

COMPARATORS IN MARITAL STATUS DISCRIMINATION: GENERAL OR SPECIFIC?



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Discrimination can be broadly defined as indefensible differential treatment based on certain prohibited grounds. It is implicit in the concept of differential treatment to have a comparator who is in similar or not materially different circumstances. It is argued that it is not always possible to find an appropriate comparator in the context of marital status discrimination, and a liberal and holistic approach is called for in the case of hiring or dismissal involving a spouse. The article concludes with some reflections on when such hiring or dismissal decisions could be justified, and points out that while a liberal and holistic approach is desirable, the present statutory regime may not permit such an analysis in the case of direct discrimination, and that the court will find itself engaged in a tortuous and artificial comparator analysis to avoid a finding of discrimination when the differential treatment may be justified.

Introduction

One of the most difficult issues in discrimination cases is to find a suitable comparator in order to show that there is differential treatment. Sometimes a suitable comparator – real or hypothetical – may simply not exist. Sometimes the only comparator available has features that are specific to the case in question only. This issue arose in the recent case of *Wong Lai Wan Avril v The Prudential Assurance Co Ltd*.¹

In that case, the plaintiff and her husband, Mr Andy Leung, were both employed as insurance agents by the first defendant. On or about 6 Apr 2006, the first defendant terminated the agency relationship with Mr Leung. On the same date, the plaintiff's employment was also terminated allegedly on the sole ground that the plaintiff was the wife of Mr Leung. There was evidence that the first defendant had no complaint against the quality of the work or performance of the plaintiff. After abortive attempts to settle the dispute and after the

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¹ [2009] 5 HKC 494.

Equal Opportunities Commission had refused to provide legal assistance, presumably on the ground of a lack of merits, the plaintiff took out a claim of marital status and family status discrimination under the Sex Discrimination Ordinance² and the Family Status Discrimination Ordinance³ against the defendants. The defendants then applied to strike out the claim on the ground that it disclosed no reasonable cause of action. They argued, *inter alia*, that there was no marital status discrimination as the defendants would have done the same to Mr Leung if the plaintiff were to be dismissed, and that the defendants would not have dismissed any other wives or persons with a similar marital status had they not been related to Mr Leung.⁴ In this regard, there was a concession from the plaintiff that she had not been treated less favourably than any other person with a similar marital status. Her case was that she was treated less favourably merely because she was married to Mr Leung and no one else.

There are two issues. The first is whether the dismissal of the plaintiff was due to her marital status as a wife in general, which she may have difficulty to establish as other persons with a different marital status were not dismissed,⁵ or whether the dismissal was due to her marital status as a wife married to a particular person only, in which case it would be difficult to find a comparator to show a differential treatment. The second issue is that if there is a differential treatment based on her specific marital status, whether the differential treatment would constitute discrimination at all. This may bring into question the legitimacy of hiring and dismissal policy in a number of industries. While these are conceptually two different issues, this article will argue that they could not be separated from one another when a comparator group is not readily identifiable.

An Appropriate Comparator

Section 7 of the Sex Discrimination Ordinance prohibits direct and indirect discrimination, defined as less favourable treatment on the ground of one's marital status. Marital status is defined to mean the "state or condition of being single, married, married but living separately and apart from

² Cap 480, occasionally referred to hereinafter as SDO.

³ Cap 527.

⁴ The other main argument is that the dismissal had nothing to do with family status as the status of being a wife is not the same as family status. This point will not be pursued in this article.

⁵ See *Chang Ying Kwan v Wyeth* [2001] 2 HKC 129 at 135, citing with approval *Chief Constable of West Yorkshire Police v Khan* [2000] IRLR 324.

one's spouse, divorced, or widowed".⁶ Section 10 further provides that a comparison of cases of persons of different marital status under s 7 shall be such that the relevant circumstances in the one case are the same, or not materially different, in the other. The issue here is whether "marital status" is a general concept or whether it could apply to the "marital status" of a particular person, such as marriage to Mr Andy Leung, which is the sole reason for the plaintiff's dismissal and which is not a factor that could easily be attributed to any hypothetical comparator. In other words, who could be a proper comparator in such cases so that the relevant circumstances are "the same or not materially different"?

