his employer for sex discrimination and named a senior fire officer as the second respondent. The senior fire officer sought to strike out the claim against him. In considering the appropriateness of the striking out action, the EAT held that there was no requirement to show that the senior fire officer had actual knowledge of aiding the complained act of discrimination. An aider can be said to have "knowingly aided" even if he did not have the motive or intention to discriminate. The aider need not to have the act of discrimination in the forefront

[110] Below at para 9.080.
[111] Judge LJ in *Hallam v Avery* [2000] 1 WLR 966 (CA) at para 27.
[112] *Hallam v Avery* (fn 105).
[113] *Ibid.*, at para 11, per Lord Bingham.
[114] See statutory defence available to employers, para 9.065.
[115] SDO s.47(2), DDO s.49(2), FSDO s.35(2), RDO s.48(2); *Yeboah v Crofton* [2002] IRLR 634 CA at para 72.
[116] [2007] IRLR 864.

of his mind nor specifically addressed his mind to it. A tribunal was entitled to find that aid was given knowingly if in all the circumstances, it could be concluded that the discriminatory act as a probable outcome was within the scope of the aider's knowledge at that time. Since discrimination can only be shown or refuted on the basis of evidence and the claim was not frivolous or vexatious, it was inappropriate to strike out the claim against the senior fire officer without a full hearing.

6. Statutory Defence

(a) Principals and those who knowingly aid

No statutory defence. Although the statutory provisions group liabilities of principals and employers together, only employers are conferred a statutory defence and not relationships of agency or people who knowingly aid unlawful discriminatory acts. 9.064

(b) Employers

The statutory defence. A statutory defence is available to an employer in a claim against him based on vicarious liability where the employer can prove that it took such steps as were reasonably practicable to prevent the employee from doing that discriminatory act, or from doing in the course of his employment acts of that description.[117] The defence is not available to employees. In claims against both the employee and employer, if the employer is able to establish that it took reasonably practicable steps to prevent discrimination in the course of employment, the employee who is the primary tortfeasor remains liable. Further, the defence is not available to an employer who is said to have done the discriminatory act(s) as it is itself the primary tortfeasor. The defence under each of the anti-discrimination ordinances is materially the same and materially correspond to the respective UK provisions. 9.065

Act of employee only. The statutory defence provisions only extend protection to employers if the unlawful discriminatory act complained of was committed by an employee. An employer who is the primary tortfeasor cannot rely on the statutory defence. In *Marks & Spencer Plc v Martins*, the English Court of Appeal considered the question of whether a decision to hire was an act of the company or an act of the employee for which the statutory defence was available to the employer. Martins who was of Afro-Caribbean origin applied for a trainee manager position but was unsuccessful after several attempts. The ET found that the employees of the respondent conducted the interviews and made a decision in a discriminatory manner for which the employer was vicariously liable. The EAT upheld the respondent's appeal on the basis that it was manifestly wrong for the tribunal to have drawn the adverse inference from the facts and evidence before it. In the Court of Appeal and on the issue of vicarious liability, the claimant suggested that the act complained of was the refusal to offer employment. Since it was a decision of the company not to offer employment, the section on vicarious liability was not engaged. The court dismissed this construction 9.066

[117] SDO s.46(3), DDO s.48(3), FSDO s.34(3), RDO s.47(3). See also *Ray Chen v IBM* (fn. 36).

and found that the act complained of was the less favourable treatment on racial grounds performed by the employees in the interview, which led the respondent not to offer employment. As such, the tribunal ought to have considered what was done in advance of and prior to the interview to determine whether they had taken reasonably practicable steps to prevent discrimination by the employees in the interview. On the facts, it was held that the respondent had taken practical and reasonable steps for the purpose of the statutory defence provisions and successfully discharged its obligations.

9.067 **Two-stage test.** The proper approach to assess whether an employer has successfully established the statutory defence involves a two-stage test. The first stage is to identify what steps the employer has taken to prevent the employee from doing the discriminatory act in the course of the employee's employment. After those steps, if any, have been identified, the second stage is to consider whether there were any further steps that were reasonably practicable that should have been taken and could have been taken by the employer.[118]

9.068 In *Caniffe v East Riding of Yorkshire Council*,[119] the EAT found that it would be contrary to legislative intention if an employer could simply point to a policy and claim to have discharged its statutory obligations. The ET having found that the respondent council had a policy against sex discrimination and its employees were notified of such a policy, decided that the respondent council had taken reasonable steps. On appeal, the EAT upheld the appeal and remitted the issue back to the ET for a rehearing to reconsider the second stage as there was sufficient evidence to suggest that certain managerial staff of the respondent council knew of the offences taking place but had not done anything.

