

Law Miu Kuen Sally v Sunbase International (Holdings) Limited

[Court Ruling](#)

DCEO 7/2012

<https://www.eoc.org.hk/en/legal-services/significant-court-cases/hong-kong/disability-discrimination>

Background Facts

The Plaintiff, a Senior Accounts Clerk, had been employed by the Defendant for 13 years before being dismissed in August 2010. The Plaintiff suffered from a traffic accident in November 2007 and had to take sick leave from time to time for medical and physiotherapy treatment.

The Plaintiff frequently turned up late for work. She claimed that she had to take her daughter to school and that the Defendant allowed her to have “flexi hours”. However, in August 2009, the Defendant issued a guideline (“the Leave Guideline”) stating that normal working hours for all employees were between 9am to 5:30pm. In line with provisions of the Employment Ordinance (Cap. 57), the Leave Guideline also required employees to submit sick leave certificates and stated that paid sick leave would only be granted if the sick leave period was not less than 4 days. The Plaintiff argued that the Leave Guideline discriminated against her because prior to its issuance the Defendant would grant sick leave to its employees without any minimum qualifying period.

In September 2009, the Plaintiff’s supervisor found that the Plaintiff’s work computer contained a lot of her personal data, violating the Defendant’s computer use regulations. The defence case was that consequently, it intended to serve a notice of termination of employment on 31 October 2009. Unexpectedly, the termination had to be put on hold when the Plaintiff submitted a pregnant certificate on 9 October 2009.

The Plaintiff alleged that, in a meeting attended between management of the Defendant and the Plaintiff in April 2010, the Defendant requested her to resign due to her unsatisfactory physical bodily condition and the necessity for her to take care of her baby after its birth. The Defendant denied making such a request.

When the Plaintiff returned to work from her maternity leave in August 2010, her work computer had been changed and her subordinates no longer reported to her. Soon afterwards, she was dismissed by the Defendant with full pay and benefits.

The Plaintiff claimed for declaration and damages on the ground of disability, sex and/or family status discrimination, both in terms of (1) the alleged unfair treatment she received during the employment and (2) the termination.

The Defendant denied the alleged discrimination. Its reasons for termination were the Plaintiff's poor work performance, rude behaviour towards colleagues as well as abuse of work computer and office time for personal purposes.

Court's Decision

The Factual Dispute

The Court held that the crux of the matter was whether the Plaintiff had ever been subject to any discrimination by the Defendant. The Court grouped the factual disputes under three main topics ("Factual Disputes"):-

1. whether the Leave Guideline and the way it was implemented constituted a discrimination against the Plaintiff;
2. during the meeting in April 2010, whether the Defendant's management had actually requested the Plaintiff to resign on the basis of her physical condition and her need to take care of her baby and if so, whether such request amounts to a discrimination; and
3. what the Defendant's real reasons were for terminating the Plaintiff and whether any of those reasons were discriminatory against the Plaintiff.

The Relevant Legal Principles

The Court held that for there to be a finding of direct discrimination, pursuant to a precedent case, both parts of the following two-part test had to be answered in the affirmative: (i) whether less favourable treatment to the Plaintiff had occurred; and (ii) whether it had been caused by one of the prohibited discriminatory grounds.

As regards (i), the comparison is not one simply with another person without the relevant attributes of the complainant (i.e. disability, gender or family status in the present case), but with another person not having the relevant attribute but behaving in the same way as the complainant did. As regards (ii), according to another precedent case, an objective "but for" test is to be applied, so that intention or motive to discriminate was not a necessary condition of liability (but intention or motive to discriminate may be relevant when determining the appropriate remedies).

The Court referred to the discrimination legislation, which stated that if an act is done for two or more reasons and one of the reasons is the prohibited discriminatory ground (whether or not it is the main reason for doing the act), then the act would be taken to have been done because of that prohibited discriminatory ground.

The Court affirmed precedent legal principles which held that the burden is on the Plaintiff to prove discrimination on the balance of probabilities. Once the Court is satisfied that the Plaintiff is able to show from the primary facts that inferences could be drawn from the circumstances that disclosed a possibility of discrimination, the Court would look to the employer for an explanation. If there is no reasonable or satisfactory explanation put forward, then the Court would be entitled to infer discrimination as a matter of common sense.

Court's judgment on Factual Dispute (1): Sick Leave Guideline

The Court held that the Plaintiff failed to establish that the issuance of the Leave Guideline and its implementation amounted to direct discrimination against her.

Firstly, the Court accepted the Defendant's evidence that the Leave Guideline aimed at malingering and not disability. As there were other employees who seemed to have imitated the Plaintiff by taking unnecessary sick leave, the Court held that there was a legitimate concern for the Defendant to tighten up the procedure for applying sick leave.

Second, the Leave Guideline introduced a scheme in compliance with the provisions of the Employment Ordinance (Cap. 57). The Plaintiff could not reasonably argue that an employer would commit an act of discrimination by following the law.

