

Means of Transformation?

The Role of Enforcement Mechanisms in Providing Protection
against Pregnancy Discrimination in Employment



University of Oslo
Faculty of Law

Candidate number: 8017
Supervisor: Anne Hellum
Deadline for submission: 15th May 2012
Number of words: 17632

Acknowledgements

Two years' study at the University of Oslo is a life-changing experience. The final master thesis' writing is a great opportunity to exercise knowledge I learnt during these two years and to improve my scholarly competence. Many individuals and organizations gave me a lot of help at various stage of my thesis's writing.

I am particularly grateful to my supervisor Anne Hellum who supported me in many ways. She gave me a very good advice on how to narrow the thesis' topic. She was always very patient to read and comment the progress of my thesis and even corrected my grammatical and spelling mistakes that non-English speakers like me often make. Without her substantive guidance, I could not enjoy the delight brought by the writing process.

Special thanks go to the staff in China Program at the Norwegian Center for Human Rights (NCHR). They awarded financial support for me to do fieldwork in Hong Kong. Because of this on-the-spot practice, I not only gained the first-hand information and material, but also had a comprehensive understanding on the working culture of Hong Kong. Furthermore, I benefited a lot from China Program's network.

I would also like to thank the staff at the Equal Opportunity Commission, Asian Legal Resource Center and the Association for the Advancement of Feminism (AAF) in Hong Kong and LDO, Oslo Conciliation Board and Legal Aid for Women in Norway. The time, experience and information they kindly shared with me were critical to the completion of my thesis.

I must also thank Nordic Institute of Asian Studies (Nias), the University of Hong Kong and China Research Study Center of the Chinese University of Hong Kong. Resources in the above organizations gave me a lot of inspiration.

Finally, I want to express my gratitude to my parents. During my study abroad, they gave me a lot of understanding and encouragement. Without their support, my study life would not be fruitful like it is now.

List of Abbreviation

AAA-Anti-discrimination and Accessibility Act
AC- Arbitration Commissions
ADA-Anti-discrimination Act
AFC-Administration and Finance Committee
AOT- Anti-Discrimination Ombud Act
CEDAW-Convention on the Elimination of All Forms of Discrimination against Women
CMAB-Constitutional and Mainland Affairs Bureau
COPs- Code of Practices
CPPC-Community Participation and Publicity Committee
DDO- Disability Discrimination Ordinance
DRB-Dispute Resolution Board
EMC- Enterprise Mediation Commission
EO- Employment Ordinance
EOC-Equal Opportunity Commission
EU-European Union
FSDO- Family Status Discrimination Ordinance
GA-General Assembly
GEA- Gender Equality Act
HKSARG-Government of the Hong Kong Special Administrative Region
HRAM- Human Resources and Administration Manual
ILO- International Labour Organization
LCC-Legal and Complaints Committee
LCL-Labour Contract Law
LDO-Likestillings-og diskrimineringsombudet
LRD -Labour Relation Division
LIB-labour Inspection Bureau
LT-Labour Tribunal
MOHRSS- Ministry of Human Resources and Social Security
NPC-National People's Congress
NHRIs -National Human Rights Institutes
NWCCW-National Working Committee on Children and Women
PARC-Policy and Research Committee
PMIs-People's Mediation Institutes
PSSM- Procurement of Stores and Services Manual
RDO- Race Discrimination Ordinance
SDO- Sex Discrimination Ordinance
UN-United Nations
UNDP-United Nations Development Program
WEA-Working Environment Act

Contents

1	Introduction	1
1.1	Background Information	1
1.2	Theoretical Framework	4
1.2.1	State Responsibility	4
1.2.2	The Case of China	5
1.2.3	The Way Forward	5
1.3	Methodology	6
2	Chinese Anti-Discrimination Legislation and Administrative Policies	8
2.1	International Obligations	8
2.2	Anti-Discrimination Legislation	8
2.3	Administrative Policies	9
3	Chinese enforcement Mechanisms in Providing Protection against Discrimination	11
3.1	Enforcement Procedures and Bodies	11
3.1.1	File a complaint with the women’s organization	12
3.1.2	File a complaint with the labour inspectorate	12
3.1.3	Settle dispute through arbitration and mediation	13
3.1.4	Lodge a lawsuit with the People’s Court	16
3.1.5	Case Study- Ms. Ma v Beijing Jinxiu Mailin Investment Consulting Co. Ltd (2010)	17
3.2	Brief Assessment	18
5	Experiences from Hong Kong	22
5.1	Hong Kong Anti-Discrimination Legislation	22
5.1.1	International Obligations	22
5.1.2	Anti-Discrimination Legislation	22
5.1.3	Eliminating Pregnancy Discrimination in Hong Kong Legislative Context	23
5.2	Hong Kong Enforcement Mechanisms in Providing Protection against Pregnancy Discrimination	25
5.2.1	Labour Department and Conciliation Service	25
5.2.2	Minor Employment Claims Adjudication Board and Labour Tribunal	27
5.2.3	EOC	29
5.2.4	Case Study- Chan Choi Yin v Toppan Forms (Hong Kong) Ltd (2002)	37
5.3	Brief Assessment	38
6	Experiences form Norway	40
6.1	Legislation	40
6.1.1	International Obligations	40
6.1.2	European Union Directives Implemented in Norway	40
6.1.3	Norwegian Anti-Discrimination Legislation	41
6.1.4	Eliminating Pregnancy Discrimination in Norwegian Legislative Context	42
6.2	Norwegian Enforcement Mechanisms in Providing Protection against Discrimination	43
6.2.1	Dspute Resolution Board (DRB)	43
6.2.2	The Equality and Anti-discrimination Ombud and the Equality and Anti-discrimination Tribunal	44
6.2.3	Norwegian Court	47
6.2.4	Case Study- Tribunal Case 16/2008 A hospital applied differential treatment on account of maternity leave in connection with the appointment of a temporary doctor	49
6.3	Brief Assessment	50

7 Conclusion	53
Bibliography.....	56
Annex I Anti-Discrimination Legislation in Mainland China, Hong Kong and Norway	A
Annex II Anti-Discrimination Enforcement Mechanism in Mainland China, Hong Kong and Norway	E

1 Introduction

1.1 Background Information

After experiencing dramatic social and economic change, China now faces a great challenge regarding a just distribution of resources. How should China ensure that all the people share the fruits of reform and opening-up? To ensure sustainable development and justice, gender equality must not be overlooked.

In China, the promotion of equality between men and women is a basic state policy. Moreover, it is widely accepted that the realization of gender equality is of great significance for social progress. However, according to the 2010 Asia-Pacific Human Development Report¹ sponsored by the United Nations Development Program (UNDP), while China has experienced unsurpassed economic development in recent decades, this progress has not been even in achieving gender equality. In the fields such as economic power, political voice and equal legal rights, there are still spaces needed to be improved.

Aiming at contributing to the promotion of gender equality in China, this thesis focuses on eliminating gender discrimination in employment. “Employment has a vital bearing on people’s livelihoods”². It is a basic approach in guaranteeing equal opportunities for women and contributes to the full participation of women in economic, cultural and social life and to realizing their potential. “In China, nearly 70 percent of women are in paid work, well above the global average of 53 percent.”³ Moreover, at the international level, China has ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1980. And at the domestic level, gender discrimination is prohibited under the Constitution, the Labour Law, the Employment Promotion Law, the Labour Contract Law and the Law on Protection of Women Workers’ Rights and Interests. Regardless of the above positive achievement, labor market shows clearly gendered patterns throughout society. Discriminations against female workers exist at all stages of employment and occupation. In employment recruitment, personal information such as marriage status impedes women from employment. “It is common knowledge in China that female graduates, even with better qualifications, have much more difficulties to find jobs

¹ UN in China. *Launch of the Asia-Pacific Regional Human Development Report on Gender*. Beijing 2010. <http://www.un.org.cn/cms/p/news/27/1346/content.html> [Visited 14 March 2012]

² *China Questions and Answers*. <http://www.china.org.cn/english/features/Q&A/161834.htm> [Visited 14 March 2012]

³ See *Supra* note 1

than their male colleagues.”⁴ According to the Third Survey on the Social Status of Women in China⁵, among female students looking for jobs, 24.7% of them reported that they had encountered unequal treatment. For the positions demanding of high-level talents, 20.6% of them are hiring men exclusively or prioritizing men over women when both have the same qualifications.⁶ Generally speaking, it is more difficult for women to get a satisfactory job than men.

What causes this gap between legislation and practice? Such gap may exist because (i) there is no specific anti-discrimination law in Mainland China; (ii) the existing gender equality provisions in labour laws lack a definition of discrimination; (iii) laws or regulations produce structural patterns leading to discrimination.

In order to provide protection against gender discrimination in employment, the current legal framework needs to be improved. However, the anti-discrimination legislation will not be enhanced over one night. An alternative measure to provide protection is to look at the access to protection against discrimination through the laws that are in place in the field of labour. Access to protection against discrimination can be examined by the equivalence and effectiveness of the enforcement mechanism which is of fundamental importance for victims of discrimination seeking redress. As regards gender discrimination in employment, there are three kinds of enforcement mechanisms: i) general-judicial mechanism (i.e. ordinary courts); ii) specific-judicial mechanism (i.e. labour courts, labour tribunals or adjudication board); iii) quasi-judicial mechanism (i.e. National Human Rights Institute) iv) non-judicial mechanism (i.e. political-administrative body or consultative body)

Among these mechanisms, the quasi-judicial mechanism and non-judicial mechanism aim at providing complaints a swifter and cheaper access to redress. In particular, quasi-judicial mechanism is greatly recommended by the international community. General Assembly (GA) resolution 48/134 of 4 March 1994 encourages Member States to establish NHRIs for the promotion and protection the effective implementation of international human

⁴ Lu, Haina. *The Rights to Work in China*. Cambridge, (GPRC Guaranteed Peer Reviewed Content) 2011. pp. 101

⁵ The Report of the Survey was issued jointly by All-China Women’s Federation and National Bureau of Statistics of China on 21st Oct. 2011

⁶ *Ibid*

rights standards and to choose the framework⁷ that is best suited to the particular needs at the national level. Since anti-discrimination is a core human rights principle, NHRIs play a crucial role in providing protection against discrimination at national level. The Paris Principles provide the guideline for the NHRIs about competence, responsibilities, operation methods as well as status. The functions of NHRIs usually include handling individual complaints, providing legal assistance, monitoring the implementation of legislation, promoting equal opportunity through publicity and education. The independent status grants NHRIs an impartial role in exercise their functions.

According to the practices in many countries, most discrimination cases are dealt with by the NHRIs. Mainland China has not established such kind of institution yet. In this situation, nearly all of the gender discrimination in employment cases are treated as labour disputes instead of discrimination complaints. On this background, it would be interesting to explore:

Given the lack of NHRIs, can other enforcement mechanisms play an equivalent and effective role to protect female workers' rights to equality and non-discrimination in Mainland China?

In order to answer this question, this thesis will give an overview of the enforcement mechanisms that are in place to protect female workers' rights to equality and non-discrimination in Mainland China. Moreover, the situation in Hong Kong and Norway in regard to anti-discrimination legislations and the corresponding mechanisms will also be described in order to make a comparison with Mainland China.

The choice of Hong Kong stems mainly from the fact that Hong Kong is a special administrative region of China. The discriminations faced by female workers in Hong Kong in many respects are similar with that faced by female workers in Mainland China. Different with Mainland China, Hong Kong has an NHRI- Equal Opportunity Commission (EOC)-with the mandate focusing on anti-discrimination which was established in 1996. Its development and functions are worth exploring. The reason for selecting Norway is that I study in Norway at this moment. Furthermore, Norway is in the frontline in the international development of gender equality. Measures to increase gender equality are carried out both by general policies designed to reconcile labour market participation and family life, as well as through specific gender equality measures. Most importantly, its

⁷ Main types of NHRIs all around the world: national commission on human rights; national advisory commission on human rights; national anti-discrimination commission; ombudsman etc.

equality and discrimination law strongly protects pregnant women. In addition, the NHRI-Likestillings-og diskrimineringsombudet (LDO)⁸-plays a key role in eliminating gender discrimination in Norway.

Since the field of gender discrimination in employment is so vast, this thesis narrows the scope by focusing on pregnancy discrimination in employment. The reason for choosing pregnancy discrimination is that a refusal of employment on the ground of pregnancy can only apply to women. It constitutes direct gender discrimination on the one hand and makes up the highest percentage of complaints concerned with gender discrimination in many countries including China. Moreover, the main focus is on female workers who work in the city areas. Female workers in rural areas as well as domestic workers will not be covered in this thesis. The reason is that domestic work is regarded as informal employment in China and that Chinese legal provisions and enforcement mechanism in place don't cover the working conditions of domestic workers.

1.2 Theoretical Framework

1.2.1 State Responsibility

Gender equality and non-discrimination is the core principle in many human rights treaties, especially in the CEDAW. States that have ratified the CEDAW have a duty to protect the rights enshrined in the convention. That is to say, as duty-bearers, states have the obligations to respect the equality and non-discrimination principle by not violating it, to make effects to promote it and to ensure remedies in case of violation. Particularly, Article 2 of CEDAW prescribed that States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women [...].

Pregnancy discrimination is a violation made by public or private bodies towards female employees. The reason why this discrimination occurs is mainly because of the conflict between the interests pursued by the public and private bodies and the reproductive role played by women in the family. In order to solve this conflict, state intervention is necessary. In general recommendation No. 24, the CEDAW committee, the United Nations treaty body which monitor states' implementation of their obligations under the International Convention on All Forms of Discrimination against Women, provides the following opinion: "state parties shall take appropriate measures to overcome all forms of

⁸ LDO equals to the Ombud in English

gender based violence in the public and private...” In addition, the CEDAW committee gives their suggestion on how to exercise this commitment in its General Recommendation No. 28 “the policy should also ensure that independent monitoring institutions such as NHRIs or independent Women’s Commissions to promote and protect the rights guaranteed under the convention”⁹ in terms of human rights compliance.

1.2.2 The Case of China

China has a long tradition of protecting women’s rights and interests on the one hand. On the other hand, when it comes to human rights compliance, China is considered as “a least likely state by virtue of its history, cultural traditions, and power”¹⁰. So it would be interesting to explore how Chinese way of dealing with women’s rights compares with women’s rights under international law.

The establishment of NHRIs at the national level to achieve human rights compliance is increasingly recognized by the international community. It “requires a structural reconstruction of the state and society as demanded by implementing international human rights”¹¹. However, “the main characteristic of China is that the state dominates society.”¹² “Almost all important initiatives, mobilization, reforms and organizing efforts are proposed and implemented, or shadowed, by state machinery.”¹³ “There are no independent social forces with any meaningful influence in China.”¹⁴ As the presence of such independent forces is the most important precondition for current theories of domestic human rights implementation, can China deal with the tension between national rights and international human rights successfully without NHRI? How can China establish an institutional framework that is in line with the Paris Principle?

1.2.3 The Way Forward

As fairness and justice are becoming a more and more important part or efforts to build a harmonious society in Mainland China, positive signs do emerge in China. The Chinese

⁹ Kent, Ann. *China, the United Nations, and human rights-The limits of compliance*. Philadelphia, University of Pennsylvania Press. 1999. Introduction, note 4

¹⁰ Hong, Yanqing. *Political Economy of the Right to Education in Rural China: Unpacking the Black Box of the State*. PhD Dissertation, Faculty of Law, Universiteit Utrecht. pp.34

¹¹ *ibid*

¹² *ibid* pp.35

¹³ Zheng, Yongnian. *The Chinese Communist Party as Organizational Emperor Cultural, Reproduction and Transformation*. Routledge. 2010

¹⁴ See *Supra* note 10. pp.37

government has already realized it is important to modify the unbalance position between employers and employees. Many improvements in legislation and administrative policies aimed at eliminating pregnancy discrimination in employment have taken place in recent years. Corresponding enforcement mechanisms also develop at a very fast pace. These encouraging trends increase the ability to make claims. Accordingly, enforcement mechanisms are modified through practices aiming at compliance with international standards. The realization of a structural reconstruction of the state and society as demanded by international human rights bodies still depends on political will. Under these circumstances, it is of great interest to make a comparative study on the equivalency and effectiveness of the anti-discrimination enforcement mechanisms that are emerging at this stage.

