

Code of Practice on Employment under the Race Discrimination Ordinance



平等機會委員會
EQUAL OPPORTUNITIES COMMISSION

(English)

This Code is published in accordance with:

1. Government Notice No. 2733 of 2009; and
2. Resolution of the Legislative Council passed on 9 July 2009 and published in the Gazette on 10 July 2009 (Government Notice No. 4183 of 2009)

Foreword

The Race Discrimination Ordinance and its Code of Practice on Employment have come into full operation from 10 July 2009. It brings to Hong Kong a new opportunity and at the same time a new challenge to make our society better and fairer for everyone living in it regardless of racial characteristics.

An important aspect of our lives is employment. This Code of Practice explains how the Race Discrimination Ordinance protects people from racial discrimination in employment-related matters. It is prepared and issued by the Equal Opportunities Commission under the Ordinance.

The Race Discrimination Ordinance is the fourth piece of anti-discrimination legislation enacted in Hong Kong, following the Sex Discrimination Ordinance and the Disability Discrimination Ordinance in 1996 and the Family Status Discrimination Ordinance in 1997. While provisions in the Race Discrimination Ordinance are generally similar to these other anti-discrimination ordinances, there are many provisions in it which are specifically enacted to deal with racial issues unique to Hong Kong's environment.

This Code of Practice has been produced after consultation with the public and stakeholders. It is intended to explain the law and to provide practical guidance on how to comply with the Race Discrimination Ordinance in relation to employment matters as well as to promote racial equality in the workplace.

We hope you will find this Code of Practice useful.

Equal Opportunities Commission
July 2009

Contents

Chapter 1 – Introduction

1.1	The Race Discrimination Ordinance	4
1.2	Purpose of the Code	4
1.3	Status and application of the Code	5
1.4	Recommendations of good practice and use of illustrations	5

Chapter 2 – Meaning of Race under the RDO

2.1	What is meant by race under the RDO	7
2.2	Religion	8
2.3	Language	9
2.4	What is not regarded as an act done on the ground of race under the RDO	9

Chapter 3 – Scope of Part 3 of the RDO

3.1	Employment field	11
3.2	Meaning of employment	11
3.3	Work wholly or mainly outside Hong Kong	11
3.4	Grace period for small employers	13
3.5	Domestic helpers	14
3.6	Religion	14
3.7	Other occupational relationships	14
3.7.1	Contract workers	14
3.7.2	Partners	15
3.7.3	Commission agents	15
3.7.4	Barristers	15
3.8	Other matters	16
3.8.1	Vocational training	16
3.8.2	Employment agencies	17

Chapter 4 – Rights and Responsibilities under the RDO

4.1	Responsibilities of employers and principals	18
4.2	Rights of employees and workers and their role	19

Chapter 5 – Practising and Promoting Racial Equality

5.1	Complying with the RDO	23
5.2	Drawing up and implementing a policy	23
5.3	Good employment procedures and practices	24
5.3.1	Recruitment using consistent selection criteria	24
5.3.2	Race must not be a factor	26
5.3.3	Genuine Occupational Qualification (GOQ)	26
5.3.4	Advertising vacancies	27
5.3.5	Shortlisting	28
5.3.6	Race related information	29
5.3.7	Interviewing	30
5.3.8	Tests	31
5.3.9	Recruitment through employment agencies or employment services	31
5.3.10	Terms and conditions of employment, benefits, facilities and services	32
5.3.11	Overseas employees	35
5.3.12	Language	36
5.3.13	Promotion, transfer and training	36
5.3.14	Prevent harassment on the ground of race	38
5.3.15	Grievance procedures	41
5.3.16	Dismissals, redundancies and unfavourable treatment of employees	42
5.3.17	Monitoring	43
5.3.18	Positive action	45

Chapter 6 – Unlawful Acts under the RDO

6.1	Types of discrimination under the RDO	46
6.1.1	Racial discrimination	46
6.1.2	Discrimination on the ground of near relative's race	50
6.1.3	Discrimination by way of victimization	50
6.2	When discrimination is unlawful in employment	51
6.3	Unlawful racial harassment	52
6.4	Vilification and the offence of serious vilification	54
6.5	Discriminatory advertisements	55
6.6	Instructions and pressure to discriminate	55
6.7	Acts allowed under the RDO	55
6.7.1	Genuine Occupational Qualification	55
6.7.2	Training for skills to be used outside Hong Kong	55

6.7.3 Special skills, knowledge or experience	56
6.7.4 Existing local and overseas terms of employment	56
6.7.5 Positive action	58
 <u>Chapter 7 – When Discrimination and Harassment is Encountered</u>	
7.1 Legal protection under RDO	59
7.2 Complaint handling by the EOC	59
7.3 Legal Assistance by the EOC	61
7.4 Other functions of the EOC	61
 Sample policy on racial equality	 63
 Supplementary explanatory notes	 66

1 Introduction

1.1 The Race Discrimination Ordinance

1.1.1 The Race Discrimination Ordinance (RDO) was enacted in 2008. Its main objectives include making discrimination, harassment and vilification on the ground of race unlawful; and giving the Equal Opportunities Commission (EOC) the function of eliminating such discrimination, harassment and vilification as well as promoting equality and harmony between people of different races¹.

1.1.2 Part 3 of the RDO deals with discrimination and harassment on the ground of race in the employment field, which includes employment as well as other occupational relationships and matters², making such discrimination and harassment unlawful. Part 5 of the RDO deals with discriminatory advertisements and other unlawful acts.

1.2 Purpose of the Code

1.2.1 This Code of Practice (Code) is issued by the EOC, pursuant to RDO section 63, to give practical guidance on how to prevent discrimination and harassment on the ground of race and other unlawful acts, and to promote racial equality and harmony, in the employment field. The Code is intended to encourage employers, employees and other concerned parties to promote racial equality and harmony in the workplace by adopting good practice, and to help them to understand their respective rights and responsibilities under the RDO so that they will respect, and refrain from infringing, the rights of other people. The Code also helps employees and workers to know what to do if they encounter discrimination and harassment on the ground of race.

1.2.2 The Code should be read in the light of and subject to the RDO. It should be read as a whole and in the spirit of promoting racial equality. It should not be read narrowly or approached in a minimalist way.

¹ See the long title of the RDO (Cap.602)

² See Chapter 3 of the Code

1.3 Status and application of the Code

1.3.1 The Code is a statutory code that has been laid before the Legislative Council. The Code provides recommendations for good employment procedures and practices. It should be used to promote racial equality and harmony in the workplace. Following good employment procedures and practices will further have the benefit of promoting racial equality and harmony beyond the workplace. For example, where the employment relates to the provision of education or other services and facilities, promotion of racial equality in the workplace will also help to ensure that these services are provided without racial discrimination or harassment. Although the Code is not law, it shall be admissible in evidence and the court shall take into account relevant parts of the Code in determining any question arising from proceedings under the RDO³. If, for example, an employer has followed the Code's recommendations on taking reasonably practicable steps to prevent discrimination and harassment, it may help the employer to show that it has complied with the law.

1.3.2 In line with the RDO's application in the employment field, the Code applies to employment relationships in both private and public sectors, unless the employee does his or her work wholly or mainly outside Hong Kong⁴. It also applies to other occupational relationships and work related matters, such as contract workers, commission agents, partnerships, vocational training and the services of employment agencies⁵.

1.4 Recommendations of good practice and use of illustrations

1.4.1 The Code provides recommendations on good employment procedures and practices⁶. Employers and other concerned parties should follow these recommendations by adopting them appropriately to the scale and structure of their organizations and available resources. Organizations and businesses operating on a small scale with a simple structure may adopt less formal practices, so long as they follow the spirit of practising and promoting racial equality.

³ RDO section 63(14)

⁴ RDO section 16 and paragraph 3.3 of the Code

⁵ See Chapter 3 of the Code

⁶ See Chapter 5 of the Code

- 1.4.2 The Code makes use of simple scenarios to illustrate how principles and concepts of the RDO may be applied in the employment field. The application of discrimination law depends very much on the facts of each particular case. The illustrations used in the Code are intended to facilitate a general understanding of the principles of the RDO. They may not embrace all the relevant facts of, and should be not understood as directly applicable to, any specific situation actually encountered by the reader.
- 1.4.3 At the time of issuing the Code, there are no court decisions in Hong Kong applying the RDO. Case law and other materials under other discrimination laws in Hong Kong or elsewhere (such as international and common law jurisprudence) may help in understanding how the RDO operates, and relevant references are given in footnotes where appropriate, though differences between legislative provisions and actual circumstances overseas and those in Hong Kong should be noted.
- 1.4.4 While the Code is intended to explain the general principles of the law, it is not a complete and authoritative statement of the law and it should not be taken as a substitute for taking appropriate legal advice in relation to any specific situation. Readers should refer to the relevant RDO provisions and legal advice for the extent of any legal obligation in relation to specific situations.

2 Meaning of Race under the RDO

2.1 What is meant by race under the RDO

2.1.1 The RDO provides that race means a person's "race", "colour", "descent", "national" or "ethnic origin"⁷. A racial group is a group of persons defined by reference to these characteristics⁸. In this respect, the RDO is in line with the meaning of racial discrimination in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

2.1.2 The RDO further elaborates on the meaning of "descent"⁹ by providing that discrimination on the ground of descent means discrimination against members of communities based on forms of social stratification such as a caste system or similar systems of inherited status which nullify or impair their equal enjoyment of human rights.

2.1.3 There is no elaboration in the RDO relating to the meaning of "race", "colour", "national" or "ethnic origin". In applying these terms, the following are useful references:-

(1) ICERD and related documents¹⁰;

(2) Case law and other materials in other jurisdictions (for example, common law jurisdictions).

2.1.4 The above reference materials indicate that:-

(1) Racism and racial discrimination are the result of social processes that seek to classify people into different groups with the effect of marginalizing some of them in society¹¹. In this context, the words "race", "colour", "national" or "ethnic origins" in discrimination laws

⁷ RDO section 8(1)(a)

⁸ RDO section 8(1)(d)

⁹ RDO section 8(1)(c)

¹⁰ For example, General Recommendation VIII of the Committee on the Elimination of All Forms of Racial Discrimination (a body of independent experts established under the ICERD) states that identification of individuals as being members of particular racial groups should be based on their self-identification if no justification to the contrary exists.

¹¹ Policy and Guidelines on Racism and Racial Discrimination, paragraph 2.1, Ontario Human Rights Commission, Canada, 2005

have broad popular meanings¹². They are not mutually exclusive and a person may fall into more than one racial group¹³. For example, identifying people as Asian is an act done on the ground of race. The same is true of identifying people as having Chinese origin. A person living in Hong Kong may be in the Asian racial group as well as in the Chinese origin group.

(2) National origin includes origin in a nation that no longer exists or a nation that was never a nation state in the modern sense¹⁴. National origin is not the same thing as nationality. The national origin of a person can be different from his nationality or citizenship. For example, a person living in Hong Kong of Indian origin may have Malaysian nationality.

(3) A group is an ethnic group (and its members having the ethnic origin of the group) if it is a distinct segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a long common history or presumed common history¹⁵. On this basis, Jews and Sikhs have been held to be ethnic groups¹⁶. Other groups in the same nature will also be regarded as ethnic groups.

