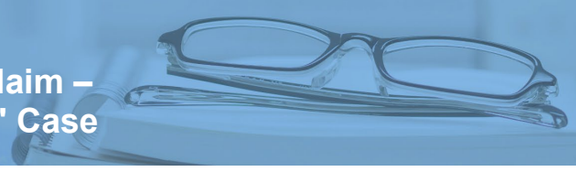
# MinterEllison LLP
## Legal update:
## Making a Discrimination Claim – Lessons from the "Gweilo" Case



9 March 2022

| OUR PARTNERS | CONTACT |
|---|---|
| **Capital Markets & Corporate** | |
| Fred Kinmonth | 2841 6822 |
| Anne Ko | 2841 6826 |
| Barbara Mok | 2841 6803 |
| George Tong | 2841 6836 |
| Katherine U | 2841 6873 |
| Nicole Chan | 2841 6854 |
| **Disputes, Competition & Insurance** | |
| William Barber | 2841 6934 |
| Nathan Dentice | 2841 6881 |
| Jonathan Green | 2841 6808 |
| Alex Kaung | 2841 6866 |
| Desmond Liaw | 2841 6819 |
| David Morrison | 2841 6932 |
| Eddy So | 2841 6879 |
| Desmond Yu | 2841 6878 |
| Jun Kwong | 2841 6930 |
| **Infrastructure, Construction & Projects** | |
| Malcolm Chin | 2841 6870 |
| Steven Yip | 2841 6843 |
| **Intellectual Property** | |
| Steven Birt | 2841 6933 |

We hope that you find this edition informative and we welcome your comments and suggestions for future topics.

If you have any questions regarding matters in this publication, please refer to the contact details of the contributing authors.

# Making a Discrimination Claim – Lessons from the "Gweilo" Case

Steven Yip T: +852 2841 6843 | E: steven.yip@minterellison.com
Malcolm Chin T: +852 2841 6870 | E: malcolm.chin@minterellison.com

On 11 February 2022, the District Court handed down its judgment in the case of *Francis William Haden v Leighton Contractors (Asia) Limited* [2022] HKDC 152, a case concerning alleged race discrimination in the context of a termination of employment. This case has attracted widespread media attention, in particular with regards to the claimant's allegation that he was called a "gweilo" in work place which was the subject of the alleged race discrimination complaint.

The District Court dismissed the claim and gave a comprehensive discussion on the race discrimination regime in Hong Kong in its judgment.

## Background

The claimant was hired by the respondent as the Blasting Team Leader in a joint venture project and his employment was terminated on 28 February 2017. The claimant claimed that the termination was a result of or otherwise influenced by his race, in particular being a non-Chinese. While there is no direct evidence to this effect, he invited the Court to draw inference from alleged primary facts, including that he was technically competent in his job, that his role was bypassed and usurped, that he raised the issue of racism at the intended termination meeting, and that his co-workers used the term "gweilo" in work place.

## The ruling

The District Court first considered the laws for direct discrimination, which entail consideration of two questions:

1. whether the respondent had treated the claimant less favourably than it treated or would treat others (the **Comparator Question**); and
2. whether the less favourable treatment (if any) was on the ground of the claimant's race (the **Causation Question**).

For the Comparator Question, the Court noted that in some cases it would be appropriate to first focus on why the claimant was treated as he was to avoid confusing disputes about identifying the appropriate comparator. For the Causation Question, the Court accepted the respondent's submission that the more stringent "real cause" test instead of the "but for" test should be adopted such that race must be the real and effective cause of the less favourable treatment, but it needs not be the only or predominate cause.

As race discrimination is usually not overt, the Court acknowledged that the claimant, who bears the burden of proof, will rely predominantly on the drawing of inferences. Once the claimant establishes that inferences could be drawn from the circumstances that disclosed a possibility of discrimination, the Court will look to the employer for an explanation. Where the explanation is absent, inadequate or unsatisfactory, the Court may infer that discrimination was on racial grounds. There is no shift of evidential burden of proof but the Court will bear in mind the standard of proof is on the balance of probabilities and that it is sometimes not easy to have direct evidence of discrimination.

Applying the foregoing principles and upon consideration of the evidence, the Court held that the termination was not on the ground of race. Even though the claimant was technically competent, he was unable to work in a team and had poor working relationship with colleagues. On the facts, there was no bypassing or usurping of the claimant's role as the Blasting Team Leader. The exclusion of the claimant arose from the different cultures of the two joint venture partner companies and his poor inter-personal relationship with others. While the "racism" issue was raised at the intended termination meeting, the complaints were in substance directed to the personnel from the other joint venture partner but not the respondent. Applying the comparator test, the respondent would have dismissed a Chinese Blasting Team Leader with the same character and communication problems as the claimant.

In respect of the "gweilo" argument, the Court held that the claimant had failed to state clearly the context in which the term "gweilo" had been used, and that the Court could not find that this term is necessarily derogatory even if used in a

work place. While the claimant may have overheard "gweilo" in conversations not directed to him, the claimant did not understand Chinese and could not establish that the discussion was about him. In short, the claimant could not prove that there was a background of racial hostility.

The Court also held that there was no lack of process in the dismissal as the claimant has been duly warned about his performance issues before he was terminated and there was no breach in any stipulated procedure within the respondent.

**Key takeaways**

While the Court acknowledged that simplified procedures are adopted for claims made pursuant to the District Court Equal Opportunities Rules (Cap. 336G) such as the present claim, the Court reiterated that the claimant is still required to state adequately what his case is about as a matter of fairness, for instance the identity of the proposed actual comparator.

For someone who wishes to make out a successful discrimination claim, the following should be of note:

1. the claimant should ensure that all possible issues and arguments are properly and adequately pleaded in the Notice of Claim, including but not limited to any proposed comparator;
2. for argument on specific terms spoken or used, context is everything and the claimant should state clearly the exact circumstances in which the term is used and avoid hearsay evidence; and
3. all potential arguments should be considered and their merits analyzed prior to the claim is made, in particular, the real and effective cause leading to the treatment should be considered.

MinterEllison LLP acted for the respondent Leighton Contractors (Asia) Limited in successfully defending the race discrimination claim.

Our trainee solicitor Eunice Leung assisted in preparing this article.

**MinterEllison Group and Associated Offices:**
Adelaide Auckland Beijing Brisbane Canberra Darwin Gold Coast Hong Kong London Melbourne Perth Shanghai Sydney Ulaanbaatar Wellington