1.3 Methodology

This thesis adopts the “structure-process-outcome” indicators approach proposed by the UN to compare the equivalency and effectiveness of anti-discrimination enforcement mechanism in Mainland China, Hong Kong and Norway. The reason to adopt this approach is that many stakeholders are involved in and many elements have an influence on the guarantee of equivalency and effectiveness of anti-discrimination. In order to ensure a comprehensive overview, “it is necessary to measure the commitment of the duty-bear to the relevant human rights standards, the efforts that are undertaken to make that a reality and results of those efforts...”¹⁵ In other words, by identifying structure-process-outcome indicators for anti-discrimination, it becomes possible to assess steps taken by the State parties in meeting the international non-discrimination principle.

In this thesis, the structural indicators refer to the international and national legal instrument ratified and adopted by the State parties to protect female workers’ rights to equality and non-discrimination. Process indicators refer to the practices of the enforcement mechanisms that are in place to protect female workers’ rights to equality and non-discrimination. Functions, legal standing, time and length, legal costs, sanctions and compensations are used to measure equivalency and effectiveness of the mechanisms. Outcome indicators refer to the outcome of the anti-discrimination legislation and

¹⁵ UN. *Report on Indicators For Promoting and Monitoring the Implementation of Human Rights*. HRI/MC/2008/3, 6 June 2008.

enforcement mechanism or to put it in another way, refer to the actual results how the pregnancy discrimination cases are solved.

The material used in this thesis is based on fieldwork, interviews as well as examination of both international and national instruments such as general recommendations of international treaty bodies, court cases, country reports, academic articles etc.

2 Chinese Anti-Discrimination Legislation and Administrative Policies

2.1 International Obligations

China ratified the CEDAW with no reservation to its substantive articles.¹⁶ The latest CEDAW country report submitted by Chinese government was in 2004. In 2006 when the CEDAW committee considered the fifth and sixth periodic reports of China in the 36th Session, “the lack of a definition of discrimination was considered as a major weakness in the legal protection against discrimination.”¹⁷

China has also ratified International Labour Organization (ILO) Discrimination (Employment and Occupation) Convention (No.111) in 2006. ILO Convention No. 111 is one of the core conventions of the international Labour Organization. According to this convention, any exclusion in respect of a particular job made on the basis of sex is prohibited. To effectively implement the Convention, the Chinese Ministry of Human Resources and Social Security (MOHRSS) and ILO jointly carried out a two-year project (2008-2010) to advocate this convention among the local labour departments and the social partners, including employers’ and workers’ organizations. Although it is impossible to immediately realize comprehensive equal and fair employment conditions for women through this short term program, “a significant number of labour officials have an increased awareness and understanding of the conceptions of discrimination and equal employment opportunity.”¹⁸

2.2 Anti-Discrimination Legislation

There is no specific anti-discrimination law in the Mainland China. “However certain general anti-discrimination provisions are included in various laws and regulations.”¹⁹ China’s Constitution, adopted on 4 December 1982, explicitly stated that women enjoy the same rights as men in all spheres of life (article 48). However, it should be mentioned that

¹⁶ Upon ratification China only made a reservation on article 29.1 that contains a clause on dispute settlements between states.

¹⁷ Committee on the Elimination of Discrimination against Women, Pre-session working group. *List of issues and questions with regard to the consideration of periodic reports*. 2006. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/250/09/PDF/N0625009.pdf?OpenElement> [Visited 8th May, 2012]

¹⁸ *Equality at Work in China*, <http://www.equalityatworkinchina.org/about-us-en-us> [Visited 16 March, 2012]

¹⁹ Mayer Brown JSM. *Guide to Discrimination Law in the P.R. China*. http://www.mayerbrown.com/files/Publication/93a8d485-c9d3-4013-9bd0-56b1a90ce6ea/Presentation/PublicationAttachment/82567d95-baf4-44c8-bf7d-5eb6f700a235/JSM_PRC_Discrimination_May2008.PDF [Visited 2nd May, 2012]

Constitution is not self-executing in China. In other words, it is aspirational and cannot by itself be enforced in Chinese courts.

In addition to the Constitution, the gender discrimination is also prohibited in the Labour Law of 1994. Article 12 stipulates that Labour shall not be discriminated against in employment due to their sex. And Article 13 provides that women shall enjoy equal rights as men in employment.

“The Employment Promotion Law of 2007 includes a specific prohibition of actions geared at restricting women from getting married or bearing a child.”²⁰ Article 27 restricts any clause in the employment contract imposing marriage or childbirth restrictions on the employment.

Moreover, “both the Labour Contract Law (LCL) (article 42) and the Law on Protection of Rights and Interests of Women (article 23) include a specific prohibition against terminating the employment of women during and after pregnancy.”²¹ In practice, the law on Protection of Rights and Interest of Women is seldom applied. Because according to the Law on Protection of Rights and Interests of Women, if the case deals with rights guaranteed in a special law, the provision of that law should be followed. In addition, under the LCL, the employer may cancel the labour contract even though the employee is pregnant:

- The employee has been proved not to satisfy the recruitment requirements during the probation period;
- The employee is in serious violation of the bylaws of the employer;
- The employee causes any severe damages to the employer due to his/her grave negligence to duties or seeking private benefits.

2.3 Administrative Policies

After the World Conference on Women in Beijing, an overall plan for the future development of women’s rights and interests was drawn in China: the Outline for the Development of Chinese Women (1995-2000). It is a national program of action aiming at “pushing forward gender equality and women’s development in a comprehensive way”²². Since then, every ten years, a renewed version of the outline will be stipulated by the State.

²⁰ ILO. *Equality and Non-Discrimination at Work in China: Handbook*. Constance Thomas ... [et al.]. Beijing, (ILO Country Office for China and Mongolia), 2010. pp.22

²¹ *ibid*

²² See *Supra* note 1

The recent one is the Outline for the Development of Chinese Women (2011-2020). The Outline lists some major goals covered by seven fields as well as policies and measures for the improvement of the status of women. Under the field of Women and Economy, goals like eliminating gender discrimination in employment, promoting women's full employment are included. The National Working Committee on Children and Women (NWCCW) under the State Council, the coordination and consultation organ of the Chinese government in charge of women and children's work, plays an important role in formulating and organizing the implementation of the outlines. Under the guideline of the Outline, 31 provinces, municipalities and autonomous regions in China enact detailed local plans for implementing the Outline for the Development of Chinese Women, and NWCCW is responsible for supervising the implementation by its subordinates.

3 Chinese enforcement Mechanisms in Providing Protection against Discrimination

Despite of the overall legal coverage and relevant administrative policies, pregnancy discrimination in employment often occurs. According to a survey “Gender Discrimination Situation at Workplaces in China”²³ launched by the Center for Women’s Law and Legal Services of Peking University in June 2009:

- One in 25 of the participated women are forced to sign labour contracts that contain clauses forbidding them to marry or become pregnant for a set period of time.
- One in 5 say their employers do not want to recruit women who are of reproductive age and do not have a child yet.
- More than 20 per cent say employers cut the salaries of women who become pregnant or give birth, and 11.2 percent of them say they lose their jobs for having a baby.
- More than one third (33.9 per cent) believe male employees have more opportunities than women in getting promoted. More than half (52.1 per cent) attribute this to the fact that women have to spend more time taking care of children and family chores.²⁴

Legislation and policy designed seem to pay attention to the rights and interests of women and their development. The reality is far from the legal and political ideals. How was this gap created? One factor needs to be given attention in the Chinese context is the current enforcement mechanism.

3.1 Enforcement Procedures and Bodies

In China, there are several ways to get relief for discrimination in employment

²³ The research polled 3,000 women and men in more than 20 provinces, municipalities and autonomous regions in China over one year’s time and came up with the result after data analysis and in-person interviews.

²⁴ *Gender discrimination in China’s workplaces*. Beijing, (Centre for Women’s Law and Legal Services of Peking University), 2009

3.1.1 File a complaint with the women's organization

The 2005 revision of the Law on the Protection of Women's Rights and Interests provide women victim a tool to file complaints with the women's group. Here the women's group mainly means the Women's Federation at various levels. As Article 53 of Law on Protection of Rights and Interests of Women granted, women's organization has the right to request and assist the department or unit concerned to investigate and deal with the case so as to protect the lawful rights and interests of the complainant. It further requires that the department or unit concerned should provide a reply.²⁵ Moreover, if women victim need help in litigation, the women's group has the obligation to provide support.²⁶

In addition, the 2005 revision also further identifies the agencies to enforce this Law. The revised version states: 'Government committees in charge of women and children (mainly the NWCCW) at the county and higher levels shall organize, coordinate, guide and urge the relevant government departments to work well on the protections of women's rights and interests.'²⁷

3.1.2 File a complaint with the labour inspectorate

Victims of discrimination may also contact the local labour administrative departments of governments above county level, as stipulated in the Employment Promotion Law²⁸. The labour protection supervising authorities -the labour inspectorate- have the responsibility to guarantee the implementation of legislation against discrimination in employment. "While employment discrimination is not explicitly listed as a subject for inspection by the labour inspectorate according to the Regulations on Labour Security Inspection or the Regulations on Labour Security Inspection, the Labour Law clearly provides enforcement powers in this regard to labour administrative departments of governments at or above county level."²⁹ And in practice, after the Labour Inspection Bureau (LIB) was established in the process of reform of "Super-Ministries System"³⁰ in 2008, labour inspectorate which is

²⁵ See Article 53

²⁶ See Article 54

²⁷ Yang, Sadie and Li, Ao. *Legal protection against gender discrimination in the workplace in China*. In: Gender and Development. Vol. 17, No. 2 (2009), pp. 304 – 305.

²⁸ See Article 60

²⁹ See *Supra* note 15

³⁰ The Super-Ministry System refers to emerge the administrative government departments of close or related functions into one super ministry

under the MOHRSS begins to play an important role in combating employment discrimination.

The labour inspectorate has been established at four-tier levels-the state, provincial, municipal and county levels. The approach carried out by labour inspectorate is called the Twin Networks. The first network stands for “the whole nation’s administrative districts will be divided into thousands of grids made up of sub-districts, townships or communities.”³¹ In every assigned territory (grid), there is one full-time labour inspector and two part-time assistants responsible for providing information on labour law towards and gather data on all the enterprises within the territory. Then the information collected by the labour inspectors will go into the second network-database. Any labor law violations will be filed in this database. The biggest challenge faced by this working approach is that it requires huge resources in personnel and equipment. While the current number of the full time labour inspectors are 23,000 which “is just a drop in the bucket when it comes to supervising the entire nation’s labour practices.”³² Besides, except for publicizing laws and inspecting work units, the duties of labour inspection also include handling complaints and correcting illegal acts. Currently China’s economy is still experiencing great transformation. All of these make the challenge seem even more troublesome. The presupposed resolution towards this challenge is to “recruit large numbers of assistant inspectors or supervisors from organizations such as trade unions, women’s federations and enterprises’ confederation.”³³ Since the LIB was established, several seminars, workshops were carried out under the support of ILO in order to improve labour inspection services in China. Moreover, one ILO training Curriculum for labour inspectors “Building Modern and Effective Labour Inspection Systems” has been translated into Chinese.

3.1.3 Settle dispute through arbitration and mediation

According to the Law on Arbitration and Mediation (2007), where labor disputes arise between employing units and laborers, mediation and arbitration can be sought. That is to say, for example in cases concerning pregnancy discriminatory dismissal, the victim may choose to take the case to a labour dispute mediation and arbitration body before they choose to lodge a lawsuit to the court.

³¹ *How Will New System Change Labour Inspection?* Beijing, 2011.

<http://english.cntv.cn/program/china24/20110603/102922.shtml> [Visited 18 March, 2012]

³² *ibid*

³³ *ibid*

Mediation

At the mediation stage, the victim brings the case before the mediation institute. At present, there are three kinds of mediation institutes in China: the enterprise mediation commission (EMC), basic-level people's mediation institutes (PMIs) and other institutes with mediation functions established in towns and districts.

The EMC comprises of representatives from the enterprise, workers and the trade union. The representatives from the union chair the committee. Enterprise mediation was widely used under the planned economy. Then the number of EMCs experienced increasingly obsolete and only a small percentage of enterprises had EMCs. However, since the end of 2011, the EMC has regained the opportunity to develop because addressing dispute through mediation at the basic-level considered to be an important strategy. According to the MOHRSS who is responsible for national labour issues in Mainland China, it is a recommended way to relief the heavy caseload of arbitration commissions. As Vice Minister of Human Resources and Social Security Yang Zhiming declared in a national working conference, by the end of the year 2015, large and medium-sized enterprises should establish the EMCs. The Regulations on Enterprises Consultation and Mediation with Labour Disputes has been come into effect on the 1st January, 2012.

The laborers are reluctant to bring the dispute within the enterprises because "they generally view these bodies [EMCs] as biased in favor of the enterprise and, therefore, choose to bypass them"³⁴. PMIs which are guided by the Judicial Station³⁵ could be an alternative choice. In addition, laborers could seek help from other institutes with mediation functions established in towns and districts, such as the Labour Service Centre at the district level under the guidance of the labor administrative system. By the end of twelfth "Five Year" Plan (2011-2015), 50% of labour disputes are expected to be solved through mediation at the basic level³⁶. There is a lot of work needed to be done in order to reach this target.

³⁴ Halegua, Aaron. *Getting Paid: Processing the Labour Disputes of China's Migrant Workers*. http://www.boalt.org/bjil/docs/BJIL26.1_Halegua.pdf [Visited 17 March, 2012]

³⁵ The Judicial Station is the Office of the Judicial System at the basic level

³⁶ Zhang, Wei. *Ministry of Human Resources and Social Security: the Large and Medium Sized Companies Should Establish the EMCs*. Beijing, 2011. <http://www.rucdpls.com/show.php?contentid=671> [Visited 17 March, 2012]

Arbitration

If the parties are not willing to go to mediate or the mediation fails, arbitration could be applied for. The time limit for application for arbitration in labour dispute is one year³⁷. The applicant that applies for arbitration shall submit a written arbitration application³⁸ to the labour dispute arbitration commission. The commissions are the organizations established by the government to handle arbitrations. Commissions are not set up according to administrative areas level by level. The principles of rationality and actual needs are the standard to establish such kinds of commissions. The Commissions comprise the representatives of the labor administrative department, the trade union and the enterprise. The arbitrator should have a law background.

Compared with rules and regulations on arbitration before the year 2008, the current law has made a great improvement in three aspects. First, the time limitation for arbitration in labour disputes is one year instead of sixty days in the past. The extension of the time limitation for arbitration provides the parties more chance to make their rights protected. Second, once the arbitral tribunal received the labor dispute case, the case shall be made within 45 days rather than the 60 days in the past. The shortened period greatly benefits the persons, like migrant workers. For migrant workers, the accommodation fee costs too much during their waiting for the arbitration result, although there is no fee charged for arbitration. Last, the arbitration award will be the final award in two types of labour dispute:

- Disputes in relation to the claim of labor remunerations, work-related injury medial expenses, economic compensation or damages which do not exceed the local monthly wage standard for an amount of 12 months;
- Disputes arising from working hours, rest days and leave days as well as social insurance in the implementation of state labor standards.³⁹

This improvement aims at making the labor dispute process more efficient. Before this provision was adopted, some employers made use of the grey area that existed in the time gap among different enforcement procedures by maliciously delaying the settlement period of the dispute. But now this phenomenon will be decreased.

