

HONG KONG / JUDGMENT

M v. SECRETARY FOR JUSTICE

COURT

District Court

DECIDED

16 July 2007

CASE / FILE NUMBER

DCEO8/2004

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DCEO 8/2004

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
EQUAL OPPORTUNITIES ACTION NO. 8 OF 2004

BETWEEN:

M Plaintiff
(
Claimant
)
and
SECRETARY FOR JUSTICE Defendant
(
Respondent
)

Coram : HH Judge Lok in Court

Dates of hearing : 6, 8-10, 13-17, 20-24, 28 November 2006 and 14 February 2007

Date of handing down of Judgment: 16 July 2007

JUDGMENT

In the year 1998, the Claimant had many reasons to be a happy young man when he finished his study in university in Canada. After graduation, he obtained to many one of the dream job as an administrative officer () in the Government of Hong Kong, and he was one of the 29 AOs appointed in that recruitment exercise out of a total of 13,000 applications. However, it seemed that things then went the other way for the Claimant. After he started his work as an AO under probation, his supervisor was not satisfied with his work performance. He was then transferred

to another post within the Government, but unfortunately, the new supervisor made similar comment about him. Subsequently, the Claimant was informed by the Civil Service Bureau () that his appointment as AO would not be confirmed. In order to avoid the embarrassment of citing dismissal as the ground for terminating his employment, the Claimant resigned on his own initiative. It is the Claimant's case that he was suffering from Generalized Anxiety Disorder (), which is a kind of psychiatric disability, and some other disabilities at the time when he worked as an AO, and his resignation was the result of a series of discriminatory and harassing conducts on the part of various other senior AOs of the Government. He therefore brings the present action for disability discrimination and harassment under the Disability Discrimination Ordinance, Cap. 487 () against the Government to claim for damages which amount to, according to the document entitled Claimant's Calculation of Loss of Earnings and Benefits , the sum of \$20,264,701. On 2 June 2005, HH Judge H. C. Wong made an order prohibiting the naming or other identification of the Claimant in the context of any report of this case, and that the name of the Claimant should appear as the letter in any report or judgment. As shown in the latter part of this judgment, there are quite a number of issues involved in this case. To give an overall picture, I would try to summarize the main issues as follows:

- (i) whether the Government was aware that the Claimant was suffering from any kinds of disability when he worked as an AO? assuming that the Government had had no such knowledge, whether the display of certain symptoms of the psychiatric disorder on the part of the Claimant would be sufficient to make the Government liable under the DDO? whether the treatments received by the Claimant were made on the ground of his alleged disabilities? in the case that the Claimant was suffering from GAD or some other kinds of disability, whether it was reasonable or justified for the Government to apply the same criteria in assessing the work performance of the Claimant? and with the alleged disabilities of the Claimant, whether he would be able to fulfill the inherent requirements of the job of an AO? By reason of the length of this judgment and for easy reference, an index listing out the various topics of this judgment is included in the appendix in the end of the judgment. One of the main difficulties in the present case is that the Claimant was suffering from some kind of psychiatric disorder, the symptoms of which may appear in any other person without suffering from such disability. Unless the employee behaves in a totally irrational manner, it would not be easy for an employer to say whether his or her employee is suffering from such kind of disability. This problem is particularly relevant in a competitive society like Hong Kong where a lot of the employees are working under various degrees of stress. Further, the local jurisprudence in this area of the law is still in the early stage of development, and this adds to the challenges facing the court in the present case. However, before I proceed to deal with the legal principles involved in the case, it would be better for me to first resolve the factual disputes between the parties.
- BACKGROUND OF THE CASE** The facts in this section are mainly agreed facts or facts which are not contentious. Mickey Chan, which is the fictitious name of the Claimant, was born in August 1976. He was raised in Hong Kong and emigrated to Canada with his family when he was 17. After arriving in Canada, he first attended a community college for about one year. In September 1995, he was admitted to a