9.069 **Reasonably practicable steps to be made before discriminatory incident.** The statutory provisions require an employer to take reasonably practicable steps in advance of the alleged discriminatory to prevent discrimination from occurring.[120] In *Al-Azzawi v Haringey Council (Haringey Design Partnership Directorate of Technical & Environmental Services)*,[121] the claimant was a senior architect who was racially discriminated against by a fellow council employee for whose conduct the council was vicariously liable. The employee in question made remarks to the effect of "bloody Arabs" in the claimant's presence. The tribunal considered the steps taken by the council after the events took place and held that the council had taken reasonably practicable steps. Nonetheless, the EAT held that the tribunal erred by looking only at the events after the act of discrimination took place. The EAT found on the facts of the case, the council had published policies in place and the said policies were made known to its employees. There was also evidence that when the policies were breached, the council took disciplinary action against those employees and were sent for corrective courses. In addition, the court observed that the abusive employee in question had taken part in one of the courses less than a year before the racial discriminatory incident took place.

[118] *Caniffe v East Riding of Yorkshire Council* [2000] IRLR 555 (EAT).
[119] *Ibid.*
[120] *Marks & Spencer Plc v Martins* [1998] ICR 1005 (Eng CA). The steps which are to be assessed by the court are those that were in place before the alleged act of discrimination.
[121] (Unrep., UKEAT, EAT/158/00).

What amounts to reasonably practicable steps. This is a general question of fact for the court to find. The obvious starting point is to assess whether equal opportunities polices exist and whether they have been implemented by management. Implementation has been shown where staff were duly notified of the existence of such polices,[122] proper training for employees,[123] effective supervision of staff,[124] and the existence and use of disciplinary procedures to enforce such policies.[125] The court may also query whether the equal opportunities policy was reasonable. Since the Equal Opportunities Commission (EOC) in Hong Kong regularly updates and publishes its Code of Practice for the forms of discrimination made unlawful by statute, it is reasonable to use the Code as a basis for comparison.[126] 9.070

Whether the taking of any steps by the employer would in fact have been successful in preventing the act of discrimination is not a determinative factor. An employer would not be inculpated if those steps taken are not successful. On the other hand, the employer will not be exculpated if it has not taken reasonable steps simply because if he had taken those reasonable steps, those steps would not have achieved anything or in fact prevented anything from occurring. Even if there was no realistic chance of success, but if in fact it was reasonably practicable for such steps to be done, they should have been done.[127] In *Balgobin & Francis v London Borough of Tower Hamlets*,[128] the applicants alleged that they were sexually harassed by a male employee. They complained to the management who subsequently suspended the male employee. After internal disciplinary proceedings which failed to find any wrongdoing, the suspended employee returned to his previous place of work which was physically shared with his co-accusers. The claimants brought a claim against the respondents for sex discrimination. The ET found that the employer was not vicariously liable because the employer had taken all reasonably practicable steps to prevent harassment once they had been made aware of the complaint.[129] 9.071

The existence of a formal grievance procedure may not be sufficient to meet the test of reasonably practicable. In *Insitu Cleaning Co Ltd v Heads*,[130] a manager greeted an employee by remarking on the size of her bosoms. Upon receiving her complaint, the company invited the employee to apply for the formal grievance procedure but she was not able to bring herself to do so and resigned. She then claimed against the company for sexual harassment and succeeded. The company claimed that they had taken 9.072

[122] Fn 118. See also *Balgobin & Francis v London Borough of Tower Hamlets* [1987] ICR 829 (EAT).
[123] Fn 120.
[124] Fn 120. *Cf King v The Great Britain-China Centre* [1992] ICR 516.
[125] Fn 118.
[126] Fn 120, where the English Court of Appeal was of the view that the arrangements compliance with the Code of Practice issued by the Equal Opportunities Commission in England were persuasive.
[127] Fn 118.
[128] Fn 122.
[129] The decision in *Balgobin* may be decided differently today. The European Code of Practice: Protecting the Dignity of Women and Men at Work, 1991 (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992H0131:EN:HTML) now recommends at (V) Disciplinary Offence "even where a complaint is not upheld because, for example the evidence is regarded as inconclusive, consideration should be given to transferring or rescheduling the work of one of the employees concerned rather than requiring them to continue to work together against the wishes of either party".
[130] [1995] IRLR 4 (EAT).

reasonably practicable steps as they referred her to the grievance procedure. In *obiter* and on the facts, the EAT held that the culture of sexual discrimination was so prevalent in the company that it should have adopted a separate procedure dealing exclusively with complaints of discrimination and that such a procedure should contain an informal first step to enable complaints of discrimination to be dealt with sympathetically.

9.073 **Burden of proof.** The defence is only required if vicarious liability can be established in the first place. Once the court is satisfied that there is vicarious liability, it is up to the employer to prove and establish such a defence, especially if liability is not challenged.[131]

9.074 **Not applicable to criminal proceedings.** The vicarious liability provisions do not apply for the purposes of any criminal proceedings.[132]

(c) Meaning of "Knowingly aided"

9.075 **Statutory defence.** The anti-discrimination legislation provides a statutory defence to a person who has been found to have aided an unlawful discriminatory act. A person does not assist "knowingly" if he can establish that he acted in reliance on a statement made to him by the other party that the act in which he aids would not be unlawful and that it is reasonable in the circumstances to rely on such a statement.[133] Due to the nature of discrimination offences, we are of the view that this defence would only succeed in very unusual circumstances.