In practice, labour dispute arbitration bodies have dealt with a large number of employment discrimination cases, including pregnancy discrimination, during their

³⁷ See Law on Mediation and Arbitration of Labour Disputes Art. 27

³⁸ *Ibid* Art. 28

³⁹ *Ibid* Art. 47

arbitration of labour disputes. The heavy burden of the caseload is a great challenge towards the current labour dispute arbitration commission mechanism. According to the statistics on labour dispute cases handled in the period of 2008-2010 published by the Ministry of Human Resources and Social Security, each year, there are more than 600,000 cases being received by commission within the whole nation. On average, 80% cases were concluded each year.

3.1.4 Lodge a lawsuit with the People's Court

The adoption of the Employment Promotion Law in 2007 makes an important procedural change for discrimination cases, "opening a direct access to People's Courts in cases of discrimination."⁴⁰ According to article 63, the workers may lodge a lawsuit in the People's Court against those who commit employment discrimination in violation of the provisions of this law.

There is no official statistic on how many pregnancy discrimination cases that were brought to the People's Court after the Employment Promotion came into effect January 1st, 2008. Not only is China a very large country, but also "not all court decisions or cases are published and available to the public"⁴¹ since cases do not necessarily have precedent value. According to the *Selective Employment Discrimination Cases of People's Court and Arbitration Organization in China* edited by Sichuan University Human Rights Research Center based on the cases provided by legal firms, NGOs as well as the university research center, "gender discrimination together with the health discrimination constitute two major parts in discrimination lawsuits"⁴². The foreword of the above *Discrimination Cases Selection* claims that the percentage of the different discrimination cases selected reflects the current discrimination cases in China. If this is correct, pregnancy discrimination cases occupy at least one third within the total number of gender discrimination cases.

Another characteristic of the pregnancy discrimination cases brought to the court is that the cases usually occur in big cities like Beijing and Shanghai. This reflects that the litigation in the field of anti-discrimination law is still at the beginning stage. Information about laws and regulations on the protection of women's rights in employment is not widely spread

⁴⁰ See *Supra* note 20. pp.59

⁴¹ *Cases and Court Decisions*. http://www.novexc.cn/cases_court_decisions_main.html [Visited 16 March, 2012]

⁴² *The Selective Employment Discrimination Cases of People's Court and Arbitration Organization in China*. Edited by Wei Zhou. Chengdu (Sichuan University Human Rights Research Center), 2011

among women in small and medium sized cities. When their rights or interests are being violated, female workers in those cities don't know how to protect themselves through judicial measures. In order to give an overview on how pregnancy discrimination is dealt in People's Court, one typical case is given in the next section.

3.1.5 Case Study-*Ms. Ma v Beijing Jinxiu Mailin Investment Consulting Co. Ltd (2010)*

Fact

On 5th August, 2009, Ms. Ma was employed by Beijing Jinxiu Mailin Investment Consulting Co. Ltd (Mailin Co. herewithafter) with a one-year contract. On 6th of March 2010, Ms Ma was pregnant and gave the notice to the company.

Having not given any notice to Ms. Ma, Mailin Co. stopped paying Ms. Ma income since May. On the 2nd September, Ms. Ma had pregnancy complication and began to take a rest. After two-week legally guaranteed sick leave, Ms. Ma did not go back work and did not hand out sick leave certification. On 8th of October, Ms. Ma was dismissed by Mailin Co. in the name of absenteeism. Ms. Ma lodged a lawsuit to Beijing Haidian District People's Court.

Core Argument

This case took Labour Contract Law into mainly consideration. Article 42 of Labour Contract law provides that, in the case of any female worker is in her pregnancy, the employer may not discharge the labour contract in accordance with Articles 40 and 41. However, this does not apply to the situations in Article 39. That is to say, for example, if the employee seriously violates the bylaws of the employer, the employer may still discharge the labour contract regardless the pregnancy of the employee.

The core argument here is if the absenteeism belongs to serious violation of bylaw of the employer. Then the court turns to Article 4. Article 4 regulates how bylaw should be constituted, modified and determined. According to this article, the draft of bylaw should be discussed and determined after equal consultation by employers and labour union or representatives of workers.

The Court held that, according to Article 4, Mailin Company could terminate the labour contract. However, according to Article 50 in which procedure of terminating labour contract is regulated, Mailin Company did not go through the procedure so the terminating is invalid.

Court Decision

According to the Article 50 of Labour Contract Law, terminated labour contract issued by the Mailin Company did not comply with procedure so it was invalid. Ms. Ma got her income 9580 RMB back and was awarded economic compensation 2395 RMB.

Analysis

The protection for the pregnant women at workplace provided by the labour related laws is not sufficient in Mainland China. Although Labour Contract law prohibited employers to dismiss pregnant employees, there are some exceptions. In order to make pregnant employees resign, employers may “produce” evidence by putting pressure on employees so that the employees would make serious misconduct or behave incompetently. Then employers can “legally” dismiss pregnant employees. When such unfair treatment happens, there is no legal instrument for pregnant employees to seek for protection. In other words, there is no punishment for employers to intentionally look for a non-existing flaw of pregnant female workers.

Accordingly, the current enforcement mechanisms treat discrimination against pregnant employees as pure labour dispute. This actually puts employees in a disadvantage situation. Pregnant employees need more protection than normal workers from both emotional and physiological aspects. Without consideration of the special situation of pregnant employees, the trial can be very harsh towards them.

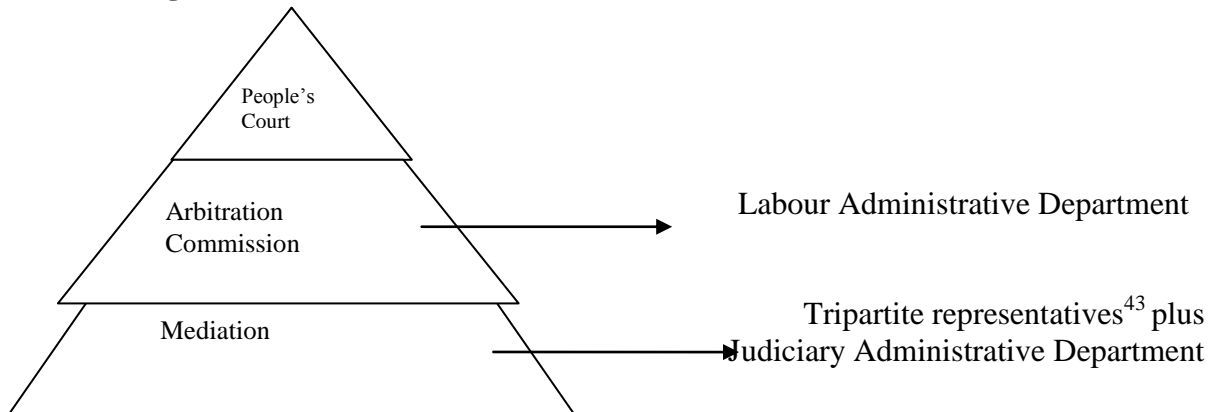
Consequently, the influence of such court practice is limited. Although the plaintiffs may get compensation, it does not mean that the employers really realize their wrongness and apologize what they did. To some extent, employers are willing to pay small amount of compensation to kick pregnant employees off since the supply of labour force exceeds the demand in the labour market. In this situation, there is a lack of awareness and sensitivity of anti-discrimination. It is hard to reach a consensus among society that pregnant women should not be treated biased in employment. Moreover, employers will consider women as the high-cost labor which makes women even in a harder position to get a job in the labour market.

3.2 Brief Assessment

From what discussed above, we can see that a comprehensive enforcement procedure concerning discrimination in employment including investigation (complaints handling), mediation, arbitration and litigation already exist in China. Unlike the practices in the most

countries of the world, i) there is no independent monitoring body; ii) discrimination complaints in the field of employment are mainly dealt with in the name of labour dispute rather than discrimination issue; iii) many political-administrative bodies and consultative bodies are getting involved in the different stage of the enforcement procedures aiming at complement each other's advantages and disadvantages. The structure could show in the Figure 3.1.

Figure 4.1 Enforcement Mechanism Structure



However, in practice, the distribution of the amount of the cases to the above four procedures does not look like the triangle, but rather like a diamond. Most cases go to the arbitration Commission, especially after the Law on the Mediation and Arbitration on Labour Dispute came into effects in 2008. More convenience and less cost makes pursuing redress through the arbitration channel is becoming more popular and widely-known. This also causes great challenges to the Arbitration Commission. Limited personnel facing vast amounts of cases is the most obvious one which makes “concluding cases within 45 days an impossible task”⁴⁴ It also raises the question whether other procedures before arbitration are being “neglected”. In order to answer this question, the powers, resources and functions of the Women’s Federation, labour inspectorate and Mediation Institutes are worth to be re-examined.

“Women’s Federation is a mass organization for the advancement of Chinese women of all ethnic groups in all walks of life.”⁴⁵ The offices of the Women’s Federation are set up at all administrative levels. Its widespread network, strong research team on women and gender issues as well as the function of participation in the formulation of law, regulations and policies concerning women makes Women’s Federation play an important role in

⁴³ Representatives of governments, employers and workers

⁴⁴ Liu, Hong and Chen, Lei. A Survey on the Operation of Mediation and Arbitration Law. Beijing, 2008. <http://acftu.people.com.cn/GB/67579/7333023.html> [Visited 18 March, 2012]

⁴⁵ ACWF brochure <http://www.women.org.cn/english/english/newsletter/ACWF%20brochure.htm>

developing supportive services for women. However, it is still a non-government organization which makes its mission to safeguard the legitimate rights and interests of women lack government authority. The lack of the actual government authority makes Women's Federation difficult to persuade the units to redress.

As for the Labour Inspectorate, its labour administrative government background and its inspecting function make it have enough authority to deal with complaints of the illegal acts in working units. In addition, it is supposed to have a larger role to play on law enforcement which could definitely contribute to the decrease of the labour dispute cases. However, as is mentioned above, the lack of resources is the main challenge faced by the current labor inspectorate. Moreover, as the innovative approach of the twin network is only piloted in some cities in 2009 and spread to other cities all over the China in 2011, the duties of publicizing laws to employers and gathering the data on each enterprise's employment practices are the two priority tasks in front of the new established LIB. While complaints handling seems to be put into the second place. But if awareness and compliance of the labour laws are improved among employers through the work publicizing laws by labour inspector, it is actually a way to deal with complaint from its original place. And it needs time to witness the effectiveness.

Mediation Institutes exist in forms of EMC, PMIs and other institutes with mediation functions established in towns and districts. This actually reflects that mediation as labour dispute measure remains finding its way to play an effective role in dealing with labour dispute. It is not a seldom situation that victims are often lack of confidence when confronted the mediation mechanism. Because Trade Union "usually did not do well at activating its primary levels to reduce violations of workers' rights"⁴⁶ so that employers took advantage of the situation"⁴⁷ in most cases.

Many hopes are attached to the development of these three types of mediation institutes in order to bring some positive changes. The EMC is supposed to be widely established among large and middle-sized enterprises. PMIs and other institutes with mediation functions are established in towns and districts directed towards small enterprises where most of the violations of rights and interests of workers are happening. New methods such as contractory professional persons to mediate disputes, carry out educational activities, form advisory groups constituted by leading figures from party committees and

⁴⁶ Pringle, Tim. *Trade Unions in China*. London and New York, (Routledge) 2010. pp. 158

⁴⁷ *ibid*

administrative departments and seek out the involvement of media etc. are being employed. Practices are various and are under testing. The aim of the efforts is to make mediation play a more and more important role in dealing with labour disputes. Undoubtedly, mediation will play this role. However, to what degree and for how long, it is still questionable.

5 Experiences from Hong Kong

5.1 Hong Kong Anti-Discrimination Legislation

5.1.1 International Obligations

The CEDAW Convention was extended to Hong Kong in 1996⁴⁸ and since then the Government of the Hong Kong Special Administrative Region (HKSARG) has submitted two reports, as part of China's report, to the CEDAW Committee. In the Concluding Report on Hong Kong's first report, "the CEDAW Committee urged the HKSARG to set up 'national machinery' for women."⁴⁹ In 2001, the Women's Commission (WoC) was set up under the Health and Welfare Bureau⁵⁰ to promote and protect the well-being and interests of women in Hong Kong.

5.1.2 Anti-Discrimination Legislation

Basic Law is the constitutional document for the HKSARG adopted on 4 April 1990 by the Seventh National People's Congress (NPC) of the P. R. China and came into effect on 1 July 1997.⁵¹ Art. 25 of the Basic Law provides that "all Hong Kong residents shall be equal before the law."

Hong Kong Bill of Rights was introduced during the British colonial administration aiming at "initiating a more (if not fully) representative Legislative Council"⁵² in early 1990s. "It reflects most of the civil and political rights in the ICCPR include explicit guarantees of equal protection of the law and non-discrimination in addition to equality before the law"⁵³

Besides the Basic Law and Hong Kong Bill of Rights, Hong Kong government has enacted four anti-discrimination statutes: Sex Discrimination Ordinance (SDO), Disability Discrimination Ordinance (DDO), the Family Status Discrimination Ordinance (FSDO) and the Race Discrimination Ordinance (RDO)⁵⁴. These four anti-discrimination statutes "prohibit discrimination on the grounds of sex, pregnancy, marital status, disability,

⁴⁸ The British government who ratified the CEDAW in 1985 did not apply CEDAW to Hong Kong during their colonial administration.

⁴⁹ Cheung, Fanny M. and Chung, Priscilla Ching. *Central Mechanisms: The Equal Opportunities Commission and The Women's Commission*. In: *Mainstreaming Gender in Hong Kong Society*. Hong Kong (The Chinese University Press) 2009. pp. 387

⁵⁰ At present, the WoC is under the Labour and Welfare Bureau.

⁵¹ *Some Facts about the Basic Law*. <http://www.basiclaw.gov.hk/en/facts/index.html> [Visited 20 April, 2012]

⁵² Loper, Kelly. *Right to Equality and Non-discrimination*. In: *Law of the Hong Kong*. Hong Kong (Sweet & Maxwell), 2011. pp 831-832

⁵³ *ibid*

⁵⁴ SDO, DDO, FSDO and RDO came into force in 1996, 1996, 1997 and 2009 separately

family status and race”⁵⁵ and are binding for both the government and the private sector. The areas of activities covered by these ordinances include both employment field and non-employment field, such as education, provision of goods, services and facilities etc. Equal Opportunity Commission (EOC) is the body established to implement and oversee the above four anti-discrimination ordinances in Hong Kong.

Moreover, the EOC issued Code of Practices (COPs)⁵⁶ on Employment under DDO, SDO, FSDO and RDO. “Codes of practice do not have the force of law, but rather are voluntary guidelines to assist employers to comply with ordinances and regulations.”⁵⁷ The motivation for employers to practice it lies on the fact that they did so will be taken into account in court or Labour Tribunal proceeding, or by a Commissioner in any investigation as evidence that the employers have taken all reasonable steps to comply with the related Ordinance. For instance, the statutory defense for an employer held to be vicariously liable for the unlawful acts of its employees is that it took "reasonably practicable steps" to prevent the unlawful act of discrimination or harassment from occurring.

5.1.3 Eliminating Pregnancy Discrimination in Hong Kong Legislative

Context

SDO

In relation to pregnancy discrimination, the SDO provides protection for female workers not to be dismissed (Section 11) or treated less favorably (Section 8) because of pregnancy. However, the burden is on the female complainants to prove she was being dismissed because of her pregnancy. Once it is found that the primary facts shown by the complainants could give proof that there is a possibility of discrimination, employer has a responsibility to give an explanation. If there is no reasonable or satisfactory explanation put forward, it will be inferred that there is discrimination as a matter of common sense.