There are two different lines of cases which attempt to answer this question. The Australian approach, as set out in *Boehringer Ingelheim Pty Ltd v Reddrop*⁷ and *Waterhouse v Bell*,⁸ is that unlawful discrimination on the ground of marital status does not extend to proscribe discrimination based upon the identity or situation of a person's spouse. In contrast, the Canadian approach, as represented by *B v Ontario (Human Rights Commission)*,⁹ is that the concept of "marital status" should encompass circumstances where the discrimination results from the particular identity of the complainant's spouse. Hence, it is sufficient that the individual experiences differential treatment on the basis of an irrelevant personal characteristic that is proscribed in the Ontario Human Rights Code.

The Australian Approach

In *Boehringer*, the plaintiff applied unsuccessfully for a position in a pharmaceutical company. The position was offered to someone with lesser qualification than her, and the reason for her unsuccessful application was that her husband worked for a rival company. She claimed to be a victim of sex discrimination on the ground of her marital status and argued that "marital status" did not merely denote her status or condition of being married but was extended to embrace the identity and situation of her spouse. Section 39(1) of the Anti-Discrimination Act 1977 provides that "a person discriminates against another person on the ground of his marital status if, on the ground of (a) his marital status; (b) a characteristic that appertains generally to persons of his marital status; or (c) a characteristic that is generally imputed to persons of his marital status,

⁶ SDO, s 2.

⁷ [1984] 2 NSWLR 13.

⁸ [1991] 25 NSWLR 99.

⁹ [2002] 3 SCR 403 at 429, paras 56–57.

he treats him less favourably than in the same circumstances, or in circumstances which are not materially different, he treats or would treat a person of a different marital status.” The New South Wales Court of Appeal held that the definition was exhaustive, and once the three situations were taken together, they would not allow any room for a further extension of the definition to embrace the particular situation or condition of one’s spouse.¹⁰ The legislature had already expanded the concept to include discrimination based on characteristics that appertained generally or were generally imputed to persons of the relevant marital status, sometimes known as “stereotyped assumptions”. The statutory definition did not go beyond that to include characteristics or conditions that were not generally appertained or imputed to persons of the relevant marital status, in this case, a husband working for a rival company.

This is a classic literal approach to interpreting a statutory provision. Given the nature and purpose of sex discrimination legislation, a formalistic approach of *expressio unius est exclusio alterius* is hardly appropriate.¹¹ While *Boehringer* was followed in *Waterhouse v Bell*, the Court of Appeal managed to reach a different conclusion. In this case, the plaintiff was refused a trainer’s licence because she was married to a person who had been warned off every racecourse in Australia and elsewhere. Without expressing its view on *Boehringer*,¹² the court was prepared to proceed on the concession of both parties that *Boehringer* was correctly decided. However, the court reformulated the question in this way: the plaintiff would fail if the reason for her unsuccessful application was that she was the wife of the notorious gambler or if the dismissal was based on a risk of disclosure of confidential information by inadvertence, but she would succeed if the reason was that as a wife she was more susceptible to be corrupted by her husband! This became a stereotyped assumption of all wives and hence there was discrimination on the ground of marital status. While this is an innovative approach to get round *Boehringer*, the distinction is subtle if not spurious, as it can easily be said in *Boehringer* that the wife was refused the position because a wife would be liable to leak confidential information to her husband and hence there was a stereotyped assumption of married persons as well.¹³ It is unfortunate that

¹⁰ [1984] 2 NSWLR 13 at 14, per Moffitt P; 21–22, per Mahoney JA; 24, per Pristley JA.

¹¹ Mentioning of one or more things of a particular class may be regarded as silently excluding all other members of the class.

¹² (1991) 25 NSWLR 99 at 105. The court found it unfair to criticise Pristley JA’s judgment that he intended to exclude cases when there were mixed reasons for discrimination: see (1991) 25 NSWLR 99 at 105, per Clarke JA.

