

Preventing employment discrimination versus upholding status of marriage

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Introduction

Article 37 of the Basic Law states that "the freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law". This protection is understood to be limited to marriage between monogamous heterosexual couples, which has led to debate on the equal treatment of homosexual couples in the context of rights and privileges borne out of marriage. The principal issue is that treating same-sex relationships differently to heterosexual relationships is discriminatory.

The Court of Appeal recently considered this issue from an employment perspective in *Leung Chun Kwong v Secretary for the Civil Service*.⁽¹⁾

Facts

The applicant, a senior immigration officer, married his same-sex partner in New Zealand. On returning to Hong Kong, the applicant claimed spousal benefits available to civil servants.

However, the secretary for civil service held that the applicant's same-sex marriage was not a marriage within the meaning of Hong Kong law and that, as such, the spousal medical and dental benefits offered to civil servants did not extend to the applicant's partner (the employment benefits decision).

Similarly, the commissioner of inland revenue informed the applicant that he was not entitled to elect for joint assessment with his partner because their same-sex marriage did not fall within the meaning of 'marriage' set out in the Inland Revenue Ordinance (the tax decision).

First-instance decision

In the first-instance decision, Justice Chow held that the benefits decision unlawfully discriminated against the applicant by reason of his sexual orientation, as there was a difference in treatment accorded to the applicant on account of his same-sex marriage. Conversely, Chow held that the tax decision was correct, as it was based on the Inland Revenue Ordinance.

Court of Appeal decision

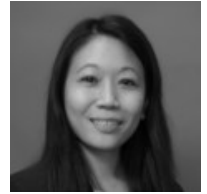
The secretary for civil service appealed the employment benefits decision and the applicant cross-appealed the tax decision. The central issue which arose from the appeal was whether either decision constituted discrimination against the applicant on account of his sexual orientation.

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In making its determination, the Court of Appeal applied the test established in the recent Court of Appeal case *QT v Director of Immigration* (which was subsequently appealed to the Court of Final Appeal, although that appeal had not been decided when *Leung Chun Kwong* was heard by the Court of Appeal).⁽²⁾ According to the Court of Appeal decision in *QT*, if a benefit is a core right or obligation unique to marriage, no justification is required for its lawfulness. Where the differential treatment falls outside such core rights and the reason for the difference is, for example, sexual orientation, the right to equality is engaged and there must be a justification for the differential treatment. However, if the court – after evaluating all of the circumstances – is unsure whether the relevant right or obligation is a core right or obligation, it must act cautiously by proceeding to consider justification.

The Court of Appeal in *Leung Chun Kwong* found that there is a strong case for saying that spousal benefits (as contractual employment benefits) are not a core right, as they cannot be said to be unique to marriage by their nature – they are simply part of a contractual remuneration package. However, the court held that the issue was not plain and obvious, and that it therefore had to be cautious and apply the justification test. Conversely, the right to elect for joint assessment was found to be a core right unique to marriage as it flowed from the special status of marriage. The justification test was therefore required.

Applying the justification test to both decisions, the Court of Appeal found that upholding the status of marriage was a "sufficient and indeed very weighty justification for both the Benefits Decision and the Tax Decision".

Accordingly, the court held that there was no discrimination against the applicant on account of his sexual orientation.

Comment

The deprivation of spousal benefits to a same-sex couple was held not to be discriminatory in this case, and differential behaviour in this regard was held to be justified by the need to protect and not undermine the status of marriage.

In determining the appeal in *QT*, the Court of Final Appeal held that the justification test as established by the Court of Appeal (and used in *Leung Chun Kwong*) should not be followed and that the correct approach is to examine every alleged case of discrimination to see whether the difference in treatment can be justified. The Court of Final Appeal decision has rendered *QT* a landmark case, which will affect how future employment-related cases on discrimination are decided and may pave the way for changes in the treatment of same-sex relationships in Hong Kong.

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Endnotes

(1) [2018] HKCU 1802.

(2) [2017] 5 HKLRD 166.