2.2 Religion

2.2.1 Religion in itself is not race. A group of people defined by reference to religion is not a racial group under the RDO¹⁷. The RDO does not apply to discrimination on the ground of religion¹⁸. But requirements or conditions having an impact on people's religious practices may indirectly discriminate against certain racial groups, and when this is so the RDO applies¹⁹ (see for example the blanket ban on beards in

¹² *King-Ansell v Police* [1979] 2 NZLR 531 and *Mandla v Dowell Lee* [1983] ICR 385

¹³ RDO section 8(1)(d) and the UK Code of Practice on Racial Equality in Employment, p.111, Commission For Racial Equality 2005

¹⁴ The UK Code of Practice on Racial Equality in Employment, p.109, Commission For Racial Equality 2005

¹⁵ *King-Ansell v Police* [1979] 2 NZLR 531; see also *Mandla v Dowell Lee* [1983] ICR 385 and *BBC Scotland v Souster* [2001] IRLR 150

¹⁶ *King-Ansell v Police* [1979] 2 NZLR 531 and *Mandla v Dowell Lee* [1983] ICR 385

¹⁷ *Nyazi v Rymans* (EAT, 10 May 1988, unreported)

¹⁸ *Tower Hamlets London Borough Council v Rabin* [1989] ICR 693

¹⁹ See RDO section 4(b); and paragraph 6.1.1(2) of the Code

Illustration 9 below may indirectly discriminate against ethnic groups whose religious practice or custom is to wear beards).

2.3 Language

2.3.1 As language used by people is often associated with their race, treatment based on language may discriminate against certain racial groups or may amount to racial harassment. Since language issues may arise in different aspects of employment matters, they will be mentioned and dealt with in different parts of the Code below (see for examples paragraphs 3.8.1(2) to (4), 5.3.1(1)(d), 5.3.1(2), 5.3.4(3), 5.3.5(2), 5.3.12, 5.3.13(1), 5.3.14(8)(c), and 6.1.1(2)(v)).

2.4 What is not regarded as an act done on the ground of race under the RDO

2.4.1 The RDO provides that acts done on the ground of the matters specified in section 8(3) are not acts done on the ground of race under the RDO. Acts done on the ground of these matters also do not constitute requirements or conditions within the definition of indirect discrimination under the RDO²⁰. These matters are:-

- (1) Whether or not a person is an indigenous villager²¹;
- (2) Whether or not a person is a permanent resident, or has the right of abode or right to land, or is subject to any restriction or condition of stay, , or has permission to land and remain in Hong Kong²²;
- (3) How long is a person's length of residency in Hong Kong²³;
- (4) Whether or not a person has a particular nationality and citizenship²⁴.

2.4.2 Although acts done on the grounds of the above matters would not constitute discrimination under the RDO because they do not come

²⁰ See RDO section 4(b); and paragraph 6.1.1(2) of the Code

²¹ RDO section 8(3)(a); "Indigenous inhabitant" is a term defined in the Village Representative Election Ordinance Cap.576; "Established village" is a term defined in the Government Rent (Assessment and Collection) Ordinance Cap.515.

²² RDO section 8(3)(b)

²³ RDO section 8(3)(c)

²⁴ RDO section 8(3)(d)

within the meaning of race under the RDO, these matters should not be used as a mask to hide what is in fact race discrimination under RDO. Where there is in fact race discrimination, the person discriminated against may bring legal proceedings in Court or complain to the EOC for investigation and conciliation²⁵.

Illustration 1

A Hong Kong resident of Pakistani origin applies for a job as a manager with a company. She meets all the requirements of the job, but she is not a permanent resident in Hong Kong. The company declined to consider her application and told her that it only employs people who are permanent residents in Hong Kong. In fact, the company does not employ only people who are permanent residents in Hong Kong and there are managers working in the company who are of various national or ethnic origins and who are not permanent residents in Hong Kong. Although whether or not a person is a permanent resident is not a ground of race under the RDO, on the information above, the court can draw an inference that the real reason for declining to consider the job applicant's application was on the ground of her Pakistani origin, which is a ground of race under the RDO.

²⁵ See Chapter 7 of the Code

3 Scope of Part 3 of the RDO

3.1 Employment Field

Part 3 of the RDO deals with discrimination and harassment in the employment field, which includes employment as well as other occupational relationships and matters.

3.2 Meaning of employment

3.2.1 The RDO defines “employment” as a contract of service or apprenticeship, or a contract to personally do any work²⁶. This definition of employment is wider than under the common law or labour legislation. People who are not employees under the common law or labour legislation are protected from discrimination and harassment on the ground of race under the RDO if they fall within the RDO definition of employment.

Illustration 2:-

The RDO applies to a self-employed musician of Filipino origin who contracts with a bar-owner to personally perform in the bar. The bar-owner may not discriminate or harass him or her on the ground of race under the RDO.

3.2.2 Private employers as well as the Government²⁷ and other public bodies are all bound by the RDO, and their employees and workers are entitled to work free from discrimination and harassment on the ground of race under the RDO.

3.3 Work wholly or mainly outside Hong Kong

3.3.1 The RDO does not apply to people who work wholly or mainly outside Hong Kong²⁸. Reference case law indicates that:-

(1) The RDO applies to all employment situations, unless the employee

²⁶ RDO section 2; and a contract within this definition needs not be written.

²⁷ RDO section 3

²⁸ RDO section 16(1)

works wholly or mainly outside Hong Kong, or works wholly outside Hong Kong on a Hong Kong registered ship or aircraft²⁹

- (2) To determine whether a person work wholly or mainly outside Hong Kong, the whole period of employment should be taken into account³⁰.
- (3) A person works mainly outside Hong Kong as long as the person has in fact spent more time working outside Hong Kong in the whole period of employment than in Hong Kong, in which case the RDO does not apply³¹.
- (4) When a person works mainly in Hong Kong, the RDO applies even if the act of discrimination takes place outside Hong Kong. This means that the RDO applies to a person who is discriminated against when he is stationed outside Hong Kong, as long as he has worked more time in Hong Kong than outside Hong Kong in the whole period of his employment³².

Illustration 3:-

The RDO applies to a manager of Dutch origin who works in Hong Kong 55% of the time and 45% of the time outside Hong Kong in the whole period of his employment. On the other hand, the RDO does not apply to a factory supervisor of Japanese origin employed by a company to stay and work in a factory in the mainland and does not work in Hong Kong at all.

Illustration 4:-

An accountant of Chinese origin who has worked for a company in Hong Kong for 5 years has just been transferred to stay and work in the company's factory in the mainland. Even though the accountant no longer has to work in Hong Kong, the RDO applies to him because for the whole period of his employment he has spent the majority of working time in Hong Kong. When he has worked in the mainland for more than 5 years, he would have worked more time outside Hong Kong for the whole period of his employment and the RDO will not apply.

²⁹ *Haughton v Olau Line (UK) Ltd* [1986] IRLR 465; RDO section 16(1) and (2)

³⁰ *Saggar v Ministry of Defence* [2005] IRLR 618

³¹ *Carver v Saudi Arabian Airlines* [1999] ICR 991

³² *Saggar v Ministry of Defence* [2005] IRLR 618

3.3.2 The RDO applies to people who work on:-

- (1) a ship registered in Hong Kong; or
- (2) an aircraft 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 Kong³³.

Illustration 5:-

The RDO applies to a person who works on a Hong Kong registered ship even if this person only spends 10% of time in Hong Kong waters. The RDO does not apply to a person who works on a Hong Kong registered ship but spends all the time outside Hong Kong waters.

3.4 Grace period for small employers

3.4.1 For the first 3 years after the enactment of the RDO, there is a grace period during which RDO section 10(1) and 10(2) (provisions making discrimination under the RDO in employment unlawful) do not apply to employers who employ no more than 5 employees³⁴. This grace period ends on 10 July 2011. If a company is controlled by another company or if 2 companies are controlled by a third person, the employees of both companies are included for the purposes of counting the number of employees³⁵. **Note**

3.4.2 The grace period does not apply to acts of harassment on the grounds of race or discrimination by way of victimisation³⁶. All employers may not at any time harass their employees on the ground of race or discriminate against them by way of victimisation. The grace period also does not apply to the employment of domestic helpers³⁷.

3.4.3 Even during the grace period, if an employer at any time has more than

³³ RDO section 16(2)

³⁴ RDO section 10(3) and (8)

³⁵ RDO section 10(9)

³⁶ See RDO section 6 and 10(3); and paragraph 6.1.3 of the Code

³⁷ RDO section 10(3)

5 employees, the RDO will apply in respect of any acts of discrimination on the ground of race done at that time.

3.5 Domestic helpers

3.5.1 RDO section 10(1) (a) and (c) make discrimination on grounds of race in recruitment unlawful. But these provisions do not apply to the recruitment of domestic helpers who work in the place where the employer or his or her near relatives live³⁸. For example, an employer may choose to recruit a domestic helper of Indonesian origin to work at his or her home and declines to recruit a domestic helper of Thai origin on the ground of the difference in origin.

3.5.2 Once the domestic helper has been employed, however, RDO section 10(2) applies and the employer may not discriminate against the domestic helper on the ground of race.

3.6 Religion

Part 3 of the RDO (provisions relating to discrimination under the RDO in employment field) does not apply to employment for the purposes of an organized religion if the employment is limited to persons from particular racial groups in order to comply with the doctrines of the religion or to avoid offending the religious susceptibilities common to its followers³⁹.

3.7 Other occupational relationships

3.7.1 Contract workers

RDO section 15 applies to people who are contract workers. Contract workers are workers who are employed by a contractor or a sub-contractor of a principal to do work for the principal⁴⁰. A contractor is a person who enters into a contract with the principal to undertake work for the principal⁴¹. A sub-contractor is a person who enters into a contract with the contractor or a sub-contractor to

³⁸ RDO section 10(7)

³⁹ RDO section 23(1)

⁴⁰ RDO section 15(1)

⁴¹ RDO section 15(7)

undertake all or part of the work⁴². The principal may not discriminate against its contract workers on the ground of race under RDO section 15. If a principal does not itself discriminate against or harass its contract workers, there would be no liability under RDO section 15. However, the principal should take reasonably practicable steps to prevent its employees from discriminating or harassing its contract workers and may not authorize its agents to discriminate the contract workers (see paragraph 4.1 of the Code).

Illustration 6:-

A cleaning contractor employs cleaners, and under a contract with a trading firm (the principal), sends the cleaners to the trading firm to clean its office. The cleaners are of different national origins (for example, some are of Chinese origin and others are of Nepalese origin). They are all contract workers of the trading firm and it must not discriminate against any of them on the ground of race.

3.7.2 Partners

RDO section 17 applies to partnership firms having 6 or more partners. These firms may not discriminate against any of its partners or any person who wishes to become a partner on the ground of race.

3.7.3 Commission agents

RDO section 22 applies to commission agents, who are people remunerated in whole or in part by commission for work done for their principal. For example, an insurance company as a principal may not discriminate on the ground of race against its insurance agents who are paid commission in whole or in part under RDO section 22.

3.7.4 Barristers

RDO section 35(1) and (2) apply to barristers and their clerks, and they may not discriminate on the ground of race against a pupil or a tenant or against any person in relation to the offer of a pupilage or tenancy⁴³. RDO section 35(3) applies to any person giving, withholding or accepting

⁴² RDO section 15(7)

⁴³ Under RDO section 35(4), the terms “pupil”, “pupilage”, “tenant” and “tenancy” have the meanings commonly associated with their use in the context of a set of barristers’ chambers.

instructions to a barrister, and there may not be discrimination on the ground of race in these matters. For example, a lay client may not refuse to instruct a barrister because the barrister is of Indian origin.