¹³ This may amount also to sex discrimination if the assumption applies to women only. The difficulty is that in most cases the employer will apply the policy equally to married men. In any event, as argued below, such stereotype assumption is rather artificial.

the court chose not to address the correctness of *Boehringer*,¹⁴ although it does show how eager the court was trying to get out of the rather artificial and narrow approach as adopted in *Boehringer*.¹⁵

The stereotyped assumption approach has also been invoked in the United Kingdom to change the basis of the claim from marital status discrimination to sex discrimination and hence it became unnecessary to address the problem of comparators in marital status discrimination. In *Skyrail Oceanic Ltd v Coleman*,¹⁶ the plaintiff was dismissed because her fiance/husband worked for a rival travel agency. However, the two rival travel agencies had apparently had a discussion and decided that the plaintiff should be dismissed as the husband would probably be the breadwinner of the family. The Court of Appeal held, by a majority, that there was discrimination as the decision was based on a stereotyped assumption that married men were more likely than married women to be the primary supporters of their spouses and children. Similarly, in *Horsey v Dyfed County Council*,¹⁷ the plaintiff was denied an application to apply for a secondment to London to join her husband on the ground that she would probably not return to her job after the secondment. The Employment Appeal Tribunal upheld her claim of sex discrimination on the ground that the decision of her employer was not based on her intention but on the stereotyped assumption that married women would give up their employment to join their husbands. Browne-Wilkinson J (as he then was), who delivered the judgment of the Tribunal, held that “a decision to treat a complainant in a particular way for reasons which, as an

¹⁴ For a criticism of *Boehringer*, see G Rowe, “Misunderstanding Anti-Discrimination Law: The New South Wales Court of Appeal in Reddrop” (1986) 10 *Adelaide Law Review* 318. The learned author may not have fully distinguished two separate issues: one is whether there is marital status discrimination if the decision was made on the basis of mixed factors. Clarke JA in *Waterhouse* lamented that this criticism was a misreading of *Boehringer*: n 8 above. The second issue is whether marital status discrimination allows the court to take into consideration the circumstances and the identity of one’s spouse. This issue was not really addressed by Rowe. Section 31(1A) of the Anti-Discrimination Act dealt with the first issue, but it has apparently left open the second issue. See also Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (Federation Press, 2008), paras 5.6–5.7.

¹⁵ It is interesting that in a subsequent case of *Liseo v Canterbury City Council* [1999] NSWADT 118, the Equal Opportunity Tribunal accepted (as conceded by the respondent in that case) that marital status discrimination applied not merely to marital status as a concept but also to the marital status of a particular person. The *Liseo* case was regarded as representing the law in *Halsbury’s Laws of Australia*, Vol 4, para [80–305], in which it is stated that “It was accepted that marital status discrimination applied not merely to marital status as a concept but also to the marital status of a particular person . . .” On the other hand, the Law Commission of New South Wales in its Report No 92 (1999), para 5.57, took the view that it was unnecessary to amend the law, thereby implicitly accepting the distinction between *Boehringer* and *Waterhouse* and accepting that *Boehringer* is still good law.

¹⁶ [1981] ICR 864 at 870–871.

¹⁷ [1982] ICR 755.

essential ingredient, contain a generalised assumption about a woman's behaviour is a decision made 'on the ground of sex'.¹⁸

While revealing stereotyped assumptions may sometimes shift the basis of the claim from marital status discrimination to sex discrimination and hence avoid the problem of an appropriate comparator in marital status discrimination, this approach may be highly artificial and in both *Skyrail* and *Horseley* cases, there was only scanty evidence of a stereotyped assumption, which may only be elicited by skilful cross-examination. The facts in these two cases were rather unique and in most cases, the employer would probably dismiss an employee in these circumstances whatever be the gender of the employee. In contrast, the Canadian Court adopted a less tortuous approach by recognising the absolute and relative nature of the concept of "marital status".