reputable university in Burnaby, British Columbia where he studied business administration. In September 1997, he applied for the post of AO with the Government of Hong Kong. He passed 5 written tests and a 2-days selection interview conducted by a 3-members selection board in Vancouver, and he was one of the 29 candidates appointed as AO out of some 13,000 applicants for that recruitment exercise. In fact, he was ranked 23 among all the candidates. Mickey passed the examinations in the university with second class honours, missing the first class honours by a small margin. Later, he passed the medical examination of the Hong Kong Government and his appointment as probationary AO was confirmed. In the application form for AO, Mickey had declared that he was not a candidate with a disability. The employment package of an AO is an attractive one. In 1998 when Mickey joined the Government, the monthly salary of an AO was \$35,285. He was also entitled to 31 days of annual vacation leave, free medical and out-patient dental treatment, reduced rates for hospital accommodation, housing benefits upon reaching a certain pay-scale and local education allowances for children. Each newly recruited AO is provided with an induction training programme which embraces various training modules on a wide variety of subjects, normally including management, law, media skills, language and personal development. As AOs are required to be capable of taking many different roles and responsibilities in the administration of the Government, to ensure the all-rounded development and versatility, it is the general policy of the Government to require all AOs to be exposed to different areas of work, including those which require skills that the officers may have yet to develop full competency, for training and development. Hence, AOs on probation are usually given 2 substantive postings of different nature in the 3 years period of probation. The postings may be to a policy or resource bureau, a District Office or a department in the Government. The AO Grade Management Division of the CSB would monitor and assess the performance of AOs of all ranks through Performance Appraisal Reports. AOs on probation are normally appraised and reported on by their supervisors once every 6 months for the first 2 years and then once every 4 months for the last year of probation. The appraising and reporting officer would apply the 25 core competency requirements in assessing the work performance of the AOs. By reason of the versatile nature of the work done by AOs, the core competency requirements cover a broad range of knowledge, skills and qualities required in most posts, including leadership quality, communication skill, personal effectiveness, analytical skill, staff and resource management skills and knowledge of work. Further, the appraising and reporting officer would assess the probationer's long term potential to reach the directorate ranks in the Administrative Service, and it is the policy of the Government that only those probationers who have displayed all-rounded abilities and clear potential to advance to the directorate ranks would be allowed to pass probation. Further, probationers would be assessed taking into account their learning curve at different stages of their 3 years of probation. If a probationary AO is considered to be below the standard required of an AO, a Performance Review Conference () would be convened with the appraising officers to review the case and to discuss follow-up actions, including the possibility of immediate termination of the employment of the relevant AO. After attending the induction training programme, Mickey started his work as

an Assistant Secretary in the Home Affairs Bureau () on 26 October 1998, whilst his family continued to stay in Canada. His supervisor was one Mr. John Wan, the then Principal Assistant Secretary for Home Affairs (Mr. Wan). The responsibilities and duties of Mickey mainly involved the formulation of youth policy of the Government, and his work required constant contacts with the Commission of Youth, the Fight Crime Committee, other Government bureaux and departments and non-Governmental organizations. What happened between Mickey and Mr. Wan is a matter of some dispute. However, it is clear that Mr. Wan was not satisfied with the work performance of Mickey. Mr. Gary Poon (Mr. Poon), the Assistant Secretary for the Civil Service (Administrative Service) in the CSB, was responsible for arranging the recruitment and training of new AOs and monitoring the performance of AOs during their probation period. By reason of his job responsibilities, Mr. Poon was also present when Mickey attended the recruitment interview in Vancouver. In or about January 1999, Mr. Poon had a telephone conversation with Mr. Wan to discuss Mickey s progress. By that time, Mr. Wan expressed his dissatisfaction about Mickey s performance, and according to the note made by Mr. Poon, the complaint was mainly as follows: [Mr. Wan] was not satisfied with the performance of [Mickey], who seemed to have difficulties to settle in the job. According to [Mr. Wan], [Mickey] was lacking in motivation and was the most inert AO he had ever seen. He worked very slowly and did not impress as a smart person. [Mr. Wan] had to coach [Mickey] hardly and give him very detailed instructions before [Mickey] could deliver. [Mr. Wan] said that [Mickey] seemed still very unsure of himself. He must show more motivation, better develop his sense of proportion and think more about his work. The only strength [Mr. Wan] could find in [Mickey] was that when provided with details, he could write them out in a satisfactory manner. By reason of the aforesaid comments, Mr. Poon arranged to meet Mickey in the HAB in a pastoral visit, or described as a career development interview in the Re-Amended Particulars of Claim, on 26 March 1999. In that meeting, Mr. Poon told Mickey about the comments by Mr. Wan, and there was some discussion about the difficulties faced by Mickey in his work. As Mickey s case was one which raised some concern, after that meeting, Mr. Poon referred Mickey s case to his supervisor, Ms. Bernadette Linn, who was then a Principal Assistant Secretary for the Civil Service (Administrative Service) of the CSB. In July 1999, Mr. Wan requested the CSB to transfer Mickey out of the HAB, and Mr. Wan also completed the first appraisal report of Mickey (the 1st Appraisal Report) covering his work performance from 26 October 1998 to 25 April 1999. In this report, Mr. Wan made the following comments: Overall, [Mickey s] performance fell short of the requirements of an Administrative Officer. He was unable to perform to an acceptable standard on his own or to offer constructive solutions to a problem, I had given him clear directions regarding our objectives and expectations, but he appeared to have problems understanding what was required of him. In the first few months, he could hardly deliver. I had to restructure his job in such a way that he could contribute to the team, but even then, his performance had not been up to standard. [Mickey s] notable strength is his conviction about his ability to do things his way. Unfortunately, he has neither the experience nor the skills to get things done. The result was that he had problems getting the co-operation he needed from his colleagues in