Third, simply because the Defendant had in the past paid all sick leaves in full did not mean that the Plaintiff had any contractual right to the same. Besides, the procedural requirements of the Leave Guideline (e.g. the requirements of informing the supervisor and the reception in the morning of the day of absence and submission of the sick leave certificate afterwards) were reasonable and fair. The Plaintiff failed to show both (a) how she had been subject to a less favourable treatment by following such procedural requirements, or (b) any valid reasons for failing to follow the procedure.

The Court also held that the Plaintiff had failed to make out a case that the issuance of the Leave Guideline or any of its requirements or conditions amounted to indirect discrimination against her. Firstly as a matter of evidence, the Plaintiff failed to prove that she had any difficulties in complying with the procedural requirements or conditions of the Leave Guideline. Secondly as a matter of inherent probability, since the Plaintiff was a person with a disability, she would have been the one employee who was more likely to be

able to meet the minimum qualifying period for paid sick leave (i.e. 4 days or more) than other employees with no disability. As such, it cannot be said that she suffered any less favourable treatment than the other employees in this regard.

Court's judgment on Factual Dispute (2): April 2010 meeting

Regarding the meeting in April 2010 between the Defendant's management and the Plaintiff, the Court held that the Plaintiff failed to prove her case that the Defendant's management had said or done anything which amounted to a discrimination of the Plaintiff by virtue of her disability, gender or family status.

The Court accepted the evidence of the Defendant and held that it was inherently improbable that its management, being highly educated persons with extensive work experience, would have been so unguarded and blunt in their conversation with the Plaintiff and say things so insensitive towards discrimination by asking her to resign owing to her physical condition and her need to take care of the baby.

Court's judgment on Factual Dispute (3): Reasons for Termination

The Court held that the Plaintiff had failed to prove, on a balance of probabilities, that she was dismissed by the Defendant on the basis of her disability, sex and/or family status.

On the other hand, the Court accepted the Defendant's evidence that its real reasons for dismissing the Plaintiff was because of her poor work performance and abuse of work computer for personal use.

As an example of poor work performance, the Defendant established the fact that due to the Plaintiff's delay in preparing the Defendant's financial statements over the course of a number of years, the Defendant was sued by the Inland Revenue Department.

Regarding the Plaintiff's abuse of her work computer, the Court accepted the Defendant's evidence which showed that the Plaintiff's work computer had contained voluminous non-work related and personal data (including her own stock trading record, personal photographs and even Mark Six records). As these were accepted by the Plaintiff, it was not in dispute that the Plaintiff had breached the Defendant's computer guidelines, which made her liable to summary dismissal.

Having assessed all the evidence, the Court held the Defendant had a strong legitimate ground to dismiss the Plaintiff as a result of the cumulative weight of her shortcomings.

Conclusion

The Plaintiff failed to prove her case that she had been subjected to discrimination (either in the course of her employment or in relation to her dismissal). The Plaintiff's claim against the Defendant was dismissed.

Law Miu Kuen Sally 訴 新恆基國際（集團）有限公司

DCEO 7/2012

案情背景

原告人是高級會計文員，受僱於被告人 13 年，於 2010 年 8 月被解僱。原告人於 2007 年 11 月一宗交通意外中受傷，需不時請病假看醫生和接受物理治療。

原告人上班經常遲到。她聲稱需送女兒上學，而被告人准許她採用「彈性時間」上班。然而，被告人於 2009 年 8 月發出一份指引（「休假指引」），訂明全體僱員的正常工作時間為早上 9 時至下午 5 時半。休假指引與《僱傭條例》（香港法例第 57 章）的條文相符，要求僱員提交病假證明書，並規定只有不少於四天的病假方獲批准為有薪病假。原告人認為休假指引對她造成歧視，因為在指引發布之前，被告人批准僱員放取病假時沒有訂定病假的最少日數。

2009 年 9 月，原告人的主管發現原告人的工作電腦載有大量原告人的個人資料，違反了被告人的電腦使用規則。被告人指原打算於 2009 年 10 月 31 日向原告人發出解僱通知書，不料原告人於 2009 年 10 月 9 日提交懷孕通知書，被告人唯有暫時擱置解僱她的打算。

原告人指稱，於 2010 年 4 月被告人的管理層和她進行的會議上，被告人要求她辭職，原因是她的健康狀況欠佳，而且她在分娩後需要照顧其嬰孩。被告人否認曾提出這樣的要求。