The Canadian Approach

In *B v Ontario (Human Rights Commission)*,¹⁹ the respondent was dismissed from his employment with the appellant D Ltd which was a firm owned by two brothers, Mr B and Mr C. Mr B terminated the respondent's employment after being confronted by the respondent's daughter and his wife with accusations that he (Mr B) had sexually molested the daughter when she was a young child. The Supreme Court of Canada held that, given the nature of the Human Rights Code, a broad meaning of "marital status" and "family status" should be adopted such that they are broad enough to encompass circumstances where the discrimination results from the particular identity of the complainant's child or spouse and that it is sufficient that the individual experiences differential treatment on the basis of an irrelevant personal characteristic that is enumerated in the grounds provided in the Ontario Human Rights Code.²⁰ It further held that it was unnecessary to embark on the artificial exercise of constructing a disadvantaged sub-group to which the complainant belonged in order to bring oneself within the ambit of marital status

¹⁸ *Ibid*, at 761.

¹⁹ [2002] 3 SCR 403.

²⁰ *Ibid*, at 429, para 57. One of the reasons relied on by the Supreme Court of Canada is that the Ontario Human Rights Code is aimed at protecting individuals as opposed to groups against discrimination (see para 40 therein). It has been held by the Hong Kong Court that freedom from discrimination is also a fundamental right of each individual: *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690 at paras 83–86.

within the Code.²¹ After referring to s 5 of the Code that every one has a right to equal treatment, the Supreme Court of Canada held:²²

“By using the words ‘every person’ the statute is clearly aimed at protecting individuals as opposed to groups against discrimination. Although it is equally clear that, in order to come under the protection of s 5(1), the discrimination must be based on one of the listed grounds, this does not mean that the discriminatory action must be directed against an identifiable group subsumed within the enumerated ground. Nor does it mean that the action complained of must result from the stereotypical application of an attributed group characteristic. Such requirements are simply not found in the wording of s 5(1).”

The court then further explained:²³

“Discrimination is not only about groups. It is also about individuals who are arbitrarily disadvantaged for reasons having largely to do with attributed stereotypes, regardless of their actual merit. While it is true that disadvantageous stereotypes usually arise when characteristics are attributed to someone based on what people in a particular group are deemed to be capable of, this does not mean that when dealing with a complaint, a complainant must be artificially slotted into a group category before a claim of discrimination can be upheld under the Code.”

In other words, instead of focusing on a comparator, the Canadian Court focused on the reason for the dismissal. As long as the dismissal is based on one of the prohibited grounds, it does not matter if there exists a group with whom the complainant can be associated and compared for the purpose of demonstrating a difference in treatment.

The Hong Kong Approach

The distinction between the Canadian approach and the Australian approach seems to lie in how the court perceived the nature of discrimination legislation. The Australian Court treated the Sex Discrimination Act as a piece of ordinary legislation, and hence adopted a literal

²¹ [2002] 3 SCR 403 at 429, para 56.

²² At 419, para 40.

²³ At 428, para 56.

approach to interpretation. In contrast, the Canadian Court recognised the special nature of anti-discrimination legislation and adopted a generous and purposive interpretation of the provision. While discrimination is proscribed in Hong Kong by the Sex Discrimination Ordinance, non-discrimination is also a general principle that has been enshrined in the Basic Law and the Bill of Rights.²⁴ Accordingly, it is not surprising that the Hong Kong Court in *Wong Lai Wan Avril* expressed a preference for a generous and purposive approach as in Canada that results in a broad definition of “marital status”.²⁵

The court also rejected the adoption of a *de facto* spouse as a comparator.²⁶ In the United Kingdom and Australia, the definition of “marital status” extends to cover the status of a “*de facto* spouse”, which is omitted from the definition of “marital status” in the Hong Kong legislation. As the court pointed out, this exclusion is deliberate to reflect the local customs and traditional values where a “common law wife” does not receive any protection under the Hong Kong matrimonial legislation. As “*de facto* spouse” is not a recognised marital status, and as the comparator must have a different marital status, *de facto* spouse would not, so the court appeared to suggest, be an appropriate comparator. This is debatable, as a *de facto* spouse would still have a status of being single, even though living with the “spouse”, and could hence arguably be an appropriate comparator. This again highlights the problem with the comparator analysis, as it is often difficult to determine, for the purpose of comparison, what the similar and material circumstances are.²⁷

As the case was only at the stage of striking out on the ground of no reasonable cause of action, the court had not gone further to decide whether the dismissal could be justified.