The “but for” test (Section 5) are often employed to prove if pregnancy discriminations exist or not. The “but for” test means that a person would have treated the pregnancy worker more favorable “but for” her pregnancy. “Normally this requires the complaints to identify a real or hypothetical ‘comparator’ and to demonstrate that the comparator either

⁵⁵ *EOC Annual Report*. Hong Kong.

<http://www.eoc.org.hk/eoc/GraphicsFolder/showcontent.aspx?fld=content&itemid=969>

6 [Visted 5th April, 2012]

⁵⁶ The structure of Hong Kong legislation: Ordinances, Regulations and Code of Practice

⁵⁷ Erika Collins. *The Employment Law Review*. London (Law Business Research Ltd.) 2011. pp. 239

received or would have received better treatment than she received from the employer.”⁵⁸ Moreover, Section 4 of SDO provides that the decision to treat an employee less favorably may be the result of many factors, but if one of these factors is related to the employee’s pregnancy, the decision is deemed to be committed on the ground of the employee’s pregnancy under the Sex Discrimination Ordinance

In addition, the claim for victimization is also upheld by the SDO. Under the section 9 of SDO, “taking an adverse employment action against an employee because he or she has brought (or may bring) a legal claim, provide evidence or information in relation to a legal claim, or alleged that a person acted in violation of the discrimination ordinance”⁵⁹ is prohibited.

Employment Ordinance (EO)

Employment Ordinance (Chapter 57) also “provides protection from pregnancy ... discrimination.”⁶⁰ The EO is the principal piece of legislation governing conditions of employment in the non-government sector. It prescribes the minimum requirements of various employment rights, benefits and protection such as rest days, holidays with pay, paid annual leave, sickness allowance, maternity protection, severance payment, and long service payment, etc.

According to the EO, an employer is prohibited from dismissing a pregnant employee from the date on which she is confirmed pregnant by a medical certificate to the date on which she is due to return to work upon the expiry of her maternity leave if the employee has been employed under a continuous contract, and she has served a notice of pregnancy to the employer.⁶¹

If a pregnant employee is dismissed by her employer before she has served a notice of pregnancy, she may serve such notice immediately after being informed of her dismissal. Under such circumstances, her employer must withdraw the dismissal or the notice of dismissal.

However, under the EO, the employer is not prohibited from dismissing a pregnant employee under the following circumstances:

⁵⁸ J. Petersen, Carole. *Stuck on Formalities? A Critique of Hong Kong’s Legal Framework for Gender Equality*. In: *Mainstreaming Gender in Hong Kong Society*. Hong Kong, (The Chinese University Press) 2009. pp. 416

⁵⁹ Downey, Michael. *Hong Kong*. In: *The Employment Law Review*. London, (Law Business Research Ltd.) 2011. pp. 247

⁶⁰ Loper, Kelly. *Discrimination Law*. In: *Employment Law and Practice in Hong Kong*. Hong Kong (Sweet & Maxwell), 2010. pp 307

⁶¹ See Employment Ordinance Section 15

- the employee is summarily dismissed due to her serious misconduct;
- where it has been expressly agreed that the employment is on probation, the employee is dismissed for reasons other than pregnancy during the probation period of not more than 12 weeks.⁶²

5.2 Hong Kong Enforcement Mechanisms in Providing Protection against Pregnancy Discrimination

In Hong Kong, if discrimination on the basis of pregnancy happens in the field of employment, the victims could i) talk to NGO women's group; ii) talk to Union representative; iii) talk to company's equal opportunity officer; iv) complain to the labour department (within 12 month) and file a claim to the Labour Tribunal; v) lodge a complaint with the EOC (within 12 months); vi) institute civil proceedings at the District Court (within 24 months)

Like the situation in Mainland China, the role played by the first three channels is limited. For example, when a female worker who claims she had been discriminated against go to seek help from women's groups or trade unions, what women's group and trade union can do is to find out how the situation is, give her some advice on what she can do or tell her about her legal rights. Both women's groups and trade unions have no statutory right to engage employers into the investigation. As for the company's internal discrimination complaints, most of the local companies just deploy the equal opportunity officer's roles and duties to one of their existing staff members, say human resources director/manager. That means the designated staff member has to take up dual roles in his/her company. Therefore the neutral intermediary role within the company is not so authoritative. Comparatively, the Labour Department and the EOC played more important roles

5.2.1 Labour Department and Conciliation Service

The Labour Relations Division (LRD) of the Labour Department is responsible for the maintenance of harmonious labour relations in the non-government sector. Its main activities include:

- Providing in-person consultation service to employers and employees on matters relating to conditions of employment and their rights and obligations under the EO;

⁶² *Frequently Asked Questions about the Employment Ordinance, Cap. 57 Maternity Leave.* Hong Kong. http://www.labour.gov.hk/eng/faq/cap57h_whole.htm#Q5 [Visited 20 March, 2012]

- Providing voluntary conciliation service to employers and employees to help settle their disputes and claims.

Conciliation service provided by the 10 branch offices of the LRD is free of charge. In case of a labour dispute, if the party concerned requires conciliation, the conciliation officer will arrange a meeting “within four to five weeks after the request of the service has been put forward”⁶³. At the conciliation meeting, the conciliation officer assists both parties to understand the problem and analyze the situation, draws their attention to the relevant requirements under the EO, and facilitates them to seek a settlement which is acceptable to both parties. However, attendance at a conciliation meeting is voluntary for both parties. If either party is not willing to attend the conciliation meeting or the conciliation fails, an application for adjudication may be made to the Minor Employment Claims Adjudication Board (MECAB) or the Labor Tribunal (LT).

In 2010, the LRD handled 68 795 in-person consultations, 68 labour disputes and 20 434 claims.⁶⁴ The success of settlement rate is 72.9 per cent. A breakdown of the claims by case is shown in the Figure 5.1

Figure 5.1 A Breakdown of the Claims by Cause

Cause	Number of Claims in 2010
Termination of contract	9 726
Non-payment of wages	6 052
Non-payment of holiday pay/ annual leave pay/ rest day pay/ sickness allowance	2 238
Cessation of business	386
Retrenchment	137
Lay-off	58
Insolvency	46
Variation of terms of employment contract	45
Others	1 746
Total	20 434

Source: Labour Relation Division, Labour Department, Hong Kong

⁶³ Lam, Kitty. *The Operation of Labour Tribunals and Other Mechanisms for Resolving Labour Disputes in Hong Kong and Selected Places*. Research and Library Services Division Legislative Council Secretariat, 2004. pp.4

⁶⁴ “Labour disputes” refer to those cases which involve more than 20 employees and “claims” refer to cases which involve not more than 20 employees.

There is no separate breakdown on the number of claims concerning dismissals of pregnant employees in the published statistics. However, according to the enquiry response from the LRD, cases involving dismissals of pregnant employees are uncommon.⁶⁵

5.2.2 Minor Employment Claims Adjudication Board and Labour Tribunal

Both the MECAB under the Labour Department and the LT under Hong Kong judicial system serve to solve labour dispute through adjudication. Differentiated with arbitration, adjudication is usually considered as a legal trial, also referred to as court-based litigation. The actual process of arbitration and adjudication is much the same. However, “an award or order of the Board or Tribunal may be registered in the District Court in Hong Kong, as a result, becomes a judgement of the District Court and be enforced accordingly”⁶⁶.

Adjudication is a quick, informal and inexpensive way of settling disputes. Before entering into this process, conciliation by the LRD should have gone through. Another similarity between MECAB and LT in Hong Kong is that no legal representation on either side would normally be allowed before the Board or the Tribunal.

Employment Claims involving not more than 10 claimants for a sum of money not exceeding 8,000HKD per claimant are referred to MECAB. While, claims falling outside the jurisdiction of the MECAB are heard by the LT within the Judiciary.⁶⁷ The adjudication process carried out by the MECAB is much simpler. The hearing is conducted in public. An award or order will be made as soon as possible after the conclusion of hearing by the adjudication officer.⁶⁸ “In 2010, the board recorded 2 067 claims amounting to \$8,807,004 and concluded 2 112 claims with a total award of \$4,874,822.”⁶⁹ As for pregnancy related cases, the amount of claim are usually far more than 8,000HKD, claims are more likely to be filed with the LT.

“The LT is headed by a Principal Presiding Officer, under whom there are 12 Presiding Officers. The Labour Tribunal Registry handles all claims filed with LT, and provides support to Presiding Officers and Tribunal Officers.”⁷⁰ The party who wants to bring a

⁶⁵ Tai, Florence. “Re:Enquiry-Labour Relation Division” to Yuting HOU, 25 March 2012

⁶⁶ A Simple Guide to the Minor Employment Claims -Adjudication Board. Hong Kong, 2011. Labour Department

⁶⁷ Introduction to the Labour Department of the HKSAR Government. Hong Kong. <http://www.hkcljc.org/en/topics/employmentDisputes/theLabourTribunalAndTheLabourDepartment/introductionToTheLabourDepartmentOfTheHKSARGovernment/index.shtml> [Visited 20 March, 2012]

⁶⁸ See *Supra* note 64

⁶⁹ *Labour Department Annual Report 2010*. Hong Kong, 2010.

<http://www.labour.gov.hk/eng/public/iprd/2010/home/chapter3.htm> [Visited 21 March, 2012]

⁷⁰ See *Supra* note 63 pp.3

claim to the LT should firstly book an appointment for the filing of a claim. Then, the Tribunal Officer will interview the claimant to obtain relevant information and set the hearing date⁷¹. After the filing procedure, the Tribunal Officer will investigate the claim and interview the defendant. A summary of the facts will be prepared by the Tribunal Officer before the first hearing. During the first hearing, the Presiding Officer will explain the issues. If the parties agree to explore a possible settlement, a Tribunal Officer will be designed to assist the parties in negotiation. If the settlement could be reached, the Presiding Officer will make an order in court in accordance with such terms. If the settlement was not reached, a further hearing will be arranged. At the trial of the further hearing, the Presiding Officer will hear the case, allow the claimant and defendant to question each other and order the parties to provide further evidence. At the end, the Presiding Officer will deliver a judgement.⁷²

The percentage of cases settled before or at first hearing in 2010 and 2011 are 64.1% and 61.7% respectively. The LT does not keep statistics on the nature of claims among the cases settled.⁷³

Caseload and Case Disposal of the Hong Kong Labour Tribunal

	Caseload			Disposal*		
	2009	2010	2011	2009	2010	2011
- Cases	7 758	4 670	4 190	5 859	4 678	4 002
- Reviews	107	79	63	112	79	62
- Restore claims	115	70	67	109	77	61
- Set-aside awards	144	113	84	135	121	87
Total	8 124	4 932	4 404	6 215	4 955	4 212

Source: Hong Kong Judiciary Annual Report 2011⁷⁴

*: Case disposal refers to claims which have been concluded, including cases awards, dismissed, settled, withdrawn and transferred

For adjudication delivered by both MECAB and LT, claimant and defendant can appeal to the Court of the First Instance of the High Court on the ground that the award or order is erroneous in point of law or that the claim is outside the jurisdiction of the Board or

⁷¹ According to the labour Tribunal Ordinance, claims referred to the LT should be heard within 30 days.

⁷² Court Services and Facilities-Labour Tribunal. Hong Kong.

http://www.judiciary.gov.hk/en/crt_services/pphlt/html/labour.htm [Visited March 21, 2012]

⁷³ Enquiry response by the Hong Kong Labour Tribunal

⁷⁴ Hong Kong Judiciary Annual Report

2011. http://www.judiciary.gov.hk/en/publications/annu_rept_2011/

Tribunal. The appeal must be made by one party within 7 days from the date of award or order was served.

A refusal by the Court of the First Instance to grant leave to appeal is final. Otherwise, the Court of First Instance will hear and determine the appeal. Claimant and defendant may also apply for leave to appeal to the Court of Appeal. The Court of Appeal may grant leave to appeal if it considers that a question of law of general public importance is involved.⁷⁵

5.2.3 EOC

Organization Structure

EOC is a statutory body established in 1996 pursuant to the Section 63 of the SDO. EOC Board is responsible for the EOC operation which is comprised of one chairperson and 16 members who are appointed by the Chief Executive of Hong Kong⁷⁶. The current Chair person Mr. LAM Woon-kwong who was a high-level government official was appointed in 2010. The background of other members are diverse including lawyers, members of Legislative Council, accountant, professors, members of women’s group, members of disability association, persons from ethnic minorities, business persons etc. The Board is comprised of four Committees: Legal and Complaints Committee (LCC), Policy and Research Committee (PARC), Community Participation and Publicity Committee (CPPC), Administration and Finance Committee (AFC) (see Chart I)

Chart I EOC Structure



Source: Annual Report of the Equal Opportunity Commission 2010/2011. p. 19

⁷⁵ *ibid*

⁷⁶ Chief Executive of Hong Kong is the President of the Executive Council of Hong Kong and head of the Government of the Hong Kong Special Administrative Region.

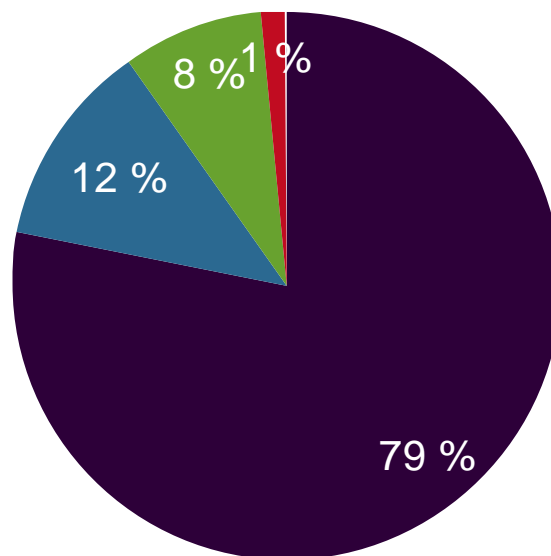
The chairperson is the ex-officio Member of the four committees. And 16 Members join at least one of the four committees according to their expertise. The Board meets four or five times each year to monitor the work of the EOC and offer advice to the EOC.

The Relationship between the EOC and HKSAR Government

The EOC is funded by Hong Kong government, but “[it] operates independently in carrying out its tasks and duties”⁷⁷ As per Section 63(7) of the Sex Discrimination Ordinance, the EOC “shall not be regarded as a servant or agent of the Government or as enjoying any status, immunity or privilege of the Government.” “Accordingly, the EOC has autonomy over the management and control of its activities and budget.”⁷⁸ At the same time, the EOC has the responsibility to ensure its effective operation and administration, high standard of staff conduct as well as the prudent use of the government funds. Both external and internal controls are used to guarantee the transparency of the EOC. The following chart is the fiscal expenditure of the EOC in 2010-11

Figure 5.1 Fiscal Expenditure of the EOC

- Staff salaries and other benefits and allowances HK\$57M
- Office rentals HK\$9M
- Publicity and public education expenses HK\$6M
- Legal fees HK\$1M



Source: Annual Report of the Equal Opportunities Commission

⁷⁷ See Supra note 1
⁷⁸ *ibid*

The total expenditure of the EOC in 2010-11 is around HK\$81,000,000⁷⁹, of which Staff salaries accounts for the most part. The legal fees which are mainly used to pay for the legal assistant service only account for 1% of the expenditure. As regard the source of the expenditure, 98% of them is funded by Hong Kong Government and 2% of them is by providing training services to clients and others. In order to avoid a conflict of interest, external donations and sponsorship are not accepted by the EOC.

Work of the EOC

According to the function and in keeping with the commission structure, the work of the EOC include: a) complaints handling and legal assistance; b) education and promotion; c) policy and research.

a) Complaints handling and legal assistance

Complaints handling

Complaints handling is at the core of the EOC work which is the most important function for the EOC to eliminate discrimination under the SDO, the FSDO, the DDO and the RDO.