3.8 Other matters

3.8.1 Vocational training

- (1) RDO section 20 applies to providers of vocational training. These providers may not discriminate on the ground of race against any person seeking or undergoing training to help fit him or her for employment. For example, a technical college may not refuse to admit a student of Pakistani origin to enrol in a mechanic training course because of his or her origin.
- (2) A vocational training provider is not required to modify its arrangements or make different arrangements regarding holidays or medium of instructions for any persons of any racial group⁴⁴. A provider may set language requirement for courses which should be commensurate with the contents of the course.
- (3) However, where practicable it is good practice to design and provide courses, programmes, information and material in ways which enable people from different racial groups to have equal opportunities to undergo vocational training. Providers are encouraged to do so by, for example, providing lecture notes and other course materials in English so that people who can read English and speak Cantonese (but not read Chinese) may participate in a course taught in Cantonese.
- (4) Providers are also encouraged to ensure that language requirements for training course are commensurate with the contents of the courses, so that people from different racial groups are not deterred by unnecessary language requirement. For example, where the language requirement for a course is only the ability to speak Cantonese, it is unnecessary to require students to be able to read and write Chinese.

⁴⁴ RDO section 20(2)

3.8.2 Employment agencies

- (1) RDO section 21 applies to employment agencies. These agencies may not discriminate on the ground of race against any person who wants to obtain their services. Agencies also may not help or aid employers to discriminate on the ground of race⁴⁵, for example, by arranging underpayment for workers from certain racial groups.
- (2) RDO section 21(4) provides that an employment agency is not subject to any liability under section 21 if it can show that it relied on a statement by an employer that the employer could lawfully refuse employment to a person under the RDO, for example, the employer stating that race is a genuine occupational qualification⁴⁶, providing that it is reasonable to rely on the statement.
- (3) For language requirement of a job and good practice relating to the language of advertisement, see paragraph 5.3.4(3) of the Code.

⁴⁵ RDO section 48

⁴⁶ See paragraph 5.3.3 of the Code

4 Rights and Responsibilities under the RDO

4.1 Responsibilities of employers and principals

4.1.1 Employees and workers are entitled to work free from discrimination and harassment on the ground of race under the RDO. Employers may not discriminate or harass their employees and workers on the ground of race. The RDO requires employers to take reasonably practicable steps to prevent discrimination and harassment. Only if an employer has done so, will it have discharged its legal responsibility under the RDO⁴⁷.

4.1.2 RDO section 47(1) provides that anything done by an employee in the course of employment is treated as done by the employer as well under the RDO. This is so even if the employer did not know or did not approve of what the employee has done. If, for example, an employee discriminates or harasses another employee on the ground of race, the employer would be treated as having also discriminated or harassed that other employee on the ground of race, and be legally liable unless the employer has taken reasonably practicable steps to prevent discrimination and harassment from happening.

(1) In order to discharge their responsibility to take reasonably practicable steps to prevent discrimination and harassment on the ground of race, it is recommended that employers adopt a policy of racial equality and implement such a policy through good employment practice and procedures. Chapter 5 of the Code provides recommendations on the contents of a racial equality policy and on good employment practice and procedures for employers' reference and adoption as appropriate according to the scale and structure of their organizations and available resources.

(2) Social gatherings involving employees immediately after work and for an organized party were held by a tribunal in the UK on the facts of the case to be within the course of employment even though the events take place outside the workplace or normal work hours⁴⁸.

⁴⁷ RDO section 47(3)

⁴⁸ *Chief Constable of the Lincolnshire Police v Stubbs* [1999] IRLR 81, a sex discrimination case which has reference value to the application of the RDO.

Whether an event occurring outside normal working hours or workplace comes within the course of employment depends very much on the specific circumstances of each case. It is recommended that employers take reasonably practical steps to prevent discrimination and harassment by adopting good employment practice and procedures as described in Chapter 5 of the Code.

- 4.1.3 Similarly, RDO section 47(2) provides that anything done by an agent with the authority of the principal (whether express or implied, precedent or subsequent) is treated as done by the principal as well, so that, for example, the principal would be held liable for any discrimination or harassment on the ground of race done by the agent with the authority of the principal. Principals should take reasonably practicable steps to prevent discrimination or harassment by their agents, by adopting and following the good practice and procedures in the workplace described in Chapter 5 of the Code as relevant to their situations. This will help principals to comply with the RDO by ensuring that their agents do not have authority to commit any act of discrimination and harassment on the ground of race.

4.2 Rights of employees and workers and their role

- 4.2.1 All employees and workers have the right to work free from discrimination or harassment on the ground of race. This right covers access to job opportunities, terms and conditions of employment (including benefits and facilities), opportunities for promotion, transfer or training, and matters of dismissal or redundancy. They are entitled to be treated with respect and dignity and not to be subjected to any unwelcome conduct or hostile environment on the ground of race. They are also entitled not to be instructed or pressurized to discriminate or harass anyone on the ground of race⁴⁹. The rights of employees and workers under the RDO are protected by law. They may seek redress by bringing legal proceedings or lodging complaints to the EOC when they encounter discrimination or harassment⁵⁰. Their right to seek redress is itself protected by law and they are entitled not to be victimized for doing so⁵¹.

⁴⁹ RDO section 43; and paragraph 6.6 of the Code

⁵⁰ See Chapter 7 of the Code

⁵¹ See paragraph 6.1.3 of the Code

- 4.2.2 Employees and workers themselves may not discriminate or harass their colleagues in the course of employment and may not aid their employer to do so. RDO section 48(1) makes it unlawful for a person to knowingly aid another person to do an unlawful act under the RDO. RDO section 48(2) provides that, when the employer or principal is liable for the act of an employee or agent, the employee or the agent will be treated as aiding the employer or the principal to do the act. In other words, employees and workers are personally liable if they discriminate on the ground of race or instruct or pressurize another person to do so. Employees and workers are also personally liable for harassment on the ground of race⁵².
- 4.2.3 Employees and workers have the responsibility to respect the rights of the people they work with. They should not discriminate or harass fellow workers on the ground of race. Employees and workers can be proactive in helping to eliminate racial discrimination by becoming familiar with the subject, so that they do not inadvertently discriminate against someone or inadvertently aid their employers to do so. Whenever appropriate, employees and workers could also encourage their employers to formulate anti-discrimination policies and to implement preventive measures. Employees and workers are encouraged to be supportive of friends or colleagues who intend, in good faith, to lodge a complaint about discrimination, or have lodged such complaint.
- 4.2.4 Employees and workers have a clear role to play in helping to create a climate at work in which racial harassment is unacceptable. They can contribute to preventing racial harassment through awareness and sensitivity towards the issue and by ensuring that standards of conduct for themselves and for colleagues do not cause offence.
- 4.2.5 All employees and workers have responsibilities as well as rights in respect of the work environment that is created. Racial harassment, particularly in its less severe forms, can be part of the usual code of behaviour in a workplace. To change this may require each employee or worker to reconsider his or her own attitudes and conduct as well as those of his or her colleagues.

⁵² Paragraph 6.2 and 6.3 of the Code

- 4.2.6 Employees and workers can do much to discourage racial harassment by making it clear that they find such behaviour unacceptable and by supporting colleagues who suffered such treatment and are considering making a complaint.
- 4.2.7 People often do not complain even when they have been racially harassed because they are afraid of co-workers' reaction. They do not want to run the risk of being accused by them of spoiling the work climate. Neither do they want to be told that they provoked the harassment themselves or that they cannot take a joke. When employees and workers show through their words and their actions that they find racial harassment unacceptable, this will provide substantial support to those who are harassed and make it easier for them to come forward to file a complaint.
- 4.2.8 Employees or workers who are themselves recipients of harassment should, where practicable, tell the harasser that the behaviour is clearly unwanted and unacceptable. Once the offender understands clearly that the behaviour is unwelcome, this may be enough to put an end to it. If the behaviour persists, employees or workers should inform management and/or their employee representative through the appropriate channels and request assistance in stopping the harassment, whether through informal or formal channels.
- 4.2.9 When telling the harasser that the behaviour is unwanted, if the employee or worker does not want to confront the harasser alone, he or she may want to ask a co-worker or a friend to be present. An alternative to confronting the harasser in person is to write to him or her and keep a copy of the correspondence.
- 4.2.10 Where an employee or worker feels uncomfortable or unsafe in confronting the harasser directly, the employee or worker may choose to inform management and/or an employee representative in the first instance and request for steps to be taken to deal with the matter.
- 4.2.11 If the harassment continues, however, the employee or worker should, if possible, seek advice on what to do next. The employee at all times has the option of seeking external assistance, such as lodging a complaint with the EOC or bringing legal proceedings in the District

Court (see Chapter 7 of the Code).

4.2.12 It is important for an employee subjected to racial harassment to keep a record of the incident(s) so as to be able to recall exactly what has happened.

4.2.13 Employees and workers are also encouraged to come forward with complaints as soon as possible after the alleged incidents as a lapse in time may, in certain circumstances, weaken a complainant's case.

4.2.14 Overall, employees and workers are recommended to:-

- (1) Observe the requirement of the RDO and follow the recommendations of the Code;
- (2) Become familiar with and follow the employer's equality policy;
- (3) Respect the racial identity of fellow workers and refrain from infringing their rights to work free of discrimination and harassment on the ground of race;
- (4) Cooperate with measures taken by the management to promote equal opportunities and prevent discrimination, harassment and vilification on the ground of race;
- (5) Take part in training related to equal opportunities.

5 Practising and Promoting Racial Equality

5.1 Complying with the RDO

Under Part 3 of the RDO, employers may not discriminate or harass any of their employees and workers on the ground of race and are required to take reasonably practicable steps to prevent such discrimination or harassment. Good employment practice is the key to employers complying with the RDO and meeting their legal responsibilities. Employers are encouraged to adopt the recommendations below as appropriate to the scale and structure of their organizations and available resources. Organizations and businesses operating on a small scale with a simple structure may adopt less formal practices so long as they follow the spirit of practising and promoting racial equality.

5.2 Drawing up and implementing a policy

5.2.1 A systematic approach is the best way to develop and maintain good employment practice. Employers are encouraged to draw up an equal opportunities policy which includes explicit reference to racial equality. This represents the employer's commitment to racial equality and forms the framework for action in promoting racial equality and putting it into practice.

5.2.2 The policy should explain that, in terms of racial equality, its objective is to ensure that:-

(1) No job applicant or employee will be treated less favourably than another on the ground of race (see paragraph 6.1.1(1) of the Code for the definition of direct discrimination under the RDO);

(2) No job applicant or employee of any racial group will suffer a detriment from requirements or conditions which have a disparately adverse impact on people belonging to his or her racial group than people not belonging to that racial group, unless such requirements or conditions can be justified as serving a legitimate objective and bearing a rational and proportionate connection to that objective (see paragraph 6.1.1(2) of the Code for the definition of indirect discrimination under the RDO);

- (3) Opportunities in the organization for employment, training and career development are equally open to all qualified people regardless of race;
- (4) The racial identity of every job applicant and employee is to be respected and no one is subjected to racial harassment in any way;
- (5) All job applicants and employees understand that the employer is determined to eliminate racial discrimination and harassment; and they know that racial discrimination and harassment is unlawful and they have a proper understanding of the relevant issues;
- (6) The grievance system is properly administered regardless of race for job applicants and employees to raise any concern or complaints internally; and that such matters will be dealt with properly with appropriate remedial action; and no reprisal will be directed against anyone raising concern or complaints; and that all job applicants and employees are aware that they may make use of the grievance system and how to do so.