7. Aggravated and Exemplary Damages

9.076 **Ordinary damages and vicarious liability.** Where a person is found directly or vicariously liable for an act of unlawful discrimination,[134] he is generally liable to pay damages,[135] although the extent of damages depends on the facts of each case[136] irrespective of whether a respondent is personally or vicariously liable in discrimination cases.[137]

9.077 **Aggravated and exemplary damages.** Until the House of Lords decision in *Kuddus v Chief Constable of Leicestershire*,[138] which concerned a claim against police officers' improper conduct against their employers, the notion of awarding aggravated or exemplary damages against an employer who was found only vicariously liable was

[131] SDO s.46(34), DDO s.48(3), FSDO s.34(3), RDO s.47(3). See also *Enterprise Glass Co Ltd v Miles* [1990] ICR 787 (EAT), where it was held that where discrimination is not in issue, the burden shifts to the employer to prove that it had taken reasonably practicable steps to prevent the discrimination.

[132] SDO s.46(4), DDO s.48(4), FSDO s.34(4), RDO s.47(4).

[133] SDO s.47(3), DDO s.49(3), FSDO s.35(3), RDO s.48(3).

[134] SDO s.76, DDO s.72, FSDO s.54, RDO s.70.

[135] See Chapter 11, "Remedies".

[136] *HM Prison Service v Johnson* [1997] IRLR 162, where aggravated damages was awarded.

[137] SDO ss.46(1) and 76, DDO ss.48(1) and 72, FSDO ss.34(1) and 54, RDO ss.47(1) and 70. See Chapter 11, "Remedies".

[138] [2002] 2 AC 122.

never thoroughly considered by courts.[139] Lord Scott remarked in *obiter* that it would seem disingenuous to impose a punitive award upon an innocent employer while at the same time allowing the guilty employee to escape punishment.[140] Lord Mackay made two further observations. First, the common law principle where the appropriate sum is the lowest sum for which any defendant could be liable where more than one defendant was sued would be relevant to any consideration for awarding aggravated or exemplary damages against a defendant found vicariously liable.[141] Second, exemplary damages would only be available in respect of discrimination and data protection law if legislation expressly authorised exemplary damages in relation to any particular breach.[142]

9.078 Unlike legislation in the United Kingdom and other like common law jurisdictions, Hong Kong's anti-discrimination ordinances expressly provide for awards of aggravated and exemplary damages and the District Court has consistently held that both aggravated and exemplary damages are available.[143] On the question of aggravated and exemplary damages for those vicariously liable, which remains undecided by any tribunal in this jurisdiction, two issues necessarily arise. First, whether the court has jurisdiction to award such damages against a respondent that is only vicariously liable and second, under what circumstances will the court exercise such jurisdiction.

(a) Jurisdiction to award aggravated and exemplary damages

9.079 **District Court has jurisdiction to award exemplary damages.** On a plain reading of the anti-discrimination ordinances and in sharp contrast with the common law, we are of the view that the courts are jurisdictionally entitled to award aggravated and exemplary damages in such situations. The observations by the House of Lords in *Kuddus v Chief Constable of Leicestershire* is therefore of little relevance in context of discrimination law in Hong Kong and can be readily distinguished.

9.080 The anti-discrimination ordinances can be said to provide that any employer, principal or person who knowingly aids or who by virtue of the respective ordinances are found to have committed an act of discrimination and are made respondent in a claim are

[139] The majority in the House of Lords in *Kuddus v Chief Constable of Leicestershire* in fact expressed no view as to the question of aggravated and exemplary damages for cases of vicarious liability as it was not relevant to the disposal of the appeal. See also *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, where it was assumed that vicarious liability could give rise to exemplary damages but the issue was not discussed. *Cf S v Attorney-General* [2003] NZCA 149, where the New Zealand Court of Appeal held that there should be no vicarious liability for exemplary damages.

[140] *McGregor on Damages*, 17th ed., paras 11.043 to 11.045. Where joint wrongdoers are sued together, the conduct of one defendant does not allow exemplary damages to be awarded in the single judgment which must be entered against all if the conduct of the other defendant or defendants does not merit punishment. See also *Kuddus v Chief Constable of Leicestershire Constabulary* (fn 138); *Broome v Cassell & Co Ltd* [1972] AC 1027; *Cf Watkins v Secretary of State for the Home Department* [2005] QB 883 (Eng CA), [2006] 2 WLR 807 (HL), where the claimant sought exemplary damages against the individual prison officers but not against the employer. This approach regarding damages was not tested before the House of Lords as they overturned the Court of Appeal's decision on liability.

[141] At 141B, per Lord Mackay. See also *Broome v Cassell & Co Ltd* (fn 140).

[142] Lord Devlin *in Rookes v Barnard* [1964] AC 1129.

[143] *Yuen Sha Sha v Tse Chi Pan* [1999] 2 HKLRD 28; *Chan Choi Yin Janice v Toppan Forms (Hong Kong) Ltd* (fn 57).