

HONG KONG: TAKING MENTAL HEALTH CONDITIONS INTO ACCOUNT – DISCRIMINATORY OR OBLIGATORY?

In a recent District Court decision [*C v The Chinese University of Hong Kong* \[2022\] HKDC 77](#), the Court considered whether the University's decision to discontinue the studies of a student, C, who suffered from mental health conditions, was discriminatory. This case provides helpful guidance on navigating employment decisions, such as whether dismissal or disciplinary action is permitted, in respect of an individual with disabilities including a mental health condition. Merely acknowledging the existence of a disability when such a decision is made will not necessarily mean that the decision was discriminatory provided that the real reason for the decision is not the disability.

Background

In early 2011, C was admitted to the University's Master of Arts in Gender Studies Programme (**MA Programme**) as a part-time postgraduate student which, according to the University's regulations, she was required to complete within a maximum study period (**MSP**) of 4 years, i.e. by 31 July 2015. C suffered from depression and generalised anxiety disorder (**Disabilities**) and was granted leave from the MA Programme that lasted 2 years in total, and extensions of time in respect of certain outstanding assignments.

By the end of the MSP, C was not able to complete four outstanding assignments to meet the graduation requirements. In August 2015, C submitted a late application to extend the MSP for two months (**Extension Application**), in order to complete the outstanding assignments. As support to the Extension Application, C enclosed a medical certificate issued by her psychiatrist to explain her mental health conditions.

In a letter to C (**Termination Letter**), the University rejected the Extension Application, and accordingly discontinued C's studies. Relevantly, the University stated in the Termination Letter that:

- it did not believe that her work to date had clearly demonstrated that she would be able to complete these assignments by the new deadline;
- the pressure to complete the outstanding assignments in such a short period of time, "**considering [C's] recent medical history**", would also not be in [her] best interests";
- C's exceptional circumstances had always been taken into account and, the University had on numerous occasions granted C lengthy extensions for her assignments.

Following a complaint to the Equal Opportunity Commission, C commenced proceedings at the District Court. The focus of C's claims was that the University's refusal of the Extension Application and discontinuance of her studies constituted both direct and indirect discrimination, as well as victimisation.

Were the Disabilities the reason for the Extension Application being refused?

The Court focused on whether the Extension Application was refused because of C's Disabilities.

C relied on the references to her medical history in the Termination Letter and claimed that the Disabilities were a reason for the University's decisions, which also involved "*patronising and offensive*" stereotyping in which the University had made incorrect and unfair assumptions about the pressure C would face to complete the outstanding assignments.

The Court was unable to find direct discrimination in the University's decisions noting the following:

- The Court was not concerned with the merits of the reasons for the University's decision only whether such decision was made because of C's Disabilities.

- The University was entitled to refuse to grant the Extension Application if C had not satisfactorily explained:
 - (i) why she was unable to complete the graduation requirements, or
 - (ii) whether she would be able to complete the graduation requirements within the extended study period applied for.

The Court found that, as a matter of common sense, the Termination Letter provided that the sole reason of the University's refusal was on ground (ii) above.

- The reference to C's medical history was included in the Termination Letter to highlight that the pressure for C to complete the outstanding assignments in such a short period of time would not be in her best interests. Naturally, as C submitted a copy of her medical certificate to support the Extension Application, the University "*could and should have*" taken into account C's mental health conditions in its decisions. It did not mean that the subsequent decisions made by the University must be **because** of C's Disabilities. In fact, C's medical history did not form any part of the reason why the Extension Application was rejected.

No evidence that those with disabilities less able to comply with MSP requirement or that requirement was unreasonable

C also claimed that she had been subject to indirect discrimination because a student with her other relevant attributes, but without the Disabilities, would have been able to comply with the MSP, or alternatively a significantly greater portion of students without a disability (or without the same disability) would have been able to so comply.

The Court also rejected C's claim of indirect discrimination, and instead found:

- on the balance of probabilities (and in the absence of statistical evidence), there was no basis to find that the proportion of students with a disability who can comply with the MSP is considerably smaller than the proportion of students without a disability. While the Court acknowledged that, in some cases statistical evidence was not necessary as the Court could make an assessment based on its own knowledge and experience, the Court found that this approach was not suitable for this case; and
- in any event, the MSP has a legitimate objective, and was justified by the University's policy considerations. Further, there was provision for an application for extension of the MSP for certain students unable to finish their studies within the MSP.

The Court also dismissed C's victimisation claim as being unfounded after finding her direct and indirect discrimination claims unsustainable.

One final point of interest is that the Court acknowledged that '*there is nothing conceptually wrong or objectionable*' in a claimant bringing, and potentially succeeding in, claims of both direct and indirect discrimination in a single proceeding. However, the claimant would of course need to prove the material facts for both claims.

Key takeaways

This case provides helpful guidance to employers on decision making that may involve considerations relating to an employee's disability, including mental health conditions. In particular:

- Employers are entitled to take into account the employee's disabilities in decision making processes, where it is clear that the employees expected them to do so (e.g. where employees offer information of their disability to the employers in relation to the decision to be made, for instance, internal promotion or transfer, etc.).
- Employers should take care not to make the decision on the ground of the employee's disabilities. Often, it will be a fine line between merely taking the employee's disabilities into account, and making the decision by reason of the disabilities. As such, it is crucial for the employers to be very clear about

the reasons for the decision and ensure any decision is based on reasons that do not include the disability. Employers should also document the reasons carefully.

- Employers should always consider the individual circumstances of an employee, not just their policies or business objectives, and what accommodations can be made as an alternative.