



Hong Kong: Case Sheds Light on Race Discrimination Law

By Leah Shepherd

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A ruling in Hong Kong's District Court has clarified what constitutes race discrimination in the workplace and what doesn't. A British employee sued a Hong Kong construction company after he was fired, claiming race discrimination because co-workers excluded him from meetings and used a disparaging Cantonese word that meant foreigner (or non-Chinese person), usually referring to white foreigners. The company argued that it fired him for having a negative attitude and trouble getting along with his co-workers.

On Feb. 11, a judge ruled that the company had reasonable grounds to fire him. The court found that the use of the disparaging word didn't necessarily constitute race discrimination in the workplace, but it might, depending on the context.

Hong Kong's population is 7.5 million people, and 94 percent are Chinese, according to World Population Review. Cantonese is the official language in Hong Kong.

"Focusing on the legal outcome [of this case] can be a distraction," said Hong Tran, an attorney with Mayer Brown, based in Hong Kong. "The employer was successful in defending the unlawful discrimination claim, but I think the objective for employers should be to be in a place where a complaint can't be made in the first place. That involves having the appropriate diversity, equity and inclusion policies in place; training and proactive update of these policies; and refresher training. Leaders should set the tone from top down."

Legal Background

Employers in Hong Kong must comply with the Race Discrimination Ordinance of 2008, which prohibits employers from treating an employee less favorably because of their race. It's also illegal to treat someone less favorably because they made a formal complaint of race discrimination.

Employers can be liable for the discriminatory conduct of their employees, regardless of whether the employer had knowledge of the conduct, according to Jenny Zhuang, a lawyer for Dentons in Hong Kong. But employers can avoid this liability if they "take reasonably practical steps" to prevent discrimination.

Establish a written anti-discrimination policy and make sure all new employees receive it and sign it after they have read it. Conduct trainings to remind all workers about the anti-discrimination policy once or twice a year.

"All employers should have a written set of policies specifically dealing with discrimination and workplace harassment," Zhuang said. "[Hong Kong's] Equal Opportunities Commission publishes useful Codes of Practice on Employment in relation to each of the Discrimination Ordinances. We recommend all employers to study and incorporate the Code of Practice into their own policies."

She added, "Most employers do not have a written policy on discrimination, and even when they do, they do not actually inform their employees of the terms of the policy, nor do they conduct regular training for their employees to educate and remind them of the terms of the policy. It is not enough to just have a written policy. Employers must make a conscious effort to ensure all of their employees are

provided a copy of the policy, acknowledge that they have read and understood it, and be regularly educated [and] reminded of its terms."

Another prudent practice is to always document in writing the legitimate reasons for firing an employee, especially if they belong to a protected class.

Consequences for Noncompliance

If an employee successfully sues an employer for race discrimination, the employer may have to pay monetary damages determined by the court. The amount "will vary from case to case, although there are some general legal principles and guidelines on the range of damages for injury to feelings, which has been established by case law authorities," Zhuang said.

Tran noted that discrimination claims often are settled out of court because "they tend to be a magnet to the press, and the claim may give rise to potential adverse reputational issues. There will be disruption to the business, including with time and money diverted to defending the claim and away from the employer's business. There may also be adverse impact on the employee relations side. The costs of defending a claim are usually not recoverable even if the respondent successfully defends a claim."

Racially loaded language can make some employees feel that the workplace environment is hostile.

A common mistake that employers make is "lack of awareness of race issues," Tran said. "Unlawful race discrimination is rarely undertaken overtly. A court will usually have to infer it from the facts and circumstances. As such, employers should proactively turn their minds to identifying and addressing potential race discrimination issues. Taking the present case as an example, just because something has always been done in a particular way in the past, or an expression is commonly or colloquially used, doesn't mean it is appropriate to use in the workplace."

Leah Shepherd is a freelance writer in Columbia, Md.

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