5.2.3 To be effective, the policy must be implemented through the adoption of good employment procedures and practices which will achieve the above objectives (see paragraph 5.3 of the Code). It is recommended that the overall responsibility for implementing the policy rests with senior management, and that employees are engaged in the development and review of the policy, such as through the establishment of a joint committee consisting of management and employee representatives. The details of the policy will depend on the scale and structure of the individual organization and the available resources, but the spirit of practising and promoting racial equality must always be followed. A sample policy is attached at the end of the Code for reference and adoption as appropriate. The policy should be disseminated and made known to all recruits and employees.

5.3 Good employment procedures and practices

5.3.1 Recruitment using consistent selection criteria

- (1) Employers should make all recruitment decisions on the basis of consistent selection criteria. Consistent selection criteria should be

specific to the job. They may set out, for example:-

- (a) The type of experience the job holder should have, for example, merchandising experience;
 - (b) The amount of experience required for the job, for example, five years experience;
 - (c) The educational qualifications, for example, a diploma in merchandising;
 - (d) The specific technical and managerial skills, for example, use of certain computer software, proficiency in particular languages (if this is necessary for the satisfactory performance of the job⁵³);
 - (e) The personal qualities required for the job, for example, willingness to travel, willingness to meet people of different backgrounds; and
 - (f) The physical and other skills required for the job, for example, eye-hand co-ordination for delicate assembly work.
- (2) Consistent selection criteria (including language requirements⁵⁴) should reflect job requirements and should be commensurate with the satisfactory performance of the job (and see paragraph 5.3.5 of the Code for shortlisting). It is recommended that employers develop consistent selection criteria as one of the first steps in establishing a fair recruitment practice, and from time to time re-examine the criteria to see whether they still apply or need to be modified.
- (3) The application of consistent selection criteria is good management practice as it helps organizations to make faster decisions because the criteria for decisions are clear; and to make better decisions because the criteria directly relate to work performance; and they form the basis for effective job evaluation. Consistent selection criteria should also be applied in respect of other employment

⁵³ See paragraph 5.3.12 and 6.1.1(2)(v) of the Code

⁵⁴ See paragraph 5.3.12 and 6.1.1(2)(v) of the Code

decisions such as promotion, transfer, or training. These criteria should be accessible by all job applicants, employees and workers.

5.3.2 Race must not be a factor

- (1) The race of a person does not affect his or her ability to do a job, so long as he or she possesses the relevant qualifications, skills and personal qualities required by the job. Employers must not assume that people belonging to certain racial groups are not suitable for employment.
- (2) By making recruitment decisions on the basis of consistent selection criteria, the employer's interest is served because each individual is assessed according to his or her capabilities to carry out a given job and will not be judged by irrelevant considerations such as race.
- (3) Except where race is a genuine occupational qualification (see paragraph 5.3.3 of the Code), employers should ensure that race is not used as a ground for determining who should be offered employment. This applies no matter whether recruiting by advertisement, through employment agencies or through career offices in educational establishments.
- (4) Employers should ensure that employees handling applications and conducting interviews are trained not to assume that people belonging to certain racial groups are not suitable for employment or to use race as a ground for determining who should be offered employment. For example, candidates with names, appearance or accent indicating they are of Pakistani origin should not be refused on the ground of their origin.

5.3.3 Genuine Occupational Qualification (GOQ)

- (1) Except for situations specified under RDO section 11, race may not be a ground for refusing employment and the consistent selection criteria may not make any reference to race. The situations specified in RDO section 11 are:-
 - (a) The job involves participation in a dramatic performance or other entertainment in a capacity for which a person of a particular

racial group is required for reason of authenticity;

- (b) The job involves participation as an artist's or photographic model in the production of a work of art, visual images or sequence of visual images for which a person of a particular racial group is required for reason of authenticity;
- (c) The job involves working in a place where food or drink is provided to and consumed by the public in a particular setting for which, in that job, a person of that racial group is required for reasons of authenticity;
- (d) The holder of the job provides persons of a particular racial group with personal services promoting their welfare, and those services can most effectively be provided by a person of that racial group;
- (e) The job involves providing persons of a particular racial group with personal services of such nature or in such circumstances as to require familiarity with the language, culture and customs of and sensitivity to the needs of that racial group, and those services can most effectively be provided by a person of that racial group.

- (2) Where a particular job falls into the above situations, race is referred to as a genuine occupational qualification (GOQ). If an employer claims that GOQ applies to a job, it is for the employer to show that it is so and the court will examine the claim strictly. For example, the situation in (d) above was held not to apply to managerial and administrative jobs because the job holders did not provide personal services and did not have direct contact with service recipients of particular racial groups⁵⁵.

5.3.4 Advertising vacancies

Employers should ensure that the contents of advertisements are based on consistent selection criteria. Employers are encouraged to:-

⁵⁵ *London Borough of Lambeth v Commission for Racial Equality* [1989] IRLR 379

- (1) Fill vacancies by open application so that people from all racial groups have the opportunity to apply. Where vacancies are to be filled by promotion or transfer, publish the information to all eligible employees so that there is no restriction on applications from any racial groups.
- (2) Avoid requests for photographs and copies of ID cards at the application stage as this may be perceived as an indication of an intention to discriminate on the ground of race although asking for ID numbers would be acceptable. Requests for photographs and copies of ID card can be made at the interview stage for identification purposes.
- (3) Advertise vacancies so that job information may reach people from different racial groups. Different channels may be used, such as newspapers, Labour Department's job centres, employment agencies, professional journals and specialist magazines or publications. Where the ability to read and write in a particular language is necessary for the satisfactory performance of a job⁵⁶, advertisement may specify the language requirement and may be published in that language. Given that English and Chinese are the two prevalent languages in Hong Kong, employers are encouraged to advertise in both English and Chinese media where reasonably practicable. Given that there are people who can speak but not read in Chinese, where the job requires only the ability to speak but not read or write Chinese, in addition to advertising in Chinese, employers are encouraged to consider advertising also in English where reasonably practicable. Employment agencies are also encouraged to provide their services in both Chinese and English where reasonably practicable.
- (4) Include statements such as "the post is equally open to people from all racial groups" in advertisements, as this will send out a clear message that applicants from all racial groups are welcome.

5.3.5 Shortlisting

It is often necessary to narrow down the field of candidates through a

⁵⁶ See also paragraph 5.3.12 of the Code

process of shortlisting. Shortlisting may take different stages and may take place with or without interviewing candidates. It is recommended that employers:-

- (1) Ensure that the factors taken into account in shortlisting objectively measure the candidates against the consistent selection criteria;
- (2) Ensure that the marking system is consistently applied to all applicants; the weighting on different factors, for example, command of a language or previous experience, should reflect the requirements of the job and be consistently applied regardless of race;
- (3) Keep record of the shortlisting process, including the shortlisting criteria and marking system, for not less than 24 months⁵⁷;
- (4) Guard against making assumptions in general about the abilities of people from different racial groups which may not be true of the individual;
- (5) Train personnel staff to objectively compare applicants when shortlisting, and not to assume that people belonging to certain racial groups are less suitable for employment or to use race as a ground for determining who should be offered employment.

5.3.6 Race related information

- (1) It is recommended that questions on application forms should not suggest that the employer wishes to take into account any race related factors not relevant to the job which would lead to employment being declined on the ground of race, unless GOQ applies⁵⁸.
- (2) Race related information should only be sought for purposes of making any special arrangement, for example, with regard to dates or times coinciding with religious festivals or observance, or dietary

⁵⁷ Under the RDO, the time limit for lodging a complaint with the EOC is 12 months (RDO section 78(4)(c)) and for taking legal action in the District Court is 24 months (RDO section 80), keeping records properly will help to deal with disputes.

⁵⁸ See paragraph 5.3.3 of the Code

needs or cultural norms. The purpose for requesting or using such information should be clearly stated. This information should be detachable from the rest of the application form and should not be made known to members of selection panels before the interview. The information should be treated in strict confidence and should not be used for other purposes. Race related information may also be used for the purpose of monitoring the implementation of racial equality policy (see paragraph 5.3.17 of the Code). When collecting and using information, the Personal Data (Privacy) Ordinance should be observed.

5.3.7 Interviewing

An interviewer who seeks evidence of skills and abilities and who relies on facts rather than generalized hunches will be less likely to be biased. In line with good management practice, it is recommended that employers:-

- (1) Ensure that personnel staff, line managers and all other employees who may be involved in staff recruitment receive training on non-discriminatory practice. It should also be brought to their attention that it is unlawful to instruct or put pressure on others to discriminate⁵⁹;
- (2) Accommodate people from different racial groups who may find it difficult to attend interviews at certain times, for example, Jewish people who have to observe Sabbath on Saturdays;
- (3) Only questions that relate to the requirements of the job are asked at job interviews;
- (4) It is a good practice to record, immediately after the interview, the assessment that each interviewer has formed on the applicant's ability to match the consistent selection criteria. This will not only ensure a logical assessment of the applicant's strengths and weaknesses but will also serve as a valuable explanation and defence against any unfounded suggestion of race bias;

⁵⁹ RDO section 43 and 44

- (5) Keep record of the recruitment process and interviews for not less than 24 months⁶⁰.

5.3.8 Tests

If tests are to be used for selection purposes, it is recommended that employers:-

- (1) Use selection tests that are specifically related to the job and/or the career requirements and should measure an applicant's actual or potential ability to do or train for the job;
- (2) Give preference to using professionally designed tests wherever practicable. These can contribute important objective information about the applicant, for example, intelligence, aptitude and skills. They have the advantage that they produce numerical scores which do not depend upon opinion or subjective interpretation;
- (3) Review tests regularly to ensure that they remain relevant and free from any bias, either in content or scoring.

5.3.9 Recruitment through employment agencies or employment services

Where recruitment is done through employment agencies, employment services provided by the Labour Department, and educational establishments or non-government organizations, the employer should advise them that they should comply with the RDO and follow the recommendations in the Code as far as practicable, so as to ensure that there would not be any discrimination on the ground of race against any applicant. Instructing employment agencies or services that there should be no discrimination in the recruitment process will help the employers to show that they have discharged their responsibilities under the law and that the agencies and services do not have authority from them to discriminate. Employers should specify that vacancies are open to people from all racial groups, unless GOQ applies (see paragraph 5.3.3 of the Code).

⁶⁰ Under the RDO, the time limit for lodging a complaint with the EOC is 12 months (RDO section 78(4)(c)) and for taking legal action in the District Court is 24 months (RDO section 80), keeping records properly will help to deal with disputes.