The method adopted by the EOC to handle the discrimination complaints is conciliation. Unlike mediation⁸⁰ and arbitration⁸¹, “conciliation may be defined as a strategy whereby a third party assists the parties to a dispute to reach a settlement.”⁸² During conciliation, “information relevant to the case will be examined and the parties will be given adequate opportunities to respond and rebut.”⁸³ It aims at eliminating misunderstandings based on incorrect assumptions or information and to achieve a real change in attitude. However, conciliation is a voluntary process. Should either party decline, conciliation could not be carried out. The remedies obtained by conciliation could be reemployment, a letter of apology, enactment of equal opportunities policies in companies, financial settlement etc. Those in Hong Kong who feel that they have been discriminated against can lodge a complaint with the EOC within 12 months. The complaint should be handed out in writing. After receiving the complaints, the EOC staff will do an assessment on the justification

⁷⁹ 1 Hong Kong Dollar = 0.745 NOK

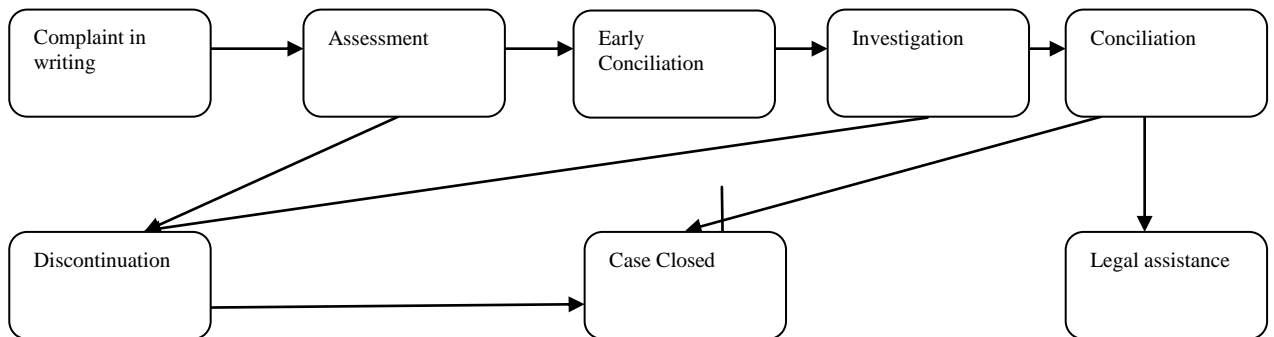
⁸⁰ Mediation is essentially a “facilitative function”. The mediator like the conciliator conveys information and clarifies issues but, in addition, gives a view on the strengths and weaknesses of a case and recommends a settlement. The process remains voluntary although any agreement reached can be binding.

⁸¹ Arbitration is a process whereby a third party makes an award having heard the cases for both parties. The parties lose their control of the settlement entirely, as the decision is the arbitrator’s not that of the party.

⁸² Bob Hepple QC. *Equality: A New Framework*. Oxford (Hart Publishing), 2000. pp. 109

⁸³ See Supra note 53

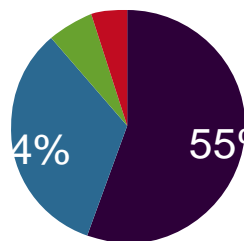
within 3 days. Uncertainty of the respondent, lapsing over 12 months, outside the EOC jurisdiction could be the grounds for the EOC not to discontinue the complaints. If the case is accepted, the EOC will do “early conciliation”. This approach was fully implemented in October 2011⁸⁴. “Under this approach, the EOC officer will invite the complainant and respondent to attempt conciliation before the EOC completes its investigation.”⁸⁵ If early investigation fails, the EOC will proceed to a full investigation. By means of investigation, the complaints which are lack of substance will be discontinued. While for the complaints likely to be an unlawful act, the EOC will “resolve the matter through post-conciliation, helping the parties involved to reach a settlement.”⁸⁶ The conciliation is free of charge. The above procedure is reflected in the following flow chart:



In the year 2010-11, The EOC handled 1119 complaints of which 835 cases are new complaints and 284 cases are carried over from the previous year. As for the 835 new complaints, “the largest proportion was complaints under the DDO (461), followed by the SDO (280), RDO (54) and FSDO (40) (See Figure 5.2)”⁸⁷

Figure 5.2 835 New Discrimination Complaints Received

■ DDO (461) ■ SDO (280) ■ RDO (54) ■ FSDO (40)



Source: Annual Report of the Equal Opportunities Commission

⁸⁴ *EOC hails use of early conciliation*. Hong Kong, 2011. http://www.rthk.org.hk/rthk/news/englishnews/20111215/news_20111215_56_805318.htm [Visited 18th March, 2012]

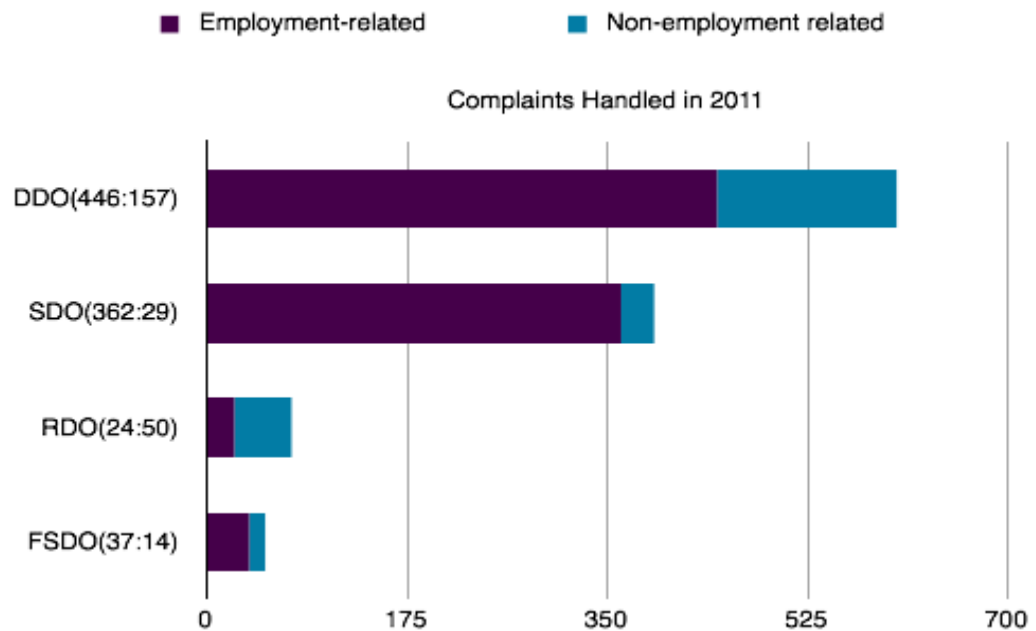
⁸⁵ See *Supra* note 60. pp.425

⁸⁶ See *Supra* note 55

⁸⁷ *ibid*

As for the 1119 cases under investigation in 2010/2011, the number of the cases handled under DDO, SDO, RDO and FSDO between employment field and non-employment field show in the [Figure 5.3](#). All these complaints are handled by the 20 staff members who work in the Operations Division of the LCC. “The successful conciliation rate was 68% during the year.”⁸⁸ According to the Service Standard listed in EOC’s Performance Pledge, a complaint case should be concluded within 6 month. For the year 2010-11, 78% cases were concluded within 6 month, compared to 75% of the performance target.

Figure 5.3 1119 Complaints Handled



Source: Annual Report of the Equal Opportunities Commission

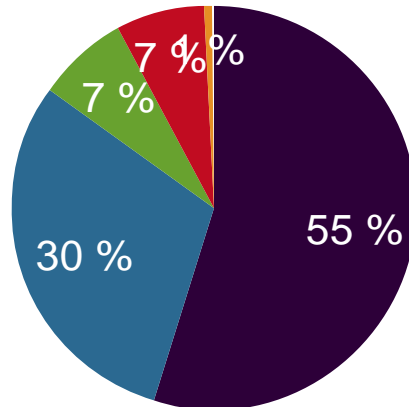
Pregnancy discrimination occupies the top rank of cases lodged under the SDO (See [Figure 5.4](#)) and most of the pregnancy discrimination complaint cases to the EOC are in the employment field. “They often take one of the following forms: verbal criticism during the pregnancy period, applying pressure to resign, less favorable treatment in bonus calculations or salary adjustments, dismissal upon return from maternity leave, or posts being taken over permanently by leave relief staff.”⁸⁹

⁸⁸ *ibid*

⁸⁹ *ibid*

Figure 5.4 SDO Complaints

- Pregnancy discrimination
- Sexual harassment
- Sex discrimination
- Victimization
- Marital status discrimination



Source: Annual Report of the Equal Opportunities Commission

Since the establishment of the EOC in 1996, up to the end of 2011, there is a total amount of 1719 pregnancy discrimination handled by the EOC which accounts for around 15% of the total complaints under all the four Anti-discrimination Ordinances. Out of the 1719 complaints, 26.6% were successfully conciliated, 14.4% were failed, 5.3% were settled by early resolution, and 51.3% were discontinued. Discontinued investigations were mainly because of i) lacking in substance, ii) withdrawn by complainant⁹⁰

Legal assistance

When a complaint cannot be settled after conciliation, complaints can apply for the legal assistance from the EOC to file civil suit in the District Court. The legal assistance may include:

- giving legal advice by EOC lawyer;
- providing legal services of gathering and assessment of further information or evidence;

⁹⁰ The EOC concludes that lacking in substance is the main reason, while some independent researcher finds that withdrawn complaints were happened more often than the reason given by the EOC. As for the reason why those complainants withdraw their complaints, some researcher thought that many women simply grow tired of the process and decide that the final remedy is unlikely to justify the effort involved.

- representing in legal proceedings by EOC lawyers or by lawyers in private practice engaged by the EOC.

However, if the applicants have not been through the conciliation, EOC will not provide legal assistance. Moreover, even if the qualified complaints apply for the legal assistance from the EOC, “there is no guarantee that a request for legal assistance will be granted.”⁹¹ The threshold of granting legal assistance is relatively high. Cases which are not involving important principle and have weak evidence will be declined. The high threshold conforms to the one million budgets of legal fees. Since the cases which granted legal assistance to commence legal proceedings were usually complex and the EOC also wanted to ensure a good prospect for success in court, lawyers in private practice are supposed to be invited. While Hong Kong has high legal fees, it is understandable why the EOC provides legal assistance to a limited number of complaints.

As regard pregnancy discrimination, there is no case completed at the court after 2004. But on 20th February 2012, the EOC lodged a lawsuit in the District Court on behalf of a shop manager of a beauty salon who alleged that she was discriminated against by her former employer on the ground of her pregnancy by demoting her and then dismissing her when she rejected the demotion. “This is the 14th time for the EOC to issued legal proceedings under the SDO for the pregnancy discrimination cases since it was established in 1996.”⁹² “The EOC finds that working pregnant women still face rampant discrimination. By taking this case to court, the EOC hopes to raise public awareness of the employment right of pregnant women under the Sex Discrimination Ordinance, and to remind employers that it is illegal to take adverse action against an employee because of her pregnancy.”⁹³ Since the year 2012 is the year of dragon according to the Chinese lunar calendar, many couples would like to give birth to a “dragon” baby this year. By bringing this case to the court, the EOC want to prevent pregnancy discrimination cases.

b) Education and Publicity

“Fostering equal opportunities values, enhancing understanding of the anti-discrimination ordinances and increasing public awareness among the community in Hong Kong”⁹⁴ are the main commitment for the EOC under its education and publicity mandate. The

⁹¹ See *Supra* note 60. pp. 428

⁹² A Shop Manager of a Beauty Salon Asked for Financial Compensation of 290,000 HKD on the Dismissal of Pregnancy Discrimination. In: Mingpao. 22nd February, 2012

⁹³ EOC Gives Legal Assistance in Pregnancy Discrimination Case. Hong Kong, 2012. <http://www.eoc.org.hk/eoc/GraphicsFolder/ShowContent.aspx?ItemID=9953>

⁹⁴ See *supra* note 57

approaches and promotion tools adopted by the EOC are diversified. Different kinds of media sources are adopted, for instance, Metro Advertisement campaign, TV Document-Drama “A Mission for Equal Opportunities”, Radio Program, Education Leaflets, Newsletters and the EOC YouTube Channel⁹⁵. In order to ensure successful communication, when targeting different groups, such as, the general public, students and educators, employers and employees, the EOC use different strategies. They provide training workshops on equal opportunities as well as consultancy services for the employers. They also offer Participation Funding Program to NGOs, community groups and schools. Those organizations could apply for projects on the subject of equal opportunities and non-discrimination. Once the initiated projects are approved, each organization will be granted 20,000-50,000 HKD to implement their projects. In 2011, 51 projects were carried out and 12% of them are concerned with Sex Discrimination.

As these activities are carried out, the publicity and public education of the Commission are strengthened. “To date, the majority of people in Hong Kong are aware of the EOC and that it could be used a redress mechanism if the aggrieved persons so desire.”⁹⁶

c) Policy and Research

The policies and research undertaken by the EOC reflect social concerns about discrimination issues and give a guideline for society to eliminate discrimination. With the help of statutory status as well as publicity and education function, the policies and research carried out by the EOC have had a great influence on the public and have made concrete changes in society. In 2009/2010, the EOC’s PARC made a survey on public attitudes towards persons with a disability and from different racial groups as well as a study on equal learning opportunities for students with disabilities. In 2010/2011, the policy area identified by PARC is called Access for All. Its priority focus was on physical access for persons with disabilities and the Government has made commitments to invest 1.3 billion HKD in improving and retrofitting access to all. In addition, study on gender stereotyping and its impacts on male gender and study on sexuality have also been carried out in 2010/2011, advertisement campaign supplemented to consolidate the result gained by the policies and research.

⁹⁵ For example Videos of EOC-Pregnancy Discrimination –Unlawful Act <http://www.youtube.com/watch?v=itqRspke1Fs> and EOC-Pregnancy Discrimination- Caring Boss <http://www.youtube.com/watch?v=89GyU-Fnws0>

⁹⁶ See *Supra* note 58

5.2.4 Case Study-Chan Choi Yin v Toppan Forms (Hong Kong) Ltd (2002)

Facts

Chan Choi Yin had been employed by the Toppan Forms Ltd as an Account Manager since 1997. Around a year later, she became pregnant. After giving pregnancy notice to the Toppan Forms, Ms Chan faced a series of less favorable treatments such as derogatory remarks made by the senior management towards her pregnancy, repeated demands by the supervisor compelling her to return to work during sick leave and black-storm warnings and difficult working conditions, etc. These less favorable treatments continued when Ms. Chan resumed duty upon the completion of her maternity leave in 1999. Particularly, she was being transferred to another division against her will, resulting in a further reduction of income, as well as a demotion. As a result, Ms. Chan pursued to lodge a complaint with the Hong Kong EOC. Shortly after, Ms. Chan was told to withdraw her complaint lodged or she would be dismissed. Eventually she was dismissed in 2000.

Legal Background

In Hong Kong, discrimination on the basis of sex, marital status and pregnancy, and sexual harassment are made unlawful under the Sex Discrimination Ordinance (1995).

For this case, s.8 (a), s. 9(1) and s. 11 (2) of the SDO are related

S. 8(a) provided that treating a person who is pregnant less favorable than the person who is not pregnant constitute the discrimination against woman.

S.9 is concerned about discrimination by way of victimization.

S.11(2) prescribes that, in case of a women employed in Hong Kong, it is unlawful to discriminate against her by dismissing her.