Some Reflections

The Hong Kong Court’s decision is welcome. It better reflects the true nature of anti-discrimination law, better accords with the prevailing

²⁴ Basic Law, Art 25; Bill of Rights, Arts 2 and 22.

²⁵ See *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690 at 720, paras 79–83.

²⁶ [2009] 5 HKC 494 at 521, para 64.

²⁷ *Purvis v New South Wales* (both the majority and minority judgments) cited in *M v Secretary for Justice* [2009] 2 HKLRD 298, at paras 46–56. I am grateful to the anonymous reviewer for drawing my attention to this case.

human rights jurisprudence, and is probably more in line with common sense. If the plaintiff was dismissed on the ground that she was the wife of another person, this must by itself be a prejudicial treatment on a proscribed ground which has to be justified. So why should she be required to further show that other wives were treated similarly? To search for a comparator in such circumstances would be bound to be a futile exercise.

The stereotyped assumptions approach adopted in both Canada and Australia may in appropriate cases provide an alternative route to get around the sometimes artificial search for a comparator, which may be compelled by a mechanical application of the “but for test”.²⁸ The effect of the Hong Kong Court’s decision is that it shifts the focus in discrimination cases from searching for a suitable comparator to an examination of the circumstances of the alleged discriminatory act. This flexible approach may have wider implications in the proof of discrimination in other types of discrimination cases. This is not to say that the court could now abandon the well-established “but for” test. In general, the “but-for” test is still helpful in elucidating the discrimination factor. However, the “but-for” test is a test of causation. It does not mandate a comparator approach in all cases. It is only a tool to elucidate causal relationship and should not be applied mechanically or be allowed to obscure the real issue in discrimination cases. After all, the right to equality is an individual right. The fundamental question is whether a claimant is singled out for treatment on prohibited grounds, not whether she can be artificially slotted into a group category. This is particularly relevant where the identity of the appropriate comparator is in dispute, in which case it may be more appropriate to concentrate on the reason why a complainant is treated in the way as she was. In this regard, the advice of Lord Nicholls for a common sense approach is most opportune:²⁹

“This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an

²⁸ See Lord Goff in *R v Birmingham City Council ex parte Equal Opportunities Commission* [1989] 1 AC 1155, which was followed by our Court of Final Appeal in *Secretary for Justice v Chan Wah* [2000] 3 HKLRD 641 at 656, per Li CJ.

²⁹ *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 at 31, paras 11–12.

examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others. The most convenient and appropriate way was to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be case where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the claimant. Adopting this course would have simplified the issues, and assisted in their resolution, in the present case.”

This passage lends support to a holistic approach that it is sometimes undesirable to mechanically compartmentalise the treatment of discrimination into establishing the factors on which differential treatment is based and the justification for such differential treatment. While conceptually these are two separate issues which could work well when a comparator is readily available, the two issues would intermingle with one another when a comparator group is not readily available. In this particular case, when it is difficult to find a hypothetical comparator who can be said to be in materially similar circumstances, the questions whether the plaintiff was treated differentially because of her marital status to her particular spouse and whether such differential treatment could be justified could not be easily disentangled, and it makes perfect sense to consider the two issues together, which seems to be the prevalent approach adopted in both the United Kingdom and Canada.

Hiring and Dismissal Policy Relating to Spouses

This brings us to the tricky issue whether a hiring or dismissal policy based on the fact that one’s spouse has worked in the same company (in the case of hiring) and has been dismissed (in the case of dismissal), or that one’s spouse works in a rival company (in both hiring and dismissal), could be justified. If it is a case of direct discrimination, there will be discrimination unless the dismissal can fall within one of the statutory exceptions, the nearest of which is genuine occupational qualification which is hardly applicable in such situations. However, in most

cases, the reason for discrimination may not be apparent,³⁰ or the reasons given would be a general concern of disclosure of confidential or sensitive trade information, which disclosure may be a result of a deliberate decision in breach of an employee's duty of confidentiality, or an inadvertent result arising from daily casual conversation between two closely related persons. Thus, it begs the question whether the decision was made on the ground of marital status in the first place. It is also probable that hard evidence of disclosure is usually not available, and on many occasions, the decision not to recruit or the decision to dismiss is made not even on any reasonable suspicion of disclosure but a mere risk of possible disclosure.