5.3.10 Terms and conditions of employment, benefits, facilities and services

- (1) It is recommended that employers make sure the terms and conditions of employment, the assignment of work and duties, the practices, rules, terms, policies, conditions and requirements on access to any benefits, facilities or services do not treat any employee less favourably on the ground of his or her race than another employee of a different race (see paragraph 6.1.1(1) of the Code for direct discrimination). This applies to commissions, bonuses, allowances, pensions, health insurance plans, annual leave, merit or performance pay, or any other fringe benefits available to employees and workers. If there is any differential treatment, ensure that it is not connected with the race of the employees.
- (2) It is also recommended that employers should minimize any disparately adverse impact that their practices, rules and requirements may have on any racial groups (see paragraph 6.1.1(2) of the Code for indirect discrimination). When employees' cultural or religious practices, such as those expressed in dress codes, conflict with an employer's policies or workplace requirements, it is recommended that the employer consider whether it is practicable to vary or adapt these requirements. For example, employers may consider flexibility in working arrangements⁶¹. Employers and employees should respect each others' culture and customs, and employers should consult staff, trade unions and other workplace representatives on practical ways in which accommodation may be made in respect of employees' needs.
- (3) In respect of pay, hours of work, overtime, bonuses, holiday entitlement, sickness leave, employers should maintain the principle of equal pay for equal work.
- (4) With everything being equal, an employee of one racial group is entitled to equal pay and benefits when he or she is doing "like work" or the same work as another employee of a different racial

⁶¹ See *Ahmad v Inner London Education Authority* [1977] ICR 490 (which is not a case under race discrimination legislation but is illustrative of what employers should do to accommodate employees), where the employer was prepared to allow a devout Muslim employee to work part-time so that he could attend Friday prayers; and *Tower Hamlets London Borough Council v Rabin* [1989] ICR 693, where the employer was prepared to seek a part-time worker to cover for a Jewish job applicant who has to observe Sabbath and cannot work on Saturdays.

group. “Like work” means work which is of a broadly similar nature and where the differences between the tasks performed by either of them are not of practical importance to the terms and conditions of employment⁶². Different job titles, job descriptions or contractual obligations do not necessarily imply that the work is different. It is what the job-holders actually do that matters. The question of whether the two jobs are “like work” can be answered by a general consideration of the type of work involved and the skill and knowledge required to do them. Examples of “like work” are: Chinese and Indian tellers working in the same bank; a Pakistani person working in an employment agency supplying clients with temporary staff and a Chinese person supplying permanent staff in the same agency; and foremen and line supervisors working in different sections of a production line.

- (5) A related principle to equal pay for equal work is that of equal pay for work of equal value. Where employees of one racial group undertake work as demanding as that of colleagues of another racial group, even though the work is different, they should receive the same pay and benefits. That is, jobs of equal value warrant equal pay. Race discrimination in pay may occur when different races are segregated into different jobs, for example, jobs having a higher status and are more highly rewarded are done mainly by Chinese people when compared to jobs done mainly by people from other racial groups. Such differences can be reinforced by discriminatory recruitment, selection and promotion procedures which restrict the range of work person of different races can perform.
- (6) Where part-time workers do not enjoy pay or benefits in pro-rata with full-time workers, employers should review the arrangements to ensure that such arrangements are justifiable without regard to race.
- (7) Overseas experience suggests that different jobs done by different workers can be compared on the basis of the demands made on a worker in terms of effort, skill, responsibility and working conditions⁶³. Employers can set individual pay rates based on market forces and individual performance but should not pay a class

⁶² UK Equal Pay Act 1970

⁶³ Guidelines Respecting the Application of Section 11 of the Canadian Human Rights Act and Prescribing Factors Justifying Different Wages for Work of Equal Value, 1986.

of workers less for doing work of equal value on the ground of race.

(8) Employers should maintain the principle of equal pay for equal work and are encouraged to progressively implement equal pay for equal value. This will require objective and professional evaluation of different jobs within the same establishment, or alternative methods of approaching the issue of equal pay which can be demonstrated to be non-discriminatory on the ground of race. Large organizations in both the public and private sectors with a structured human resources department could take a lead in this.

(9) Individual differences in pay are not in themselves discriminatory. Each case should be considered on its own merits. According to overseas experience⁶⁴, the following considerations are relevant in considering differences in pay for equal work or work of equal value:-

- (a) Different performance ratings;
- (b) Length of service;
- (c) Re-evaluation and downgrading of a position on objective work-related criteria;
- (d) A temporary training position;
- (e) The existence of internal labour shortage in a particular job classification;
- (f) Re-classification of a position to a lower level, where the person continues to get the former level of pay;
- (g) Regional rates of pay; for example, an employee is rewarded because the work is done in different locations; and
- (h) Economic factors, such as a temporary shortage in a particular type of skilled labour.

⁶⁴ UK Equal Pay Act 1970 and Guidelines Respecting the Application of Section 11 of the Canadian Human Rights Act and Prescribing Factors Justifying Different Wages for Work of Equal Value, 1986.

(10) In addition, such considerations should:-

- (a) actually exist (e.g. the person belonging to one race has more experience than the person belonging to another race);
- (b) be genuinely the cause of the difference in pay (i.e. the employer should have a pay system which applies to all races alike and consistently rewards experience, where appropriate);
- (c) account for the whole of the pay gap (i.e. the extra payment is not an excessive reward for the additional experience); and
- (d) have the effect which the employer sets out to achieve, e.g. there is evidence that, as a result of the specific employee's experience, he/she does the work better than the other colleague, who belongs to another race.

5.3.11 Overseas employees

- (1) Circumstances concerning employees coming from overseas to work in Hong Kong may be different from local employees and the differences may not be on the ground of race. For example, overseas employees may require relocation assistance or that they are recruited because they possess skills that are not readily available in Hong Kong.
- (2) It is recommended that, when employers address circumstances concerning employees coming from overseas to work in Hong Kong by providing benefits to them which are not available to local employees, they ensure that the benefits are commensurate with the circumstances of the overseas employees and are not given on the ground of race.
- (3) RDO section 12, 13, 14 and Schedule 2 deal with employees coming from overseas. RDO Schedule 2 defines those employees in existing employment who are on overseas terms of employment; and those who are on local terms of employment. Situations where differences in treatment are allowed under the RDO between these employees are specified in RDO section 14 (see paragraph 6.7.2 to 6.7.4 of the Code).

5.3.12 Language

- (1) Employers must ensure that any language requirement (including academic qualification, fluency and accent requirement) for a job is relevant to and should be commensurate with the satisfactory performance of a job (see paragraph 6.1.1(2)(v) of the Code; and paragraphs 5.3.1, 5.3.4 and 5.3.5 for recruitment criteria, vacancy advertising and shortlisting).
- (2) A person's accent in speaking a language can be related to his race, employers should ensure that employees and workers are not discriminated against or harassed because of their accent⁶⁵ (see paragraph 5.3.14 of the Code for prevention of harassment). This applies to all aspect of employment including promotion, transfer and training (see paragraph 5.3.13 of the Code).
- (3) Where the workforce includes people who are not proficient in the language of the workplace, employers should take reasonably practicable steps to ensure that they are provided with and understand information on health and safety requirements and other matters relevant to their employment; for example, safety signs and notices.

5.3.13 Promotion, transfer and training

It is recommended that employers:-

- (1) Examine the assessment criteria of any appraisal system to ensure that employees are promoted on merit and the criteria adopted (for example, any language requirement) are not discriminatory on the ground of race. Measurable standards for evaluating job performance should be established;
- (2) Organize selection for promotion along the same lines as recruitment. Consistent selection criteria for posts should be compared with the detailed assessment of all candidates' abilities and qualities including

⁶⁵ Policy and Guidelines on Racism and Racial Discrimination, paragraph 3.6, Ontario Human Rights Commission, Canada, 2005

their potential. The individual whose profile best fits the job requirements should be selected;

- (3) Where opportunities for promotion, training or transfer arise, specify the conditions for application to all staff who may be interested, and set out related procedures in writing for communication to all employees irrespective of race who are eligible;
- (4) Assess all possible candidates, and if promotion is by nomination, ensure that everyone suitable is considered and that nobody with potential has been overlooked;
- (5) Keep records of notes on promotion, transfer and training for not less than 24 months⁶⁶;
- (6) Review and change rules which restrict or preclude transfer between certain jobs if they are found to be discriminatory. Employees of certain racial groups may be concentrated in sections from which transfer are traditionally restricted without real justification; and
- (7) Examine policies, rules and practices regarding selection for training, day release and personal or career development (for example, any language requirement) to ensure that:-
 - (a) No one from any racial group is treated less favourably on the ground of race than another not from that racial group;
 - (b) Any disparately adverse impact on any racial groups is minimized;
 - (c) Where there is found to be an imbalance in training between persons of different racial groups than might be expected, the cause should be identified and, if necessary, remedied to ensure that it is not discriminatory.

⁶⁶ Under the RDO, the time limit for lodging a complaint with the EOC is 12 months (RDO section 78(4)(c)) and for taking legal action in the District Court is 24 months (RDO section 80), keeping records properly will help to deal with disputes.

5.3.14 Prevent harassment on the ground of race

- (1) Employees and workers of all racial groups are entitled to be free from harassment on the ground of race. Employers must ensure that the working environment is one in which the racial identity of all employees is respected.
- (2) An absence of complaints about racial harassment does not necessarily mean an absence of racial harassment. It may mean that the recipients of racial harassment think that there is no point in complaining because nothing will be done about it, or because it will be trivialized or the complainant will be subjected to ridicule, or because they fear reprisals.
- (3) Implementing the preventive and procedural measures outlined here should facilitate a favourable climate at work.
- (4) Both the policy and complaints procedures should be introduced after consultation or negotiation with the employee representatives. Strategies to create and maintain a working environment in which the dignity of employees and workers is respected are most likely to be effective where they are jointly agreed.
- (5) Employers should also make clear that employees and workers have a duty and responsibility towards creating such an environment and in ensuring that racial harassment does not occur.
- (6) Employers should make a clear statement in the equal opportunities policy that harassment on the ground of race will not be tolerated.
- (7) The statement should make it clear that the work environment is to be safe and free from abuse and insults. Employees and workers should treat each other politely and with respect.
- (8) The statement should also explain that harassment on the ground of race is unlawful⁶⁷ and unacceptable; and explain the types of behaviour which can be regarded as harassment on the ground of race, such as:-

⁶⁷ See paragraph 6.3.2 and 6.3.3 of the Code

- (a) Racially derogatory remarks or insults; for example, name calling which people of certain racial group may find offensive or impolite should be avoided;
 - (b) Display of graffiti or slogans or other objects offensive to certain racial groups;
 - (c) Racist jokes, banter, ridicule or taunts; for example, laughing at the accent or habits of people belonging to certain racial groups;
 - (d) Using a disparaging or offensive tone when communicating with people on the ground that they belong to certain racial groups;
 - (e) Ostracize people because of their racial group;
 - (f) Imposing excessive workloads or unrealistic performance targets on people on the ground of race;
 - (g) Unnecessarily picking on individuals from particular racial groups.
- (9) Information should be given about internal complaint procedures, assuring employees and workers that confidentiality will be observed.
- (10) The contact details should be given of officers who are responsible for dealing with complaints, providing information and advice; and there should be a note about disciplinary action for harassers and that the complainant may lodge a complaint with the EOC or bring legal proceedings in the District Court.
- (11) Make the above known to all recruits and employees.
- (12) Ensure that grievances and complaints are properly dealt with; in doing so, as an alternative to dealing with a complaint of harassment formally in accordance with the designated internal grievance procedures, employers should consider offering an informal route to resolving a grievance.

(13) Ensure that no one will be victimized⁶⁸ or penalized for coming forward with a complaint or grievance.

(14) A co-ordinator, preferably with special training, should be designated to establish and administer both informal and formal complaints procedures.

(15) Effective and regular promotion of the policy is important to a successful programme against racial harassment in that:-

- (a) it warns that certain offensive conduct is unlawful;
- (b) it sends out a clear message that management will act against such behaviour;
- (c) it ensures that all persons in the organization know what to do if they encounter racial harassment and know that any complaint will be handled effectively and properly; and
- (d) it assures staff that they are unlikely to be disadvantaged by racial harassment or be victimized by making a complaint.

(16) In order to promote the policy, information may be disseminated through:-

- (a) speaking at staff meetings;
- (b) distribution and re-circulation of policy statements;
- (c) posting notices; and
- (d) conducting training and refresher courses.