Burden of Proof

The burden is on Ms. Chan to show that the less favorable treatments towards her were because of her pregnancy. “Once the Court is satisfied that Ms. Chan has shown from the primary facts that inferences can be drawn that disclosed a possibility of discrimination, the Court will look to the employer for an explanation.”⁹⁷ Moreover, even though the less favorable treatment is done for two or more reasons but one of which is pregnancy, it will be treated for the reason of pregnancy. If employer could not put forward reasonable or satisfactory explanation, “the Court will draw an inference of discrimination as a matter of common sense.”⁹⁸

⁹⁷ Chan Choi Yin v. Toppan Forms (Hong Kong) Ltd. DCEO 6/2002, Para 68

⁹⁸ *ibid*

Court's Decision

The Toppan Forms had discriminated against Ms. Chan. Ms Chan was awarded a total of HK\$544,156.15 and the breakdown of the damages was as follows:

Loss of earnings	HK\$164,505.20
Future loss of earnings	HK\$179,650.95
Injury to feelings	HK\$200,000.00
Total	HK\$544,156.15

5.3 Brief Assessment

According to the information I got through my fieldwork in Hong Kong, pregnancy discrimination is more common towards new mothers who resume duty shortly after given birth. “Many employers think that as long as they fulfill the requirements of the EO i.e. given 10 weeks paid maternity leave, they can fire the new mother.”⁹⁹ And the reason for employers to dismiss “new mothers” is that “new mothers” seem to be considered as family-oriented and not working hard. Moreover, the employers are worried that “new mothers” want to have another baby in the near future. In order to “reasonably” dismiss new mothers, some employers may attempt to put pressure on the pregnant female worker so that she will make a serious misconduct. However, after SDO came into effect in 1996, female workers have a tool to defend their rights against malicious pressure from the Employer. Dismissing a female worker, no matter during or after her maternity leave, because of her pregnancy is a direct evidence of discrimination. Furthermore, both less favourable treatment because of pregnancy and victimization are prohibited under the SDO.

As the body to implement SDO, the EOC is the most important mechanism in providing protection against pregnancy discrimination. Compared with Labor Department and Labour Tribunal, it deals with unlawful dismissals as discrimination issues rather than labour disputes. When employment field cases could be covered by both EO and SDO, the victim would more likely to file the complaints to the EOC. On the one hand, their rights and interests are protected in every aspect of employment under SDO; on the other hand, the victim may get legal assistance from the EOC which makes them have more chance to

⁹⁹ *FAQs on Pregnancy Discrimination.* Hong Kong. http://www.eoc.org.hk/eoc/graphicsfolder/faq_pd.aspx [Visited 22nd March, 2012]

win the case and get the compensation. Another point which makes the EOC more popular than other enforcement mechanisms is its right to bring the judicial review case against government.

The recommendation for the establishment of Equal Opportunity Tribunal has been raised since 2009. “The aim is to provide a user-friendly and more flexible judicial system, in order for discrimination cases to be adjudicated promptly.”¹⁰⁰ If this can be realized, it will greatly promote the access to anti-discrimination legislation. The budget for legal assistance provided by the EOC is only HK\$ 1 Million per year which means only 3 or 4 cases would be brought to the court with the assistance of the EOC. If the Tribunal is in place, more case would be heard in public.

With many activities carried out to increase public awareness, the EOC successfully advocates the conception of non-discrimination and equality. More and more Hong Kong people understand their rights and obligations under anti-discrimination legislation. It could be said that the EOC not only provide redress for discrimination, but also “foster an inclusive society in which all individuals are treated with respect and dignity”¹⁰¹.

¹⁰⁰ See *Supra* note pp.53

¹⁰¹ EOC. We As One. Hong Kong.

<http://www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=welcome%20message> [Visited 3rd May, 2012]

6 Experiences form Norway

6.1 Legislation

6.1.1 International Obligations

At the international level, Norway ratified CEDAW without reservation on 21 May, 1981 and its Optional Protocol to the CEDAW on 5 March 2002. In 2005, CEDAW and its Optional Protocol was incorporated into the Norwegian legislation through the Gender Equality Act. Since June 2009, the CEDAW and its Optional Protocol have been incorporated into the Norwegian Human Rights Act and given precedence when in conflict with domestic law.”¹⁰² In addition, Norway has ratified three important ILO Conventions concerning the matter of equality between man and woman, inter alia: Equal Remuneration Convention, 1951 (No. 100), Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and Workers with Family Responsibilities Convention, 1981 (No. 156).

6.1.2 European Union Directives Implemented in Norway

“As Norway is a party to the European Economic Area Agreement (EEA), a number of EU Directives have been implemented in Norway.”¹⁰³

The EU directives in relation to gender equality, such as Directive 2004/113 implementing equal treatment between men and women in access to and supply of goods and services and Directive 2006/54 implementing equal treatment between men and women in matters of employment and occupation, which have already been implemented in the EEA agreement, are covered in Norwegian national legislation mainly through the the Gender Equality Act (GEA)¹⁰⁴..

The EU non-discrimination directives-Directive 2000/78 establishing a general framework for equal treatment in employment an occupation and Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin-are not implemented in the EEA agreement. “However, the [Norwegian] government has committed to having as high or higher standards in its work against discrimination as the requirements of the EU.”¹⁰⁵ Directive 2000/78 is thus implemented through chapter 13 of

¹⁰² Committee on the Elimination of Discrimination against Women. *Consideration of reports submitted by States parties under article 18 of the CEDAW-8th periodic report of States parties, Norway*. CEDAW/C/NOR/8, 2010

¹⁰³ Noss, Cecilie Ostensen. *Gender Equality in Norway*. For: European Commission for Democracy through Law (Venice Commission). Strasbourg, 2006. pp.3

¹⁰⁴ GEA came into force in 1970, and has amended several times, most recently in 2005

¹⁰⁵ See Supra note 102. pp. 6

the Working Environment Act (WEA)¹⁰⁶ and in Norwegian Anti-discrimination and Accessibility Act (AAA)¹⁰⁷, whereas Directive 2000/43 is implemented by Norwegian Anti-discrimination Act (ADA)¹⁰⁸.

6.1.3 Norwegian Anti-Discrimination Legislation

At the domestic level, “the non-discrimination principle in the Norwegian legal system is acknowledged in different statutes”¹⁰⁹

The Norwegian Constitution, “the highest source of national law, has no provisions regarding discrimination, neither on grounds of sex”¹¹⁰ However, over the last decades, a number of provisions regarding human rights have been added. For example, section 110 (c) proclaimed that “it is the responsibility of the authorities of the State to respect and ensure human rights...”

The Human Rights Act of 1999 aims at strengthening the status of human rights in Norwegian law. International treaties incorporated into the Human Rights Act takes precedence over any other conflicting statutory provision.¹¹¹ Thus in the event of conflict between the conventions incorporated in the Human Rights Act and other Norwegian legislation, the conventions will take precedence over other Norwegian Statutes.

There is not a unified anti-discrimination legislation in Norway. The Norwegian legislative framework for addressing discrimination issues is constituted by four different acts: the GEA, ADA, WEA and AAA. GEA promotes gender equality in all sectors of society. According to this Act, actions that “place a woman in a worse position than that in which she otherwise would have been because of pregnancy belongs to ‘direct differential treatment’”¹¹². ADA prohibits discrimination based on ethnicity, national origin, descent, skin color, language, religion belief.¹¹³ The Act applies in all areas of society except for family life and personal relationships.¹¹⁴ WEA prohibits discrimination on the basis of political views, membership of a trade union, sexual orientation, disability or age.¹¹⁵ The scope of the WEA covers all aspects of employment from the initial advertisements of

¹⁰⁶ WEA came into force in 2004

¹⁰⁷ AAA entered into force on 1st January, 2009

¹⁰⁸ ADA entered into force in 2006

¹⁰⁹ Norwegian Center for Human Rights, University of Oslo. *CEDAW 39th session-consideration of the seventh periodic report of Norway*. Oslo, 2007

¹¹⁰ Mclimans, Else Leona. *A Comparative Study on Access to Justice in Gender Equality and Anti-Discrimination Law*. Belgium, (Milieu Ltd) 2010. pp.6

¹¹¹ Human Rights Act Section 3

¹¹² GEA Section 3

¹¹³ ADA Section 1

¹¹⁴ ADA Section 3 the first sentence

¹¹⁵ WEA Section 13-1

posts until the termination of the work contract, such as pay and working conditions, training and other forms of competence development, appointment, relocation and promotion.¹¹⁶ Moreover, both part-time workers and contract workers are covered by the WEA. The purpose of AAA is to promote equality, and ensure equality opportunities for and rights to social participation for all persons regardless of disabilities, and to prevent discrimination on the basis of disability. Like the ADA¹¹⁷, the AAA applies to all areas of society with the exception of family life and other relationships of a personal nature¹¹⁸.

6.1.4 Eliminating Pregnancy Discrimination in Norwegian Legislative Context

With regard to pregnancy discrimination, prohibitions are mainly covered by GEA and WEA. Section 15-9 of the WEA provides protection against dismissal during pregnancy. According to this section, an employee who is pregnant may not be dismissed on grounds of pregnancy. Furthermore, pregnancy will be deemed to be the reason for dismissal of a pregnant employee unless other grounds are shown to be highly probable. As regards GEA, protection for the pregnant women is mainly covered by section 4. Under section 4, female workers should be treated equally with male workers in employment and occupation for job advertisement, recruitment, promotion and dismissal or layoff. In particular, section 4 (3) proclaims that during the hiring process, including during the interview, the employer may not ask the applicant to provide any information on pregnancy.

Once the complainant provides information that gives reason to believe that pregnancy discrimination has taken place, such discrimination shall be assumed to have taken place. The burden of proof then shifts to the employer who must substantiate that such discrimination has not occurred or such circumstance is because of other grounds rather than pregnancy discrimination.¹¹⁹ This principle also applies to victimization. Protection against acts of victimization is fully implemented by GEA section 3(5), and WEA section 2-5. Accordingly, it is not permitted to make use of reprisals against any person who has submitted a complaint regarding a breach of provisions of the discrimination legislation, or who has stated that a complaint may be submitted.

¹¹⁶ WEA Section 13-2

¹¹⁷ AAA Section 1

¹¹⁸ AAA Section 2

¹¹⁹ GEA section 16, WEA section 13-8

6.2 Norwegian Enforcement Mechanisms in Providing Protection against Discrimination

In Norway, there are mainly three bodies that have the power to assess cases of discrimination: i) Dispute Resolution Board; ii) Equality and Anti-discrimination Ombud and Equality Tribunal; iii) ordinary courts, such as, district court or special court, such as, labour court.

6.2.1 Dispute Resolution Board (DRB)

The Dispute Resolution Board was an institution created by the WEA. When disputes concerning working conditions constitute a breach of some provisions of WEA, such as, working hours (S. 10-2), overtime (S.10-6), maternity leave (S.12-4) as well as preferential rights of part-time employees (section 14-3) etc., the party who want to make a complaint should bring disputes to the DRB for decision before brought to the courts. The Board is an independent regulatory body, which is administratively subordinate to the Ministry of Labour.¹²⁰ The Ministry of Labour is responsible for regulating the procedural rules of the Board, for example, appointment of the Board's members, time limits for bringing matters before the Board¹²¹ etc. The Labour Inspection Authority acts as a secretariat for the Board. The Board has three permanent members including a chairman and two members who are appointed for each case submitted. The chairman is appointed by the King and should have a law degree and especially insight into workplace issues.¹²² The other two permanent members are "lawyers from the Confederation of Norwegian Enterprise and the Norwegian Trade Union Confederation"¹²³ The members appointed specifically for each case are appointed on the recommendation of the concerned parties on each side. These two members are to be called "industry members" because they shall be connected to the industry that are affected in the case.

The establishment of the DRB aims at providing a fair, swift and efficient institute to resolve disputes between the parties. The number and type of disputes brought before the DRB from 1 January 2006 to 1 October 2008 is showed in the following Table

¹²⁰ Bråten, Mona. *Evaluering av tvisteløsningsnemnda etter arbeidsmiljøloven*. Fafo 2009. pp.10

See also WEA Section 18

¹²¹ Regulations on Dispute Resolution Board for the Working Environment Act, Section 3 <http://translate.google.com/translate?client=safari&hl=en&ie=UTF8&oe=UTF8&u=http://www.lovdata.no/cgi-wift/ldles%3Fdoc%3D/sf/sf-20051216-1569.html> [Visited 2nd April, 2012]

¹²² *ibid*

¹²³ *ibid*

**Table 6.1 Disputes brought before the Dispute Resolution Board 2006-2008
Number and type of disputes brought before the Dispute Resolution Board 2006-2008, actual numbers**

Sector	Total	Exception from night work	Flexible working arrangements	Reduced working time	Exception from overtime work	Parental leave	Educational leave	Preferential rights of part-time employees
Public	83	5	3	17	1	2	9	46
Private	27	0	6	11	0	1	5	4
Total	110	5	9	28	1	3	14	50

Source: Bråten, Mona Evaluation of the Dispute Resolution Board established by the Working Environment Act, First period of activity 2006-2008 (Own translation) (Evaluering av tvisteløsningsnemnda etter arbeidsmiljøloven, Første funksjonsperiode 2006-2008), Fafo-report no. 2009:3

Cases of dispute shall be sent to the Secretariat of the Board to assessment in writing. The accepted cases will be discussed in the Board meetings and the final decisions are passed by simple majority and sent to the parities. On average, it takes 159 days from dispute submission to the Board to judgement rendered by the Board.¹²⁴

The Board's service is free. The administrative decisions made by the Board are binding. "The DRB has no other sanctions than their decisions. The parties must apply to the District Court for leave to appeal if they do not agree with the boards' decisions or if they want to claim compensation for lost income etc."¹²⁵ The time limit for bringing the dispute before the courts is eight weeks from the date of the Board's decision. In many cases, only a few cases have gone on to the courts

6.2.2 The Equality and Anti-discrimination Ombud and the Equality and Anti-discrimination Tribunal

Grown out of the Gender Equality Ombud which was originally created by the Gender Equality Act, the current Equality Ombud was established in 2006 with an expanded mandate. The responsibility of the Ombud is to monitor and contribute to the

¹²⁴ See *Supra* note 120. pp. 11

¹²⁵ Enquiry reply by the Dispute Resolution Board

implementation of a series of equality and anti-discrimination Acts including GEA, ADA, WEA and AAA etc as well as Norwegian law's compliance with the ratified interational treaties such as CEDAW and CERD. The Ombud is an independent public administrative agency, but is subject to the administration of the Ministry of Children, Equality and Social Inclusion under the provisions of the Anti-discrimination Ombud Act. The genuine equality promoted by the Ombud is not only in sphere of working life, but also in other social sectors irrespective of gender, ethnicity, national origin, descent, skin colour, language, religion or belief.

A person who claims to be a victim of discrimination may bring the complaint in writing for the Ombud. The Ombud will investigate the complaint by demanding information and documentation from the parties. If necessary, the Ombud may also require assistance from the police. After investigations, the Ombud will give an opinion as to whether or not the prohibition against discrimination has been violated. If a breach is found, the Ombud will usually seek to recommend the party who has been in breach of the law to correct the wrongness voluntarily. "In many cases, the employers will follow the Ombud's recommendation and obey her suggestion of redress to avoid the case being taken to the Equality tribunal or court."¹²⁶ Every year the biggest cause of complaints received by the Ombud is on the basis of gender discrimination. And most of the enquiries about gender discrimination lies in the area of pregnancy discrimination. The causes are focus on temporary female workers and "the typical situation is that women with temporary jobs do not have their working relationships extended when they are pregnant or go on maternity leave."¹²⁷ In addition to issue opinions on complaints, the Ombud also provides advice and guidance with regard to the legislation within its mandate¹²⁸ and involve disseminating information about anti-discrimination protection to various groups¹²⁹.

The decision of the Ombud is not legally binding. Either of the parties not satisfied with the Ombud's statement may refer the complaint to the Equality Tribunal. Same as the Ombud, the Tribunal is also an independent pulic administrative agency whose members are appointed by the King. The Tribunal consists of a chairperson, a deputy chairperson and six other members. In addition, there are other four deputy members for substitution.