A few observations can be made here. First, each case has to be decided on its own merits. Therefore, a general employment policy which is to be applied irrespective of the circumstances of each case is likely to be challenged. The job nature, the nature of information involved, the seniority of the position occupied (or to be occupied), the size of the company, the ease of access to confidential or sensitive information, the safeguard system, one's work attitude, and one's past employment record and performance will be some of the relevant factors. In this regard, hiring may be different from dismissal in that some companies may adopt an anti-nepotism policy to avoid a conflict of interest or favouritism, which seems to be a legitimate concern. Such consideration is less likely to be relevant in the case of dismissal when the main concern is more likely to be disclosure of confidential or sensitive information. Secondly, a decision will be on a safer ground if it is made on the basis of actual evidence or reasonable suspicion of disclosure of confidential or sensitive information. In the case of a reasonable suspicion, it will be necessary to show objective grounds other than the spousal relationship to justify the suspicion.

Thirdly, the justification is protection of confidential or sensitive information. It is therefore necessary to show that the person involved has access to confidential or sensitive information. What constitutes confidential or sensitive information may vary from trade to trade. Sensitive information may include valuable information that is not readily available to the outsiders but which may not necessarily be confidential in nature. One has to exercise common sense in determining this issue and will have to bear in mind that sometimes information which is neutral on its face may be of great significance to a rival company when

³⁰ While it is true that so long as marital status is one of the reasons for the differential treatment it will be regarded as marital status discrimination (s 4, SDO), in most cases whether marital status plays a part in the decision making is at best speculative or highly contested.

it is put together with other information in the hands of the rival. On the other hand, confidential or sensitive information should not be extended to cover information that is readily available in the public domain or readily available to a rival company in the same trade or business.

Fourthly, a decision will be dubious if it is purely based on a mere risk of disclosure of confidential or sensitive information to one's spouse. Such a decision may involve a stereotype assumption relating to a particular gender, as in *Waterhouse*, *Skyrail* and *Horsey* above. However, evidence of such a stereotype assumption is unlikely to be readily available, and will most likely come to light only upon skilful cross-examination. This may pose particular difficulty to an unrepresented litigant or a legal aid body in deciding whether legal assistance should be granted. On the other hand, even without evidence of such stereotype assumption, it is open to the court to evaluate critically how likely the risk is and what basis there is for the assumption of such a risk. It may also be necessary to bear in mind that on the one hand, employment is essentially a relationship of trust, and on the other hand, the law of discrimination is to eradicate unfounded prejudice. The nature of the job, the nature of information involved, the ease of access to sensitive or confidential information and the possibility or practicability of alternative posting or reorganising one's job duties or portfolio will be of paramount importance in such case. A vigilant scrutiny would be called for if the decision is based on nothing more than the existence of a spousal relationship.

Conclusion

Decisions on hiring or dismissal involving a spouse are a tricky area which touches on sensitive issues of trust and human relationship. On the one hand, a person should be treated on his or her own merits and not who he or she has married to. On the other hand, there could be legitimate concerns on the part of the employers. No formulaic approach would be appropriate and the court will have to exercise great caution, sensitivity and common sense in the light of the circumstances of each individual case. A mechanical approach insisting on finding a suitable comparator may not work. It is also important for the employer to show that the concern is genuine and based on reasonable grounds and not a matter of prejudice, which is what most discrimination cases are about. At the end of the day, the court will have to find a balance between upholding the dignity of a person and the legitimate concern for protection of one's business. A holistic approach may be desirable and permissible if there is

a dispute whether marital status played any role in the relevant human resources decision, or when the challenge was based on indirect discrimination or on general equality protection under the Basic Law or the Bill of Rights. Unfortunately, this type of holistic analysis may not be permitted by the Sex Discrimination Ordinance when it is admitted or proved that marital status is a factor in making the human resources decisions, that is, direct marital status discrimination. In such circumstances, when the differential treatment is justifiable, the court may well have to find itself engaged in such a tortuous comparator analysis in order to avoid a finding of discrimination under the Ordinance.