(17) The co-ordinator or any other staff member involved in the complaints handling procedures should receive adequate training to enable sensitive treatment of cases in relation to racial harassment, for example:-

⁶⁸ See paragraph 6.1.3 of the Code

- (a) what is racial harassment: definitions and examples; the role of power in harassment situations; the reasons why some individuals harass; recognize harassment situations, e.g. who are the workers at risk;
 - (b) prevention of racial harassment: recognize the role of publicity, how to use publicity and available resources effectively; informal monitoring of the workplace; recognize symptoms of harassment; and alert staff of possible acts of racial harassment; and
 - (c) dealing with harassment: skills on responding to enquiries and maintaining privacy and confidentiality; non-judgmental listening skills; informing enquiries of alternative ways of handling harassment other than by making a formal complaint; knowledge of outside bodies that can be approached for assistance or to whom complaints can be made, e.g. the EOC.
- (18) Regardless of whether an informal or formal complaints procedures is in use, it is good practice for employers to monitor and review complaints of racial harassment and how they have been resolved, in order to ensure that the procedures are working effectively.

5.3.15 Grievance procedures

It is recommended that employers:-

- (1) Ensure that employees who have in good faith taken action under the RDO do not receive less favourable treatment than other employees, for example, by being sidelined for training or promotion, disciplined or dismissed;
- (2) Designate an internal grievance procedure or an officer to deal with complaints concerning discrimination and harassment on the ground of race or victimization⁶⁹ within the organization. These procedures should be communicated to all staff and be reviewed from time to time;

⁶⁹ See paragraph 6.1.3 of the Code

- (3) Advise employees to use the internal grievance procedures, where appropriate, but without prejudice to the individual's right to apply to the EOC or the court;
- (4) Deal with all complaints of discrimination and harassment on the ground of race or victimization seriously, effectively and promptly. It should not be assumed that they are made by those who are over-sensitive. Confidentiality should be observed and the rights of both the complainant and respondent respected;
- (5) Handle disciplinary procedures uniformly without reference to race;
- (6) Keep records of notes on grievances and disciplinary matters for not less than 24 months⁷⁰.

5.3.16 Dismissals, redundancies and unfavourable treatment of employees

It is recommended that employers:-

- (1) Ensure that employees and workers are not dismissed, made redundant, or given unfavourable treatment on the ground of race or irrelevant race-related factors such as language, appearance or attire;
- (2) Ensure that employee of one racial group is not disciplined or dismissed for performance or behaviour which would be overlooked or condoned in the case of another employee of a different racial group;
- (3) Review redundancy procedures affecting employees of any racial group so as to ensure that there is no discrimination on the ground of race and to remove any unjustifiable and disparately adverse impact on any racial groups;
- (4) Ensure that conditions of access to voluntary redundancy benefits are available on equal terms to employees of all racial groups in the same or similar circumstances

⁷⁰ Under the RDO, the time limit for lodging a complaint with the EOC is 12 months (RDO section 78(4)(c)) and for taking legal action in the District Court is 24 months (RDO section 80), keeping records properly will help to deal with disputes.

- (5) Ensure that when there is downgrading or short-time working (for example, owing to a change in the nature or volume of an employer's business) the arrangements do not discriminate on the ground of race;
- (6) Keep records of notes on dismissals and redundancies for not less than 24 months⁷¹;
- (7) Ensure that a standard of conduct or behaviour is observed to prevent employees of any racial groups from being intimidated, harassed or otherwise subjected to unfavourable treatment⁷².

5.3.17 Monitoring

- (1) Employers are encouraged to take reasonably practicable steps to regularly monitor and review the implementation of the equal opportunities policy and the good employment procedures and practices. The objective of monitoring is to gain an appreciation of the situation regarding, for example:-
 - (a) The composition of the workforce by racial group, for comparison with benchmarks such as census data;
 - (b) The distribution of people from different racial groups within the organization, by job type and grade, or by work locations;
 - (c) The pattern of career development (including remuneration and benefits, termination or other disciplinary action) of people from different racial groups.
- (2) Such information will show, for example, whether people from particular racial groups:-
 - (a) Do not apply for employment or promotion, or that fewer apply than might be expected;

⁷¹ Under the RDO, the time limit for lodging a complaint with the EOC is 12 months (RDO section 78(4)(c)) and for taking legal action in the District Court is 24 months (RDO section 80), keeping records properly will help to deal with disputes.

⁷² See paragraph 5.3.14 of the Code

(b) Are not recruited, promoted or selected for training and development or are appointed or selected in a significantly lower proportion than their rate of application; and

(c) Are concentrated in certain jobs, sections or departments.

(3) In organizations with a simple structure, the situation may be assessed from personal knowledge. In organizations with larger structure, monitoring will require formal processes for collecting, analyzing and evaluating information, for example, through surveys, consultation and feedback. This may be done in stages as operational requirements or resources permit and should be done with prior consultation with employees or their representatives. The purpose of collecting the information must be clearly stated. Information collected should be treated in strict confidence and should not be used for other purposes. When collecting and using information, the Personal Data (Privacy) Ordinance should be observed; in this connection, employers and other concerned parties may consider collecting and using information in a way which does not identify particular individuals.

(4) Information obtained through monitoring will help to show whether:-

(a) Employees and workers (including job applicants⁷³) from any racial group are being treated less favourably than those not from the same racial group;

(b) Policies, rules and practices have disparately adverse impact on any racial group.

(5) If monitoring data shows significant disparities between racial groups, employers should investigate the cause to ensure that race is not a barrier to opportunities. They should examine and review relevant policies, rules and practices to see if they have disparately adverse impact on any racial group; and if so, take steps to minimize such impact.

⁷³ See paragraph 5.3.6 of the Code for obtaining race related information from job applicants.

- (6) Employers are also encouraged to take positive action to address any situation where any racial group might be under-represented in the workforce than might be expected (see paragraph 5.3.18 of the Code).

5.3.18 Positive action

- (1) Because of discrimination or other disadvantages in the past, people from particular racial groups may have been deprived of the opportunity to gain the qualification or experience to fully realize their potential.
- (2) Therefore, RDO section 49 allows employers and other concerned parties to provide people from a particular racial group (or groups) goods, access to facilities, services, opportunities, grants, benefits or programmes to meet their special needs in relation to employment, when it is reasonably intended to ensure that they have equal opportunities in employment.
- (3) RDO section 51 and 52 allow employers and other concerned parties to provide training for people from a particular racial group (or groups) for particular work, when for the past 12 months in Hong Kong generally (or for an employer, in a particular establishment) no person from that racial group (or groups) has been doing that work or the number of persons from that racial group doing that work has been comparatively small.
- (4) Measures taken under RDO section 49, 51 or 52 are called positive action. Examples of positive action may include encouragement to apply for employment, transfer or promotion, language classes, mentorship schemes, and management skills training or other training courses.
- (5) Positive action under the RDO means providing only training or encouragement, and does not extend to providing employment to individuals from particular racial groups on the ground of their race⁷⁴.

⁷⁴ UK Code of Practice on Racial Equality in Employment, p.40, Commission For Racial Equality 2005

6 Unlawful Acts under the RDO

6.1 Types of discrimination under the RDO

The RDO defines different types of discrimination. They are:-

6.1.1 Racial discrimination

Racial discrimination occurs in the following situations under the RDO⁷⁵:-

(1) Direct discrimination

Direct discrimination occurs when person A treats person B (belonging to one racial group) less favourably than person C (belonging to a different racial group) on the ground of person B's race, when person B and person C are in same or materially similar situation⁷⁶.

Illustration 7:-

A person of Pakistani origin who speaks fluent Cantonese and has adopted a Chinese name applies by telephone for the job of a sales person and is invited for an interview. But, because his appearance indicates that he is of Pakistani origin, when he turns up to the interview he is falsely told that someone else has already been hired and the interview is declined. This is less favourable treatment on the ground of race if another job seeker not of Pakistani origin would not have been declined.

Illustration 8:-

A manager of Chinese origin is treated less favourably on the ground of race (directly discriminated against), if a manager of English origin is paid a higher amount of salary than the manager of Chinese origin on the ground of their difference in origin, when they are both in the same or materially similar employment

⁷⁵ RDO section 4(1)

⁷⁶ RDO section 4(1)(a) and section 8(5)

situation (such as they both do the same job and have similar experience and their performance are both good).

The following points should be noted:-

- (a) RDO section 9 provides that if an act is done for more than one reason and one of the reasons is the race of a person (whether or not it is the dominant or substantial reason), then it is taken to be done for the reason of the race of the person;
- (b) RDO section 4(3) provides that segregation of a person on the ground of his or her race from other persons is direct discrimination; for example, segregation occurs if employees of non-Chinese origins are required to have their meals in a separate part of the staff canteen from employees of Chinese origin;
- (c) A person's command of a language, including the accent, can be related to his or her race⁷⁷, and employers should ensure that employees and workers are not treated less favourably because of their accent or language.

(2) Indirect discrimination

Indirect discrimination occurs when a person applies an apparently non-discriminatory requirement or condition to everyone of all racial groups⁷⁸, but:-

- (a) Only a considerably smaller proportion of people from a particular racial group can meet the requirement or condition than the proportion of people not from that racial group;
- (b) The person applying the requirement or condition cannot show the requirement or condition to be justified on non-racial grounds;
- (c) The requirement or condition is to the detriment of a person

⁷⁷ Policy and Guidelines on Racism and Racial Discrimination, paragraph 3.6, Ontario Human Rights Commission, Canada, 2005

⁷⁸ RDO section 4(1)(b)

of that particular racial group because he or she cannot meet it.

Illustration 9:-

A blanket ban on beards for health and safety reasons in a food packaging factory is a requirement or condition that indirectly discriminates ethnic groups such as the Sikhs (who by their custom have to keep a beard), when compared to other racial groups, if information shows that the blanket ban is not justifiable as face masks could have been used satisfactorily to meet health and safety standards⁷⁹.

The following points should be noted:-

- (i) Preferences and factors to be taken into account (as opposed to an absolute requirement or condition for achieving an objective) are not within the meaning of requirement or condition under the RDO⁸⁰.
- (ii) A requirement or condition cannot be met if a person cannot meet it consistently with the customs and cultural conditions of his or her racial group⁸¹.
- (iii) RDO section 4(2) provides that a requirement or condition is justifiable if it serves a legitimate objective and bears a rational and proportionate connection to the objective.
- (iv) Reference case law indicates that requirement or conditions in relation to work times and appearance can lead to claims of indirect discrimination. To determine whether a requirement or condition is justifiable, each case has to be examined on its own merits, considering any discriminatory effects against any significant degree of increased cost, decreased efficiency, or serious safety problem in accommodating individuals from particular racial groups⁸².

⁷⁹ UK Code of Practice on Racial Equality in Employment, p.20, Example B; and *Mandla v Dowell Lee* [1983] ICR 385

⁸⁰ *Perera v Civil Service Commission* [1983] IRLR 166

⁸¹ *Mandla v Dowell Lee* [1983] ICR 385

⁸² *Osborne v Inco Ltd* [1985] 15 DLR (4th) 723

Illustration 10:-

A blanket ban on beards in a food packaging factory in Illustration 9 above is justifiable if information shows that face masks could not satisfactorily meet health and safety standards⁸³.

Illustration 11:-

An employer who decides not to accommodate Jewish employees (who have to observe Sabbath and cannot work on Saturdays) but requires them to work on Saturdays is able to justify this requirement with information showing that accommodation would lead to a significant degree of increased safety risk, increased cost and decreased efficiency⁸⁴.

Illustration 12:-

A requirement to wear protective headgear in a repair workshop, even if indirectly discriminatory for Sikhs (who by their custom have to wear a turban), is justifiable given information on the risk of injury, and the possibility of liability on the employers, and that the requirement would be more difficult to enforce if an exception is made for one person⁸⁵.