¹²⁶ See Supra note 102. pp. 16

¹²⁷ LDO. *Discrimination on grounds of pregnancy*. Oslo, 2010 <http://www.ldo.no/en/Legal-duties/-Discrimination-on-grounds-of-pregnancy/> [Visited 3rd April]

¹²⁸ The Anti-Discrimination Ombud Act (AOT) Section 3, last paragraph

¹²⁹ Norwegian NGOs. NGO Shadow Report to CEDAW 2011. Oslo, 2011. pp.12

“Most of the members are of the legal profession.”¹³⁰ When dealing with the cases, the members are divided into two divisions with five members each. The chairperson and the deputy chairperson participate in both divisions. The tribunal’s function is to handle the cases that are brought before it with the recommendation of the Ombud. At the trial of the hearing, the chairpersons and members will hear the defence of the claimant and defendant. In most cases, the judgement will be delivered at the first hearing. Until the March of 2009, the Tribunal had handled 81 cases in total. The type and number of the cases brought before the Tribunal is shown in the following table. The Tribunal’s administrative decisions are binding. “However, neither the Ombud, nor the tribunal has the right according to the law to award damages or financial compensation. Where a party does not pay compensation voluntarily, the victim may bring an ordinary complaint before the courts.”¹³¹ The legal proceedings for the review of an administrative decision made by the Tribunal must be brought within three months of receipt of notification of the decision.¹³²

Table 6.2 The Number and Type of the Cases Brought before the Equality Tribunal by March 2009

Discrimination Grounds	case number
Maternity leave	19
Equal pay for men and women	8
Other gender related grounds	22
Age	9
Ethnicity	15
Language	3
Disability	2
Non-membership of trade union	1
Total	79

Source: The Norwegian Equality Tribunal Website¹³³

The Ombud and the Tribunal is a free and low threshold complaint system but not compulsory which means discrimination cases can be brought directly before an ordinary

¹³⁰ The Norwegian Equality Tribunal <http://www.diskrimineringsnemnda.no/wips/1416077327/>

¹³¹ See *Supra* note 110. pp. 16

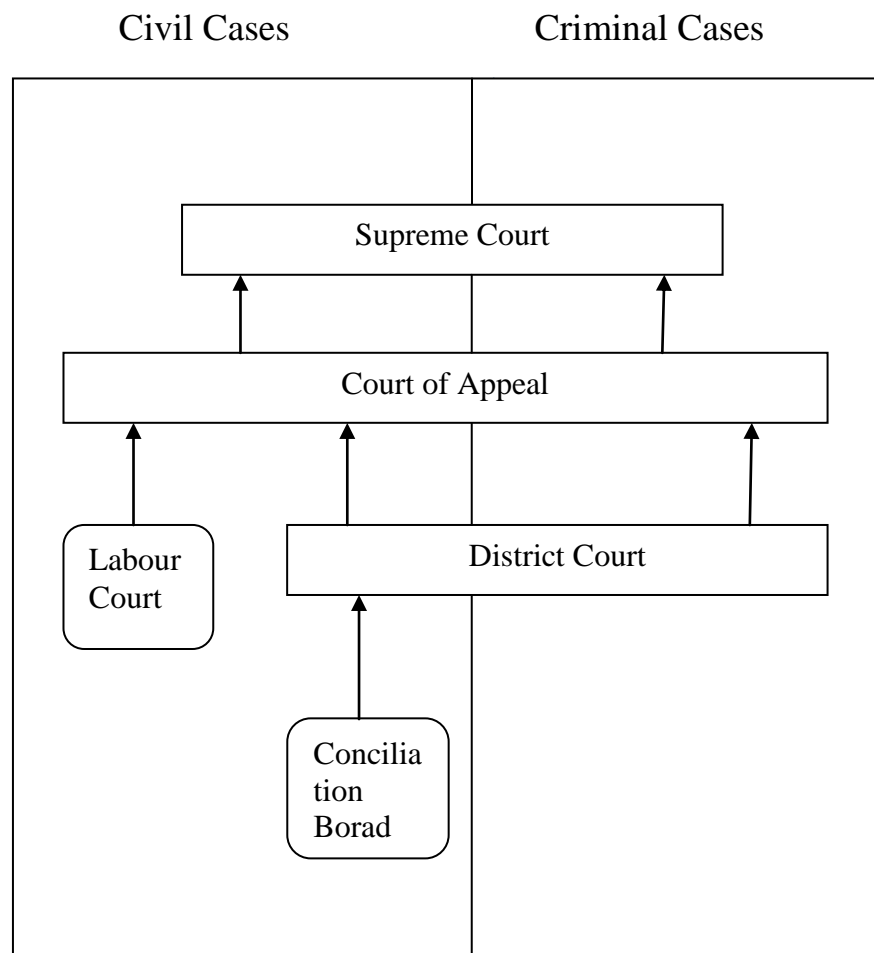
¹³² AOT Section 12

¹³³ See *Supra* note 121

court or the Labour court by the victim without the need of administrative decisions made by the Ombud or the Tribunal. Even though “only the courts may award compensation and redress”¹³⁴, more than 90% of the cases alleging instances of discrimination are dealt by the Ombud and the Tribunal. It does not mean that the victims do not want to get compensation. The main reason is that costs of the judicial proceedings in Norway are very high. Trade unions and the Government may grant free legal aid to those who do not have the financial resources to pay for costs for legal assistance. However, “the free legal aid scheme does not award legal costs from the opposite party, thus making litigation risky also for recipients of free legal aid.”¹³⁵

6.2.3 Norwegian Court

The Judicial hierarchy in Norway is as follows:



¹³⁴ See *Supra* note 110. pp.22

¹³⁵ *ibid*

Ordinary Court

The Norwegian court structure consists of three levels: the District Courts, the Courts of Appeal, and the Supreme Court. The courts have very broad jurisdiction and hear both civil and criminal cases. All current prohibited grounds of discrimination such as gender, ethnicity may be handled by civil courts. The legal procedure in civil cases is mainly governed by the Dispute Act of 17. June 2005 which is originated from the Civil Procedure Act 1915. The new Dispute Act emphasises on active case management and extensive use of court mediation. Active management means “the notion of the passive and reticent judge in order to maintain impartiality and neutrality is replaced by a call for active case management in an efficient and impartial manner.”¹³⁶ As for extensive use of court mediation, I will discuss about it in the following Conciliation Board part. In addition, “key procedural principles in civil cases, including in discrimination cases, is the principle of the free evaluation of evidence in the case.” The legal procedure in criminal cases is mainly governed by the Criminal Procedure Act of 22. May 1981.

Labour Court

The ordinary Court is supplemented by special courts, such as the Land Consolidation Court, the Labour Court etc. The Labour Court specifically deals with disputes concerning the interpretation, validity and existence of collective agreement. For example, cases alleging that collective agreements contain discriminatory clauses may be taken to the Labour Court. Its legal source is the Labour Dispute Act of 5 May 1927. There is no court fee taken charged by the Labour Court. The Labour Court judgments are final and are not subject to appeal to any other court. Unlike the Equality Ombud and Tribunal, the Labour Court have the authority to award financial compensation in disputes on the lawfulness of a collective industrial action. In all other matters of labour law, jurisdiction resides with the ordinary courts. Accordingly, it is the ordinary courts that have jurisdiction over rights issues concerning individuals such as dismissals, discrimination in hiring or employment etc.¹³⁷

Conciliation Board

The Conciliation Board is the lowest level of the judicial system for civil cases. Discrimination cases in which the compensation is less than NOK125.000 and where both

¹³⁶ Backer, Inge Lorange. *The Norwegian Reform of Civil Procedures*. pp. 51
<http://www.domstol.no/upload/DA/Internett/domstol.no/Aktuelt/Backer.pdf>

¹³⁷ The Labour Court of Norway
<http://www.arbeidsretten.no/index.php?module=Pagesetter&func=viewpub&tid=4&pid=15>

parties are not represented by a lawyer will start in the Conciliation Board. As a starting point for most civil cases, Conciliation Boards are found in every municipality and consists of lay people. It is a mediation body and has a certain power to enter judgement by law¹³⁸ Cases processed by the Conciliation Board could be mainly divided into three stages. The first stage comprises activities undertaken from the time the complaint is submitted to the Board until it is prepared for a meeting of the Board. The complaint submitted to the Board should be orally or in writing. If the Conciliation Board accepts the complaint, a reply to the complaint from the defendant will be ordered. The time limitation for reply is normally two weeks. The second stage comprises the preparation of a case for a Board meeting and the meeting itself. The meeting should take place within three months after the complaint was submitted. The third stage comprises activities following the processing undertaken at the Board meeting until the final decision is communicated to the parties. “Cost in the Conciliation boards are limited to court costs ¹³⁹, traveling costs, and limited costs for attorney’s fees (maximum of \$750)”¹⁴⁰ In most situations, the Board seeks to finalize the proceedings at the first meeting. By caseload, the Conciliation Boards play an important part in Norwegian civil justice; in 2004, they handled more than 218 000 disputes.¹⁴¹ The discrimination cases sent to the Conciliation Boards are very few. Oslo Conciliation Board has not got any pregnancy discrimination cases within the last five years.¹⁴² The rulling of the Conciliation Board may be appealed to the District Court, the usual deadline for appeal is one month after the verdict is handed down.¹⁴³

6.2.4 Case Study- Tribunal Case 16/2008 A hospital applied differential treatment on account of maternity leave in connection with the appointment of a temporary doctor

Fact

A female doctor was appointed to a temporary position. The temporary position ran from 22 February to 31 August 2006. She was pregnant when appointed to the new temporary position, with a due date three weeks after 31 August 2006. The hospital was aware of this.

¹³⁸ RDA Section 6

¹³⁹ In 2010, the court fee is NOK 860 <http://www.nyinorge.no/en/New-in-Norway/Useful-information/The-law-and-crime/The-Consiliation-Board/>

¹⁴⁰ Reimann, Mathias. *Cost and Fee Allocation in Civil Procedure*. For International Academy of Comparative Law. Washington D.C., 2010 http://www-personal.umich.edu/~purzel/national_reports/Questionnaire.pdf [Visited 12nd April]

¹⁴¹ Statistics Norway. www.ssb.no

¹⁴² Løkken, Thomas. Telephone Interview. 20 April 2012

¹⁴³ Dispute Act Section 6-14

Legal background

For this case, Section 4 and Section 16 of GEA are related.

Section 4 second paragraph provides that in connect with the employment...no difference must be made between women and men in contravention of section 3.

Section 16 prescribes the principle of shared burden of proof.

Core argument

Is it reasonable for the hospital to choose an end date for the temporary position that coincided with the expected start of the woman's maternity leave?

Findings of Tribunal

The hospital argued that the choice of the end date is according to the end date of other employee's leaves of absence. However, the Tribunal found that the most obvious person for the women to have replaced was expected to return from maternity leave into 2007. According, it was no reason to choose temporary appointment until 31 August. In addition, there were no any other rival candidates.

Therefore the Tribunal concluded that there were circumstances that gave reason to believe that the maternity leave had been attached to the hospital's decision to limit the temporary position to 31 August 2006. The burden of proof therefore shifted to the hospital. However the hospital did not provide any evident that could justify the choice of the ending date.

Tribunal's decision

The hospital fails to prove the rationality of the date choosing. Therefore, the hospital acted contrary to Section 4, cf. Section 3, of the GEA.

6.3 Brief Assessment

According to the interview with the staff in the Ombud, pregnancy discrimination most likely happens at the recruitment period in Norway¹⁴⁴. There is a total number of 51 pregnancy, maternity and parent leave discrimination cases brought before the Ombud in 2008 and 2009. 24 of them, which occupied the top rank of the cases, happened at the recruitment period. Since April 2010, it has been prohibited by law to ask about a woman's pregnancy during the process of hiring. The influence brought by this amendment is too early to tell.

Why cases of unfair dismissal during pregnancy or following the birth brought before the Ombud are few? It is mainly because of the strong protection under the WEA (chapter 15).

¹⁴⁴ Jervell, Claus. Personal Interview. 29 April 2012

Employees may not be dismissed unless the dismissal is objectively justified (Section 15-7). In other words, if the employees wish to claim that a dismissal is unlawful, he/she can demand negotiations within two weeks or bring the case to the court when no negotiations have been conducted. Before the final judgment is made, the employees have the right to maintain in his/her posts.

Another noteworthy practice in Norwegian anti-discrimination legislation is that “equality is treated as a pro-active legislative duty”¹⁴⁵. This implies that employers or public authorities must fulfill their responsibility to promote equality within their spheres of activity, as they have a proactive duty to do so. The implementation of this duty is supervised according to the annual reports prepared by the employers and public authorities. The Ombud is responsible for enforcing and monitoring the report duty.

Compared with the strong protection provided by the anti-discrimination law, the power of Norwegian anti-discrimination enforcement mechanism-the Ombud and Tribunal-seems a little bit weak. Neither Ombud nor Tribunal will provide financial and legal support or award compensation to alleged victims of discrimination. It is believed that this mechanism discourages the victim to seek justice through Ombud. In addition, statistic shows that most complaints are brought by the people who live in Oslo. It may be said that the location of the Ombud has a deterrent effect on people who live in other areas out of Oslo. It is also interesting to have a look at the professions that have been covered by the complaints filed with the Ombud. Academic occupation as well as sale, service and care sector occupied the first two ranks. The result is understandable in that female workers account for the most positions in sale, service and care sector and women who worked in the high school, college and university are the group with more motivation to protect their rights. However, to some extent, it also indicates that the enforcement power of the Ombud is less attractive toward other women groups to bring their cases forward.

Norwegian courts is the only mechanism can award compensation and redress toward discrimination cases. However, this has not led to many cases brought before the court. “It was found that in the course of the 30 years that the GEA has been in force, a very limited number of cases had been brought before court.”¹⁴⁶ In my opinion, the reason is that the purpose of complainants who decide to file discrimination cases is to seek for fairness. The

¹⁴⁵ See *Supra* note 110 pp.58

¹⁴⁶ McClimans, Else Leona. *Rettspraksis om diskrimineringslovgivning (Court cases concerning discrimination legislation)*. diskrimineringslovutvalget. 2008

high legal cost, litigation risk as well as time spent on the procedure may make them feel that “the final remedy is unlikely to justify the effort involved”¹⁴⁷.

¹⁴⁷ See *Supra* note 58 pp.424

7 Conclusion

Pregnancy discrimination is the most wide spread gender discrimination faced by many female workers, especially those who are in informal and low-income jobs. Economic growth, in itself, will not lead to the disappearance of such kind of discrimination because of both historical and contemporary structural patterns. Practices demonstrated that appropriate measures are needed to be improved to ensure non-discrimination. Among different measures, enforcement mechanism is crucial one.

In order to examine the steps taken to provide protection against pregnancy discrimination in China as well as the results and effects achieved compared with other places and countries, this thesis conducted research on anti-discrimination enforcement mechanisms in Mainland China, Hong Kong and Norway.

Arbitration Commissions (AC), EOC and Ombud are major anti-discrimination enforcement mechanisms in Mainland China, Hong Kong and Norway separately. The effectiveness and equivalency of the above mechanisms are reflected by following indicators:

The time limitation to lodge complaints application with AC and EOC is one year. “There is no time limitation for using the Ombud.”¹⁴⁸ For all of three mechanisms, the application should be handed out in writing. Once the application is received, a response in respect of acceptance condition should be made within 5 days for the AC, 3 days for the EOC and 3 weeks for the Ombud. Once the application is accepted, an award should be concluded within 45 days for AC, 6 months for the EOC, and no rule on the length of the procedure for the Ombud. However, for the AC, there is no statistics on how many complaints can be concluded within 45 days. For the EOC, the percentage on fulfilment their 6 months target is 78% in 2010/2011. And for the Ombud, 51% of all cases were not finalized within 1 year in 2008.

