

## **Major Judicial Decisions under Sex Discrimination Ordinance**

(i) *Secretary for Justice and others v Chan Wah*, FACV No. 11 of 2000

In Chan Wah's case, the electoral arrangements of village representatives in Po Toi O Village were challenged, among other things, as being inconsistent with the Sex Discrimination Ordinance. Section 35(3)(c) of the Sex Discrimination Ordinance provides that:

“It is unlawful for a person to discriminate against another person in –

- (c) determining the eligibility of a person to vote in elections of members of a relevant body or the holder of a relevant position or take part in the selection of the holder of a relevant position.”

2. Chan Wah was a non-indigenous villager born and brought up in Po Toi O Village and married an indigenous woman. He was excluded from voting in the village representative election on the ground that he was not indigenous, meaning that he was not a descendant of ancestors who in 1889 were residents of villages in the New Territories. Chan Wah challenged the electoral arrangement relying on Article 26 of the Basic Law and Article 21 of the Hong Kong Bill of Rights which was in analogous terms as Article 25 of the International Covenant of Civil and Political Rights (ICCPR). He further argued that he had suffered unlawful discrimination prohibited by the Sex Discrimination Ordinance since a non-indigenous villager woman married to an indigenous man could vote but not a non-indigenous man married to an indigenous woman.

3. The Court of Final Appeal ruled in favour of Chan Wah and held that arrangements which excluded a non-indigenous man who married an indigenous woman from voting were inconsistent with the Sex Discrimination Ordinance.

(ii) *Yuen Sha Sha v Tse Chi Pan* [1999] 1 HKC 731

4. The sexual harassment law was tested in Yuen Sha Sha's case. Sexual harassment is prohibited by the Sex Discrimination Ordinance. Sexual harassment is defined in section 2(5)(a) of the Ordinance as follows:

“...a person (however described) sexually harasses a woman if –

(a) the person –

(i) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to her;

(ii) engages in other unwelcome conduct of a sexual nature in relation to her,

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that she would be offended, humiliated or intimidated...”

5. Yuen Sha Sha, the plaintiff, was a student of Shaw College of the Chinese University of Hong Kong. The defendant was also a student of the same College. The plaintiff accidentally discovered a camcorder hidden inside a paper box on top of her roommate's wardrobe. It was so placed that its lens directed at the plaintiff's wardrobe and it contained a videotape which depicted the plaintiff changing clothes. The plaintiff filed a complaint with the Equal Opportunities Commission under the Sex Discrimination Ordinance. Although there was little dispute over the facts, the defendant refused to resolve the matter at the conciliation proceedings. The District Court gave judgment for the plaintiff, holding that videotaping the plaintiff dressing and undressing without her consent was an act of sexual harassment prohibited by the Sex Discrimination Ordinance. The judge awarded \$50,000 for injury to feelings, \$20,000 as exemplary damages and \$10,000 as aggravated damages and ordered that the defendant tender a written apology. This case has established an important precedent which other women can rely on in future.

(iii) *Chang Ying Kwan v Wyeth (HK) Ltd*, Equal Opportunity Action 10 of 1999

6. Pregnancy discrimination is prohibited by section 8 of the Sex Discrimination Ordinance<sup>1</sup> and discrimination by way of victimisation is prohibited by section 9 of the Ordinance<sup>2</sup>. These provisions were tested in Chang Ying Kwan's case. Chang Ying Kwan, the plaintiff, was employed by the defendant. Shortly after she gave notice of pregnancy, senior employees of the defendant forced her to resign. The plaintiff refused to resign and complained to the Equal Opportunities Commission. Thereafter the plaintiff was refused salary increase and was subject to additional reporting requirement. She subsequently resigned and claimed both pregnancy discrimination and discrimination by way of victimisation.

7. The defendant's defence was that the plaintiff was monitored because of her inferior performance. Her pregnancy was a mere coincidence. The defendant also argued that other pregnant employees were not treated less favourably.

8. The Court ruled that the plaintiff was unlawfully discriminated against by the defendant because of her pregnancy. The Court held that in pregnancy discrimination, the comparator for the purpose of the 'but for' test was not another pregnant employee but a person who was a normal employee. As such, no inference could be drawn from the treatment of other pregnant employees that the plaintiff's pregnancy was not one of the reasons of the treatment she received.

9. The Court further ruled that the plaintiff was unlawfully victimised by the defendant by reason of her complaint to the Equal Opportunities Commission. The Court held that a plaintiff who complained of discrimination by way of victimisation under s 9 of the Sex Discrimination Ordinance must establish that at least one of the four acts set out in s9(1)(a)-(d) was within the knowledge of the defendant when he carried out the acts

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<sup>1</sup> For a detailed description of Section 8, please refer to paragraph 2 of Part II the Initial Report.

<sup>2</sup> For a detailed description of Section 9, please refer to paragraph 2 of Part II of the Initial Report.

complained of. Once that had been established, in the absence of a satisfactory explanation, the plaintiff would have established on the balance of probabilities that there had been victimisation.

(iv) *Equal Opportunities Commission v Director of Education*,  
HCAL1555/2000

10. The Equal Opportunities Commission brought these proceedings for judicial review. It argued that the Director of Education ('the Director') managed a system for the transfer of students from primary to secondary school (called 'the SSPA' system) which discriminated against individual pupils on the basis of their sex and was therefore unlawful under the Ordinance. The Commission asserted that the SSPA system discriminated in the main against girls. However, because of the complex, gender-based construct of the system, it also could (and did) discriminate against individual boys. The Court ruled for the Commission and held that for a significant number of students gender had been (and continues to be) the sole cause of their unequal treatment. In the course of its judgment, the Court referred to Article 10 of CEDAW and reiterated that stereotyped concepts of both men and women were the wellspring from which discrimination flew. The Court held that appropriate measures should be taken to bring about their elimination.