原告人於 2010 年 8 月結束產假後復工，她的工作電腦已被更換，她的下屬亦不再由她管轄。其後不久，被告人解僱她，並向她支付了全薪及補償金。

原告人聲稱她基於**殘疾、性別及／或家庭崗位遭受歧視**，並因此提出索償，理由是**(1)她受僱期間遭受指稱的不公平待遇，以及(2)遭解僱**。

被告人否認指稱的歧視，指解僱原告人的原因是原告人**工作表現欠佳、對同事無禮，以及濫用工作電腦和工作時間處理私人事務**。

法庭的裁決

事實爭議

法庭認為事情的關鍵是原告人有否遭受被告人作出的任何歧視。法庭把事實爭議歸類為三大課題（「事實爭議」）：

休假指引及實施休假指引的方式有否對原告人構成歧視；

2010 年 4 月的會議上，被告人的管理層是否確實曾基於原告人的健康狀況及照顧嬰孩的需要，要求原告人辭職。如是，這要求是否等同歧視；以及

被告人解僱原告人的真正原因為何，以及那些原因是否對原告人構成歧視。

相關的法律原則

法庭認為可引用一宗案例所採用的**兩部測試**以查證是否有直接歧視。**兩部分的答覆必須同時為肯定的，才能證實有直接歧視**。兩部分的測試包括(i)原告人有否遭受較差待遇；以及(ii)該較差待遇是否源自其中一個法律禁止的歧視理由。

關於測試(i)，比較對象並非純粹不具投訴人相關特質（即本案中的殘疾、性別或家庭崗位）的另一人，而是不具投訴人相關特質但行為表現與投訴人相同的另一人。至於測試(ii)，根據另一宗案例，應採用客觀的「若非因」測試，以排除歧視的意圖或動機為負上法律責任的必要條件（但判定恰當補償時，歧視的意圖或動機則可能是相關因素）。

法庭引用歧視法例，當中訂明若作出某行為的原因有兩個或以上，而只要其中一個原因屬法律禁止的歧視理由（不論這原因是否作出該行為的主因），該行為即會被視為基於禁止的歧視理由而作出。

法庭確判例的法律原則，裁定原告人有舉證責任，須以相對可能性的衡量證明歧視。法庭一旦信納原告人能夠根據基本事實，從有關情況作出可能有歧視的推論，便會向僱主要求解釋。若僱主未能提供合理或令法庭滿意的解釋，法庭即有權按常理推論有關行為屬於歧視。

法庭對事實爭議(1)的判決：**病假指引**

法庭裁定原告人未能證實發布及實施休假指引對她構成歧視。

第一，法庭接納被告人的證據，即休假指引旨在打擊裝病，不是歧視。由於有其他僱員似乎仿效原告人放取不必要的病假，法庭裁定被告人有合理理由收緊申請病假的程序。

第二，休假指引所實施的制度與《僱傭條例》（香港法例第 57 章）的條文規定一致。原告人不能合理地爭辯僱主遵守法律是違法的歧視行為。

第三，單單因為被告人以往就所有病假支付全薪，並不代表原告人有任何合約權利收取病假的全薪。此外，休假指引所訂的程序要求（例如要求僱員在缺勤當天早上通知主管及接待處，並在之後提交病假證明書）是合理和公平的。原告人未能證明(a)遵守這樣的程序要求如何使她遭受較差待遇；以及(ii)她有何合理理由可以不遵守程序。

法庭亦裁定原告人未能提供理由支持休假指引的發布或其任何要求或條件對她構成間接歧

視。第一，就證據而言，原告人未能證明她在遵守休假指引的程序要求或條件方面有任何困難。第二，就實質的可能性而言，由於原告人是殘疾人士，她與沒有殘疾的其他僱員相比，理應較有可能符合最少有薪病假日數（四天或以上）的要求。因此，說不上她比其他僱員遭受較差的待遇。

法庭對事實爭議(2)的判決：2010 年 4 月的會議

有關被告人的管理層和原告人於 2010 年 4 月進行的會議，法庭認為原告人未能證明她指稱被告人的管理層基於她的殘疾、性別或家庭崗位，曾經以任何說話或行動歧視她。

法庭接納被告人的證據，認為被告人管理層**皆具備高學歷和豐富工作經驗**，與原告人對話時實質上不大可能這麼輕率直接，漠視歧視的問題，要求原告人因為她的健康問題和照顧其嬰孩的需要辭職。

法庭對事實爭議(3)的判決：解僱的原因

法庭裁定原告人未能以相對可能性的衡量證明被告人基於她的殘疾、性別及／或家庭崗位解僱她。

另一方面，法庭接納被告人的證據，即解僱原告人的真正原因是原告人工作表現欠佳及濫用工作電腦作私人用途。

被告人提出原告人工作表現欠佳的例子，確立原告人多年來延誤編製被告人的財務報表，令被告人被稅務局起訴。

有關原告人濫用其工作電腦一事，法庭接納被告人的證據，證明原告人的工作電腦載有大量無關工作的個人資料（包括其股票交易記錄、私人照片，甚至六合彩記錄）。由於原告人承認這事，因此原告人違反被告人的電腦使用指引一事並沒有爭議，這使她可能遭即時解僱。

經衡量所有證據，法庭裁定被告人因原告人的多項不足之處解僱她，是充分的合理理由。

結論

原告人未能提出理由，證明她在受僱期間或有關其解僱方面遭受歧視。原告人對被告人的申索遭駁回。