The great challenge faced by AC is its heavy burden of the caseload. Each year, there are more than 600.000 cases received by Comissions. But there is no seperate breatdown on the number of complaints concerning pregnancy discrimination. The public data shows that rate of complaints settled was around 86%¹⁴⁹. In 2010/2011, the EOC accepted 835 new complaint cases. More than 100 of them are pregnancy discrimination cases. The sucessful conciliation rate is 68%. In addition, the EOC has authority to provide legal

¹⁴⁸ See Supra note 110. pp. 20

¹⁴⁹ 2008 Human Resources and Social Security Development Statistical Communique

assistance. Since the establishment of the EOC in 1996, 14 pregnancy discrimination cases have been taken legal proceedings on behalf of the EOC. In 2008/2009, there is a total number of 51 pregnancy, maternity and parent leave discrimination cases brought before the Ombud. 40 of them have got recommendation from the Ombud. 10 of them are discontinued. 1 of them is outside the Ombuds jurisdiction.

The working methods adopted by the AC, EOC are arbitration and conciliation separately. As for Ombud, the working method is more like arbitration. However, the Ombud makes decisions on basis of written complaint. No hearing will be hold for both parties. Moreover, the Ombud has no rights to make compensation. The services provided by all of three mechanisms are free of charge.

From above indicators, we could see that Chinese anti-discrimination enforcement mechanism is far from mature. The framework is there. However, its enforcement power could not be reflected by the existing statistics. Many efforts need to be made. By comparison, anti-discrimination in Hong Kong and Norway are developed further. They are not just waiting complaints. To some extent, they are “pushing the envelope”. In addition, EOC seems more efficient than Ombud in many dimensions. The lack of the competence to award financial compensation and the lack of authority to bring the case to the court also impede Ombud’s influence.

Currently, enforcement mechanisms in China are experiencing reform and many challenges are still in front. Some good practices in Hong Kong and Norway can be adopted by Mainland China to seek ways to face these challenges. From what we discussed above, four recommendations are worth considering:

i) Call for clear legislations

Although this thesis mainly discussed about anti-discrimination enforcement mechanisms, anti-discrimination legislations play crucial role to provide protections. Current legislations need a definition of discrimination. Moreover, what kinds of behavior constitute discrimination and guidelines on how to identify discrimination are also needed.

ii) Call for cooperation and integration of current fragment mechanism

There is no body specifically dealing with discrimination issues in Mainland China. Discrimination complaints handling, supervision and public awareness, advocacy are mainly conducted by Mediation Institutes and Arbitration Commissions, labour inspectorate as well as women’s group separately. Each of them has their strengths and weaknesses. But none of them could work effectively in enforcement without the support

from others. This situation may lead to buck-pass. No body would like to take responsibility to promote anti-discrimination. In order to make the best practice of the enforcement mechanism, the coordination among them is necessity. An alternative way is to establish a unified body that it integrates all the possible methods to combat all forms of discrimination in an efficient way.

iii) Call for mainstreaming of equality and non-discrimination

The current enforcement mechanism seems to treat labour dispute handling as a work to put out a fire rather than creating an equality and non-discrimination environment in the working place. The attitude-changing measures and increased awareness of the prohibition on discrimination are required. Capacity building for labour officials is necessary. Through education, their services delivered to the public can be improved.

iv) Call for gender awareness and sensitiveness

Because of the absent of discrimination law, gender discriminations in employment are usually categorized as labour dispute. This also reflects that labour market interest is more influential than gender interest. Laws or regulations on protection or development of women's rights and interests don't play their role very well. Female workers, as a vulnerable group in the labour market, do not get enough support. Potential activities to change this situation could be international experience sharing and policy discussions. Gender-disaggregated data collection should also be carried out.

Bibliography

List of Judgments/Decisions

Chan Choi Yin v. Toppan Forms (Hong Kong) Ltd. DCEO 6/2002, Para 68

Ms Ma v Beijing Jinxiu Mailin Investment Consulting Co. Ltd

Treaties/Statutes/Country Reports

Convention on the Elimination of All Forms of Discrimination against Women (Adopted in 1979 by the UN General Assembly)

Committee on the Elimination of Discrimination against Women. *Consideration of reports submitted by States parties under article 18 of the CEDAW-8th periodic report of States parties, Norway*. CEDAW/C/NOR/8, 2010

ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

ILO Workers with Family Responsibilities Convention, 1981 (No. 156)

Norwegian NGOs. NGO Shadow Report to CEDAW 2011. Oslo, 2011. pp.12

Sendondary Literature

A Simple Guide to the Minor Employment Claims -Adjudication Board. Hong Kong, 2011. Labour Department

Backer, Inge Lorange. *The Norwegian Reform of Civil Procedures*. pp. 51
<http://www.domstol.no/upload/DA/Internett/domstol.no/Aktuelt/Backer.pdf>

Bråten, Mona. *Evaluering av tvisteløsningsnemnda etter arbeidsmiljøloven*. Fafo 2009. pp.10

Cases and Court Decisions. http://www.novexc.cn/cases_court_decisions_main.html
[Visited 16 March, 2012]

Cheung, Fanny M. and Chung, Priscilla Ching. *Central Mechanisms: The Equal Opportunities Commission and The Women's Commission*. In: Mainstreaming Gender in Hong Kong Society. Hong Kong (The Chinese University Press) 2009. pp. 387

China Questions and Answers. <http://www.china.org.cn/english/features/Q&A/161834.htm>
[Visited 14 March 2012]

Court Services and Facilities-Labour Tribunal. Hong Kong.
http://www.judiciary.gov.hk/en/crt_services/pphlt/html/labour.htm [Visited March 21, 2012]

Downey,Michael. *Hong Kong*. In: The Employment law Review. London, (Law Business Research Ltd.) 2011. pp. 247

EOC Annual Report. Hong Kong.

<http://www.eoc.org.hk/eoc/GraphicsFolder/showcontent.aspx?fld=content&itemid=9696>
[Visited 5th April, 2012]

Equality at Work in China, <http://www.equalityatworkinchina.org/about-us-en-us> [Visited 16 March, 2012]

Erika Collins. *The Employment Law Review*. London (Law Business Research Ltd.) 2011

Frequently Asked Questions about the Employment Ordinance, Cap. 57 Maternity Leave. Hong Kong. http://www.labour.gov.hk/eng/faq/cap57h_whole.htm#Q5 [Visited 20 March, 2012]

Halegua, Aaron. *Getting Paid: Processing the Labour Disputes of China's Migrant Workers*.
http://www.boalt.org/bjil/docs/BJIL26.1_Halegua.pdf [Visited 17 March, 2012]

Hong Kong Judiciary Annual Report 2011.
http://www.judiciary.gov.hk/en/publications/annu_rept_2011/

Hong Yanqing. *Political Economy of the Right to Education in Rural China: Unpacking the Black Box of the State*. PhD Dissertation, Faculty of Law, Universiteit Utrecht. pp.34

How Will New System Change Labour Inspection? Beijing, 2011.
<http://english.cntv.cn/program/china24/20110603/102922.shtml> [Visited 18 March, 2012]

ILO. *Equality and Non-Discrimination at Work in China: Handbook*. Constance Thomas ... [et al.]. Beijing, (ILO Country Office for China and Mongolia), 2010. pp.22

Introduction to the Labour Department of the HKSAR Government. Hong Kong.
<http://www.hkcljc.org/en/topics/employmentDisputes/theLabourTribunalAndTheLabourDepartment/introductionToTheLabourDepartmentOfTheHKSARGovernment/index.shtml>
[Visited 20 March, 2012]

J. Petersen, Carole. *Stuck on Formalities? A Critique of Hong Kong's Legal Framework for Gender Equality*. In: *Mainstreaming Gender in Hong Kong Society*. Hong Kong, (The Chinese University Press) 2009. pp. 416

Jervell, Claus. Personal Interview. 29 April 2012

Kent, Ann. *China, the United Nations, and human rights-The limits of compliance*. Philadelphia, University of Pennsylvania Press. 1999. Introduction, note 4

Labour Department Annual Report 2010. Hong Kong, 2010.
<http://www.labour.gov.hk/eng/public/iprd/2010/home/chapter3.htm> [Visited 21 March, 2012]

- Lam, Kitty. *The Operation of Labour Tribunals and Other Mechanisms for Resolving Labour Disputes in Hong Kong and Selected Places*. Research and Library Services Division Legislative Council Secretariat, 2004. pp.4
- LDO. *Discrimination on grounds of pregnancy*. Oslo,2010 <http://www.ldo.no/en/Legal-duties/-Discrimination-on-grounds-of-pregnancy/> [Visited 3rd April]
- Liu, Hong and Chen, Lei. A Survey on the Operation of Mediation and Arbitration Law. Beijing, 2008. <http://acftu.people.com.cn/GB/67579/7333023.html> [Visited 18 March, 2012]
- Loper, Kelly. *Discrimination Law*. In: Employment Law and Practice in Hong Kong. Hong Kong (Sweet & Maxwell), 2010. pp 307
- Loper, Kelly. *Right to Equality and Non-discrimination*. In: Law of the Hong Kong. Hong Kong (Sweet & Maxwell), 2011. pp 831-832
- Lu, Haina. *The Rights to Work in China*. Cambridge, (GPRC Guaranteed Peer Reviewed Content) 2011. pp. 101
- Løkken, Thomas. Telephone Interview. 20 April 2012
- Mayer Brown JSM. *Guide to Discrimination Law in the P.R. China*. http://www.mayerbrown.com/files/Publication/93a8d485-c9d3-4013-9bd0-56b1a90ce6ea/Presentation/PublicationAttachment/82567d95-baf4-44c8-bf7d-5eb6f700a235/JSM_PRC_Discrimination_May2008.PDF [Visited 2nd May, 2012]
- McClimans, Else Leona. *Rettspraksis om diskrimineringslovgivning (Court cases concerning discrimination legislation)*. diskrimineringslovutvalget. 2008
- Mclaimans, Else Leona. *A Comparative Study on Access to Justice in Gender Equality and Anti-Discrimination Law*. Belgium, (Milieu Ltd) 2010. pp.6
- Norwegian Center for Human Rights, University of Oslo. *CEDAW 39th session-consideration of the seventh periodic report of Norway*. Oslo, 2007
- Noss, Cecilie Ostensen. *Gender Equality in Norway*. For: European Commission for Democracy through Law (Venice Commission). Strasbourg, 2006. pp.3
- OHCHR and NHRIs*, <http://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx> [Visited 14 April 2012]
- Pringle,Tim. *Trade Unions in China*. London and New York, (Rouledge) 2010. pp. 158
- Rae, Isabella. *Women and the Right to Food-International Law and State Practice*, Rome (Food and Agriculture Organization of the United States) , 2008. pp.12
- Reimann, Mathias.*Cost and Fee Allocation in Civil Procedure*. For International Academy of Comparative Law. Washington D.C., 2010 http://www-personal.umich.edu/~purzel/national_reports/Questionnaire.pdf [Visited 12nd April]

Some Facts about the Basic Law. <http://www.basiclaw.gov.hk/en/facts/index.html> [Visited 20 April, 2012]

Tai, Florence. “Re:Enquiry-Labour Relation Division” to Yuting HOU, 25 March

The First Lawsuit against Pregnancy Discrimination in Guangdong. Guangzhou, 2012. www.cnithr.com [Visited 19th March, 2012]

UN. *Report on Indicators For Promoting and Monitoring the Implementation of Human Rights.* HRI/MC/2008/3, 6 June 2008.

UN in China. *Launch of the Asia-Pacific Regional Human Development Report on Gender.* Beijing 2010. <http://www.un.org.cn/cms/p/news/27/1346/content.html> [Visited 14 March 2012]

Yang, Sadie and Li, Ao. *Legal protection against gender discrimination in the workplace in China.* In: *Gender and Development.* Vol. 17, No. 2 (2009), pp. 304 – 305.

Zhang, Wei. *Ministry of Human Resources and Social Security: the Large and Medium Sized Companies Should Establish the EMCs.* Beijing, 2011. <http://www.rucdpls.com/show.php?contentid=671> [Visited 17 March, 2012]

Zheng, Yongnian. *The Chinese Communist Party as Organizational Emperor Cultural, Reproduction and Transformation.* Routledge. 2010

Annex I Anti-Discrimination Legislation in Mainland China, Hong Kong and Norway

	Provisions	Mainland China Legislation	Provisions	HK Legislation	Provisions	Norway Legislation
Equality	Art. 48 (1) Women in P.R.China enjoy equal rights with men in all spheres of life, political, economic, cultural and social, including family life	the Constitution	Art. 25 All Hong Kong resident shall be equal before the law	Basic Law	Section 100 (c) it is the responsibility of the authorities of the State to respect and ensure human rights	the Constitution
Recruitment period	Art27(2)...no employment unit, when recruiting new employees, shall refuse to recruit women by reason of gender or impose higher employment criteria for women.	Employment Promotion Law	S11 (1) It is unlawful for a person, in relation to employment by him at an establishment in Hong Kong, to discriminate against a woman (a) in the arrangements he makes for the purpose of determining who should be offered that employment. (b) in the terms on which he offers her that employment; or (c) by refusing or deliberately omitting to offer her that employment.	SDO	Section 4 (1) A job vacancy must not be advertised as being restricted to one sex only unless there is an obvious reason for doing so. Nor must the the advertisement give the impression that the employer expects or prefers one of the sexes for the position... (3) During the hiring process, including during the interview, the employer may not ask the applicant, ... , to provide any information on pregnancy,.....	GEA

	Provisions	Mainland China Legislation	Provisions	HK Legislation	Provisions	Norway Legislation
Pregnant, confinement and lactation period	Art. 42 The employer shall not terminate the labour contract ...if th employee meets any of the following conditions: ...(4)Female employee during pregnant, confinement and lactation period.	Labour Contract Law	S.15 An employer shall not terminate her continuous contract of employment...during the period from the date on which her pregnant is confirmed by a medical certificate to the date on which she is due to return to work on the expiry of her maternity leave...	Employment Ordinance	Section15-9 <i>Protection against dismissal during pregnancy or following the birth or adoption of a child</i> (1) An employee who is pregnant may not be dismissed on grounds of pregnancy. Pregnancy shall be deemed to be the reason for dismissal of a pregnant employee unless other grounds are shown to be highly probable...	WEA
			S11(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Hong Kong, to discriminate against her... (c) by dismissing her, or subjecting her to any other detriment	SDO	Section 4 (2) In connection with the employment, promotion, dismissal or lay-off of employees, no difference must be made between women and men in contravention of section 3	GEA

	Provisions	Mainland China Legislation	Provisions	HK Legislation	Provisions	Norway Legislation
Promotion	Art. 48 (2) The state protects the rights and interests of women, applies the principle of equal pay for equal work for men and women alike, and trains and selects cadres from among women.	Constitution	S11(2) It is unlawful for a person, in the case of a women employed by him at an establishment in Hong Kong, to discriminate against her (a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them; (b) in the terms of employment he affords her...	SDO	Section 4(2) In connection with the employment, promotion, dismissal or lay-off of employees, no difference must be made between women and men in contravention of section 3	GEA
Less favorable treatment			S. 8(a) A person discriminated against a woman ... (a) on the ground of her pregnancy he treats her less favorably than he treats or would treat a person who is not pregnant	SDO		

	Provisions	Mainland China Legislation	Provisions	HK Legislation	Provisions	Norway Legislation
Victimization			S 9 “taking an adverse employment action against an employee because he or she brought (or may brought) a legal claim, provide evidence or information in relation to a legal claim, or alleged that a person acted in violation of the discrimination ordinance is prohibited”*	SDO		

*this is the simplified version of the original section

Annex II Anti-Discrimination Enforcement Mechanism in Mainland China, Hong Kong and Norway

	Mainland China	Hong Kong	Norway
Litigation	People's Court	Court	Ordinary Court and Labour Court
Adjudication	None	Labour Tribunal	None
Arbitration	Arbitration Commission	None	Dispute Resolution Board , Ombud and Tribunal (without compensation)
Mediation	Mediation Institute	None	None
Conciliation	None	EOC Labour Department	Conciliation Board