- (v) Reference case law also indicates that requirement or condition in relation to academic or language standard can lead to claims of indirect discrimination. Employers must be able to justify any such requirement or condition by showing that it is relevant to and not more demanding than what is required for doing the job. Each case depends on its own facts and Illustration 13 below is for reference only.

Illustration 13:-

For a job as a clerical officer or clerical assistant in a government department in the UK, successful applicants would be required to deal with inquiries from the public in person and by telephone. An ability to understand and communicate in English was a prime requirement, and a requirement that

⁸³ *Panesar v The Nestle Co Ltd* [1980] IRLR 60

⁸⁴ *Osborne v Inco Ltd* [1985] 15 DLR (4th) 723

⁸⁵ *Singh v British Rail Engineering Ltd* [1986] ICR 22

candidates must possess an English Language “O” Level or equivalent was overall fair and not arbitrary⁸⁶. Such a requirement is justified on grounds unconnected with race because it bears a rational and proportionate connection to the objective of communication in English which is legitimate and required for the job.

6.1.2 Discrimination on the ground of near relative’s race

Discrimination on the ground of the race of a near relative happens when person A treats person B less favourably than other people on the ground of person B’s near relative’s race⁸⁷. A near relative means a person’s spouse, parent or child (including born out of wedlock, adopted or step child), grandparent or grandchild, sibling and in-laws⁸⁸.

Illustration 14:-

A manager is discriminated against on the ground of his near relative’s race when he applies for promotion to the post of director but is declined because the company considered he and his wife are not suitable for company social functions on the ground that his wife is of Indonesian origin, and another manager whose wife is not of Indonesian origin is appointed.

6.1.3 Discrimination by way of victimization

Discrimination by way of victimization happens if person A treats person B less favourably than other people by reason that person B or a third person has done or intends to do, or is suspected to have done or to intend to do, the following⁸⁹:-

- (1) Bring proceedings under the RDO;
- (2) Give information or evidence in connection with proceedings under the RDO;
- (3) Otherwise do anything under or by reference to the RDO;

⁸⁶ *Raval v Department of Health and Social Security* [1985] ICR 685

⁸⁷ RDO section 5

⁸⁸ RDO section 2

⁸⁹ RDO section 6

- (4) Allege that someone has contravened the RDO (except where the allegation is false and not made in good faith).

Illustration 15:-

A manager of Nepalese origin is discriminated against by way of victimization if he complains that he was paid less annual bonus than another manager of Chinese origin on the ground of race, and the company dismisses him by reason that he makes this complaint.

6.2 When discrimination is unlawful in employment

6.2.1 Employers may not discriminate against job applicants in the ways described in paragraph 6.1.1 – 6.1.3 above of the Code⁹⁰:-

- (1) In the arrangement for determining who should be offered employment (for example, an employer may not refuse to interview a job applicant on the ground that the name, appearance or accent of the job applicant indicates that he or she is of Pakistani origin);
- (2) In the terms on which the employment is offered (for example, an employer may not offer a lower starting salary for the same post to applicants of Chinese origin than applicants of Japanese origin, on the ground of the difference in origin);
- (3) By refusing, or deliberately omitting to offer employment (for example, an employer may not refuse to offer employment to a job applicant on the ground that he or she is of Indian origin).

6.2.2 Employers must not discriminate against employees and workers in the ways described above paragraph 6.1.1 – 6.1.3 above of the Code⁹¹:-

- (1) In the terms of employment (for example, for the same job doing the same work for the same pay, the employer may not on the ground of race require a employee of Nepalese origin to work longer hours than an employee of Chinese origin);

⁹⁰ RDO section 10(1); and see paragraph 6.7 of the Code for acts allowed under the RDO

⁹¹ RDO section 10(2); and see paragraph 6.7 of the Code for acts allowed under the RDO

- (2) In the access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or refusing or deliberately omitting to afford access to these things (for example, an employer may not give priority for promotion to employees of Chinese origin over employees of other origins on the ground of the difference in origin);
- (3) By dismissing the employee or subjecting him to any other detriment (for example, in a downsizing exercise, an employer may not use race as a factor and select employees of Chinese origin for redundancy first and employees of English origin last);
- (4) In arrangements relating to death or retirement⁹²;
- (5) Reference case law indicates that an employee who is forced to resign because he or she is discriminated against on the ground of race by the employer is treated as having been dismissed on the ground of race by the employer⁹³;
- (6) Reference case law also indicates that employers may not discriminate against former employees in the ways described in paragraph 6.1.1 – 6.1.3 of the Code in relation to internal appeal process or reference letters after termination⁹⁴.

6.3 Unlawful racial harassment

6.3.1 The RDO makes it unlawful for:-

- (1) An employer to harass on the ground of race a job applicant or an employee⁹⁵;
- (2) An employee to harass on the ground of race a job applicant or another employee of his or her employer⁹⁶;

⁹² RDO section 10(4) and (5)

⁹³ *Chang Ying Kwan v Wyeth (HK) Ltd* [2001] HKC 129, a case of pregnancy discrimination resulting in resignation which has reference value to the application of the RDO

⁹⁴ *Rhys-Harper v Relaxion Group* [2003] IRLR 484

⁹⁵ RDO section 24(1) and (2)

⁹⁶ RDO section 24(3)

- (3) A principal to harass on the ground of race a contract worker⁹⁷;
- (4) A contract worker to harass on the ground of race another contract worker⁹⁸;
- (5) A partner of a partnership firm to harass on the ground of race another partner or a person applying to be a partner⁹⁹;
- (6) A principal to harass on the ground of race a commission agent¹⁰⁰;
- (7) A commission agent to harass on the ground of race a fellow commission agent¹⁰¹;
- (8) A job applicant or an employee to harass on the ground of race his or her employer¹⁰²;
- (9) Person A to harass person B on the ground of race, if person A lives in a place where person B is employed by a third person to work¹⁰³, for example, a lodger harasses a domestic helper employed by the landlord to work in the place the lodger lives;
- (10) Providers of vocational training to harass on the ground of race people who want to be trained or are being trained¹⁰⁴;
- (11) Employment agencies or their staff to harass on the ground of race people who want to be provided with their services¹⁰⁵.

6.3.2 Harassment on the ground of race occurs in the following situations under the RDO:-

(1) Unwelcome conduct harassment

Person A engages in unwelcome conduct (which may include an oral

⁹⁷ RDO section 24(4)

⁹⁸ RDO section 24(5)

⁹⁹ RDO section 24(6), (7) and (8)

¹⁰⁰ RDO section 24(9)

¹⁰¹ RDO section 24(10)

¹⁰² RDO section 24(11)

¹⁰³ RDO section 24(12)

¹⁰⁴ RDO section 25(3)

¹⁰⁵ RDO section 25(4)

or a written statement) towards person B on the ground of person B's race or person B's near relative's race, in circumstances where a reasonable person would have anticipated that person B would be offended, humiliated or intimidated¹⁰⁶. There is liability for harassment even if there is no intention or motive to offend, humiliate or intimidate.

(2) Hostile environment harassment

Person A engages, on the ground of person B's race or person B's near relative's race, in conduct alone or together with other persons that create a hostile environment for person B¹⁰⁷.

6.3.3 For good practice on prevention of racial harassment, please see paragraph 5.3.14 of the Code. For types of behaviour which can be regarded as harassment on the ground of race, please see paragraph 5.3.14(8) of the Code.

6.4 Vilification and the offence of serious vilification

6.4.1 RDO section 45 makes it unlawful for a person by any public activity to incite hatred towards, serious contempt for, or severe ridicule of another person(s) on the ground of race. Such public activity is vilification on the ground of race.

6.4.2 An activity in public includes any form of communication to the public or conduct observable by the public, such as speaking, writing, gestures or wearing of clothing, displaying signs, flag, emblems and insignia¹⁰⁸.

6.4.3 An act of vilification done with intent and involves threats of physical harm to people of the targeted race or their property is a criminal offence punishable on conviction by fine at a maximum of \$100,000 and imprisonment for a maximum of 2 years¹⁰⁹. This offence is called serious vilification.

¹⁰⁶ RDO section 7(1)

¹⁰⁷ RDO section 7(2)

¹⁰⁸ RDO section 45(4)

¹⁰⁹ RDO section 46

6.5 Discriminatory advertisements

RDO section 42 makes it unlawful to publish or cause to be published an advertisement which indicates, or might reasonably be understood as indicating, an intention by a person to do an unlawful act under Part 3 of the RDO. For example, it is unlawful to publish an advertisement indicating that only people of Chinese origin would be employed by a company.

6.6 Instructions and pressure to discriminate

RDO section 43 makes it unlawful, if person A has authority over person B, or if person B usually acts on the wishes of person A, for person A to make or try to make person B to do an unlawful act under the RDO (such as to racially discriminate or harass on the ground of race a third person). RDO section 44 makes it unlawful for person A to induce or try to induce person B, by offering some benefit to or by threatening person B, to do an unlawful act under the RDO.

Illustration 16:-

The personnel manager is required to carry out instructions from the managing director. The managing director may not tell the personnel manager to recruit only candidates who are Caucasian to be the general manager.

6.7 Acts allowed under the RDO

6.7.1 Genuine Occupational Qualification

Where GOQ applies as specified under RDO section 11, employment may be declined on the ground of race (see paragraph 5.3.3 above of the Code). If an employer claims that GOQ applies to a job, it is for the employer to show that it is so and the court will examine the claim strictly.

6.7.2 Training for skills to be used outside Hong Kong

RDO section 12 provides that RDO section 10 (provisions making discrimination under the RDO in employment unlawful) does not apply to an act done by an employer for the benefit of a person employed in Hong Kong (but who is not ordinarily resident in Hong Kong) in order to train him or her in skills which are intended to be used wholly outside

Hong Kong.

6.7.3 Special skills, knowledge or experience

- (1) RDO section 13 provides that RDO section 10 (provisions making discrimination under the RDO in employment unlawful) does not apply to an act done by an employer for the benefit of a person recruited or transferred from outside Hong Kong to work in Hong Kong where the work requires special skills, knowledge or experience not readily available in Hong Kong. Relevant considerations in determining whether skills, knowledge or experience are readily available in Hong Kong may include the response and time spent for recruitment in Hong Kong, the response and time spent for recruitment of other comparable jobs, information from recruitment agencies and other general information about the labour market.
- (2) The act done must be reasonable having regard to the prevailing terms of employment offered to people with the relevant skills, knowledge or experience in places outside Hong Kong. The act done would be reasonable if it is broadly comparable to such prevailing terms of employment.
- (3) RDO section 13 also applies when this person's employment is renewed, or he or she is promoted or transferred within the same group of companies, so long as the act is reasonable.
- (4) The person must actually possess the skills, knowledge or experience not readily available in Hong Kong.

6.7.4 Existing local and overseas terms of employment

- (1) RDO section 14 provides that, for employees in existing employment as specified in RDO Schedule 2, RDO section 10 (provisions making employment discrimination on the ground of race unlawful) does not apply to different treatment:-
 - (a) Between an employee on local terms of employment and another employee on overseas terms of employment;

- (b) Between an employee on overseas terms of employment who is a national or citizen of a country or place and another employee on overseas terms of employment who is a national or citizen of another country or place.
- (2) Employees in existing employment as specified in RDO Schedule 2 are employees who fall within RDO Schedule 2 section 1 to 6 (including judicial officers, ICAC officers, other public officers and specified English teachers). For details please refer to the RDO.
- (3) RDO Schedule 2 section 11 provides that:-
 - (a) For judicial officers, ICAC officers and other public officers,
 - (i) Local terms of employment mean the local conditions or terms of service within the meaning of such regulations, administrative rules, circulars and circular memoranda as apply generally from time to time to the appointment or employment of these officers;
 - (ii) overseas terms of employment mean the overseas conditions or terms of service within the meaning of such regulations, administrative rules, circulars and circular memoranda as apply generally from time to time to the appointment or employment of these officers.
 - (b) For any employee other than a public officer,
 - (i) local terms of employment mean the conditions or terms of service as apply from time to time primarily to the employment of a person who is a Hong Kong permanent resident;
 - (ii) overseas terms of employment mean the conditions or terms of service as apply from time to time primarily to the employment of a person who is not a Hong Kong permanent resident.
- (4) Employees in existing employment as specified in RDO Schedule 2 remain so specified upon their promotion, extension of

employment, or renewal or re-engagement after termination.

6.7.5 Positive action

RDO sections 49, 51 and 52 allow for positive action to be taken to assist racial groups who have been disadvantaged in the past (see paragraph 5.3.18 of the Code). Examples of positive action may include encouragement to apply for employment, transfer or promotion, language classes, mentorship schemes, and management skills training or other training courses.

7 When Discrimination and Harassment is Encountered

7.1 Legal protection under RDO

- 7.1.1 The right of employees or workers (including job applicants) to be free from discrimination and harassment on the ground of race under the RDO is protected by law. They may bring civil proceedings in the District Court to seek remedies to redress any loss or damage when they have been discriminated against or harassed on the ground of race¹¹⁰. Legal proceedings should be brought within 24 months from the time when the discrimination or harassment is done¹¹¹.
- 7.1.2 Employers and employees are encouraged to resolve discrimination and harassment issues internally informally or formally using their grievance procedures before taking legal proceedings. Employees are encouraged to seek legal advice or apply for legal aid from the Legal Aid Department before taking legal proceedings.
- 7.1.3 As an alternative to taking legal proceedings, employees or workers (including job applicants) may lodge a complaint with the EOC for investigation and conciliation¹¹². Complaints should be lodged within 12 months from the time when the discrimination or harassment is done.

7.2 Complaint handling by EOC

- 7.2.1 When a complaint is lodged with the EOC, the EOC will investigate into the complaint. The investigation is an exercise to help clarify the issues for the EOC and the parties, so as to facilitate settlement by conciliation.
- 7.2.2 All parties to the complaint (complainant, respondent and witnesses) should provide all relevant and appropriate information during the investigation.
- 7.2.3 RDO section 78(4) provides that, if the EOC takes the view that the complaint is frivolous, vexatious, misconceived or lacking in substance, the EOC may not conduct or may discontinue an investigation. Other

¹¹⁰ RDO section 70

¹¹¹ RDO section 80

¹¹² RDO section 78

situations when the EOC may not conduct or may discontinue an investigation include where the complaint is not unlawful under the RDO, or where more than 12 months have passed since the act was done, or where the person aggrieved does not desire the investigation to be conducted or continued.

- 7.2.4 Information provided during the investigation may be admissible in evidence before the Court if legal proceedings are brought at a later stage.
- 7.2.5 The EOC maintains an independent and impartial role during the investigation. If investigation is conducted and is not discontinued, the EOC will help the parties to settle their dispute by conciliation.
- 7.2.6 The primary objective of the complaint-handling process is settlement by conciliation, the EOC may at any stage of the process explore the possibility of settlement between the parties. This may occur at an early stage soon after the complaint is lodged before any investigation into the details. If parties could not at an early stage reach settlement, then investigation into details will continue.
- 7.2.7 If the EOC does not discontinue the investigation, it will proceed formally to the conciliation process. In the conciliation process, it is for the parties to decide if and how they would agree to resolve their dispute. Everything said and done by a party in the course of conciliation is not admissible in subsequent legal proceedings relating to the dispute except with the consent of that party.
- 7.2.8 If parties are able to reach a settlement, a settlement agreement is usually signed and is legally binding between the parties. Subject to parties' agreement, terms of settlement may include monetary compensation, changes in policy and practices, reinstatement or apology.
- 7.2.9 The time spent by the EOC in the complaint handling process does not count towards the 24 months timeline for taking legal proceedings¹¹³. In other words, that timeline is extended by the period of time spent by the EOC in the complaint handling process.
- 7.2.10 The complaint-handling process by the EOC provides an alternative to

¹¹³ RDO section 80(3)

legal proceedings in resolving discrimination and harassment issues. Confidentiality is a feature of the process. This alternative can be a less formal, cheaper, faster way of resolving these issues when compared to legal proceedings, but it depends on the co-operation of the parties and will result in a settlement only if both parties agree. Information obtained during the investigation part of the process may be admissible in Court if legal proceedings are brought later and this information may help the parties to assess their positions. For further details on the EOC's complaint handling process, please consult specific publications by the EOC. If the parties do not wish to resolve disputes through settlement and wish to obtain a binding decision from the District Court, they may resort to legal proceedings directly.

7.3 Legal Assistance by the EOC

- 7.3.1 When a complaint has been lodged with the EOC, but there has been no settlement of the complaint, the aggrieved person may apply for assistance from the EOC to take legal proceedings.
- 7.3.2 The EOC will consider all applications for legal assistance. In deciding whether to provide assistance in each application, the EOC will take into account a wide range of factors, in particular, whether the case raises a question of principle, the complexity of the case, and also the strength of the evidence, and whether the case reflects the EOC's strategic concerns such as a widespread problem indicated through the EOC's complaint handling experience.
- 7.3.3 If legal assistance is provided by the EOC, it may include giving legal advice and representation on the case by the EOC's own legal officers or outside lawyers. For further details on legal assistance by the EOC, please consult specific publications by the EOC. If legal assistance is not provided by EOC, claimants may still take legal proceedings in the District Court and they may seek legal advice or apply for legal aid from the Legal Aid Department.

7.4 Other functions of the EOC

- 7.4.1 The EOC is a statutory body created by law. Other than the complaint handling and legal assistance functions described above, it has powers and functions under different anti-discrimination laws including the RDO. EOC's other powers and functions under the RDO include:-

- (1) Working towards the elimination of all forms of racial discrimination, harassment and vilification;
- (2) Promoting equality of opportunities between persons of different racial or ethnic backgrounds;
- (3) Encouraging settlement by conciliation of alleged unlawful act under the RDO;
- (4) Initiating formal investigation or appropriate legal action in the public interest;
- (5) Issuing codes of practice for elimination of discrimination and promotion of racial harmony through public education and publicity initiatives;
- (6) Enforcing the RDO by issuing enforcement notices and bringing proceedings in respect of discriminatory practices and certain other unlawful acts;
- (7) Reviewing the working of the RDO and making proposals for amendment.

Sample policy on racial equality

1. Introduction

- 1.1 [Organisation's name] is committed to making full use of the talents, skills, experience, cultural perspectives of different people, and to making sure that it is an organization where they are respected and valued and can achieve their full potential, regardless of race, colour, descent, or national or ethnic origins;
- 1.2 [Organisation's name] will comply with the Race Discrimination Ordinance and will follow the recommendations in the Code of Practice issued by the Equal Opportunities Commission under the Ordinance.

2 Objectives

- 2.1 The objectives of this policy are to ensure that:-
 - (1) No one will be treated less favourably on the grounds of race, colour, descent, national or ethnic origins;
 - (2) No one from any racial group will suffer a detriment from any requirements or conditions which cannot be justified on non-racial grounds;
 - (3) Opportunities for employment, training and career development are equally open to all qualified people regardless of race, colour, descent, national or ethnic origins;
 - (4) Everyone is treated with respect and dignity and no one will be subjected to any unwelcome conduct, or to an environment that is hostile or intimidating, on the ground of race, colour, descent, national or ethnic origins;
 - (5) The grievance system is properly administered regardless of race, colour, descent, national or ethnic origins; and there will be no reprisal against anyone raising concerns or complaints or taking action on discrimination or harassment on the grounds of race, colour, descent, national or ethnic origins.

3 Implementation

- 3.1 This policy will be a priority for [Organisation's name];
- 3.2 [Position] will have overall responsibility for this policy; and [Position (if different)] will be responsible for the day-to-day operation of this policy;

- 3.3 The policy will be communicated to all workers and job applicants;
- 3.4 Workers and management staff will be consulted about the policy and its implementation;
- 3.5 Workers and management staff will be trained on the policy and their rights and responsibilities;
- 3.6 Opportunities for employment, promotion, transfer and training will be advertised widely, internally and externally, and all applicants will be welcomed, regardless of race, colour, descent, national or ethnic origins;
- 3.7 Selection criteria and performance appraisals will be entirely related to the job or training opportunity;
- 3.8 The effectiveness of this policy will be monitored regularly. Information on the ethnic and racial backgrounds of workers and applicants for employment, promotion and training will be collected and analysed, to monitor the implementation of this policy. Grievances, disciplinary action, performance assessment and termination of employment will also be monitored by racial group. The information will be held in strictest confidence and will only be used to promote equality and prevent discrimination;
- 3.9 Terms and conditions of employment, rules and practices, requirements and conditions will be reviewed in the light of monitoring results with a view to take steps to promote equality and prevent discrimination in consultation with employees, workers and management staff;
- 3.10 Harassment on the ground of race

(1) Every worker will be treated with respect and dignity. All workers have a right to work in an environment that is free from abuse or insults, where individuals treat each other with respect and value politeness.

(2) Harassment on the ground of race, colours, descent, national or ethnic origins is unacceptable. Workers must not take part in, or encourage, condone or gossip about cases of harassment or bullying. No one should be subjected to any unwelcome conduct, or to an environment that is hostile or intimidating, on the ground of race, colours, descent, national or ethnic origins. Workers should be supportive of fellow workers who are victims of harassment. Examples of unacceptable conduct include:-

- (a) Racially derogatory remarks or insults; for example, name calling which people of certain racial groups may find offensive or impolite should be avoided;
- (b) Display of graffiti or slogans or other objects offensive to certain racial groups;
- (c) Racist jokes, banter, ridicule or taunts;
- (d) Using a disparaging or offensive tone when communicating with people on the ground that they belonging to certain racial groups;
- (e) Ostracize people on the ground that they belong to certain racial groups;
- (f) Imposing excessive workloads or unrealistic performance targets on people on the ground of their race, colour, descent, national or ethnic origins;
- (g) Unnecessarily picking on individuals from particular racial groups.

3.11 Complaints about discrimination or harassment on the ground of race, colour, descent, national or ethnic origins will be taken seriously and dealt with effectively and promptly and may result in disciplinary sanctions including dismissal.

Supplementary explanatory notes

The EOC may from time to time issue supplementary explanatory notes to the Code. These notes are not part of the Code but are intended to clarify matters as appropriate.

The following is a supplementary explanatory note issued by the EOC:

- The contents of the Code are written from the perspective of race equality. There may be matters dealt with in the Code which are also subject to other laws and regulations, for example, the collection of personal data. This Code does not have the effect of overriding other laws and regulations. Where other laws and regulations also apply, the Code should be read subject to the requirements of the relevant laws, regulations and recommendations of relevant authorities.



平等機會委員會
EQUAL OPPORTUNITIES COMMISSION

地址 Address : 香港黃竹坑香葉道41號16樓
16/F., 41 Heung Yip Road,
Wong Chuk Hang, Hong Kong

電話 Tel.No. : (852) 2511 8211

傳真 Fax No : (852) 2511 8142

網址 Website : www.eoc.org.hk