departments and other bureau. Nevertheless, [Mickey] could communicate better on paper. [Mickey] was not always able to meet deadlines. (p. 7 of the report) He appeared slow and even sluggish. I have found it difficult to communicate with this young man. [Mickey] told me that his dream job would be one with precedents to follow and where procedures are laid down clearly step by step. He did not appear to me to be a [focused] or organized person, and I have been unable to motivate him. He might have great potential, but they must have escaped me. There are signs that [Mickey] has tried to improve, and one hopes that he would. [Mickey] clearly needs training, on teamwork, interpersonal skills, time management and management generally. (p. 13 of the report) Mr. Wan gave Mickey a Grade 5 for overall performance, which means Performance falls well short of requirements. An unsatisfactory performance which has much room for improvement, and Mr. Wan was also of the view that Mickey was not yet fitted for confirmation. The countersigning officer agreed with such appraisal. Mr. Wan then had an interview with Mickey to discuss the 1st Appraisal report on 14 July 1999. In that interview, they discussed the problems faced by Mickey in his work, and they both agreed that a transfer of posting would be beneficial to Mickey in term of his career development. On 28 July 1999, a meeting was arranged for Mickey to meet Ms. Linn and Mr. Poon to discuss the 1st Appraisal Report. Ms. Linn told Mickey that his premature transfer out of the HAB was arranged upon the request of his supervisor. In that meeting, they again discussed the difficulties faced by Mickey in his work, but the contents of the conservation are matters of some dispute between the parties. At a later time, Mr. Wan also completed a second appraisal report of Mickey covering the period from 26 April 1999 to 29 July 1999 (the 2nd Appraisal Report). The following comments were made in this report: During these three months, [Mickey] demonstrated signs that he had tried hard to improve his performance. However, I would have liked him to be more forceful and pro-active in his day to day contact with his counterparts either in government departments or with the [non-government organizations] . His overall performance just fell short of our requirements, but as I said, he was working hard to improve. (p. 7 of the report) At this stage, I cannot see his potential. (p. 13 of the report) Mr. Wan gave Mickey a higher grade, Grade 4, for overall performance, which means Performance close to fully meeting requirements. Generally effective, with some room for improvement. Mr. Wan was again of the view that Mickey was not yet fitted for confirmation, with which the countersigning officer agreed. On 29 July 1999, Mickey was transferred to the Transport Bureau () to work as an Assistant Secretary under the supervision of Mr. Patrick Ho (Mr. Ho), the then Principal Assistant Secretary of the TB. There was a hand-over period of about one week, during which the outgoing Assistant Secretary would help Mickey to get acquainted with the work in the TB. The main responsibilities of Mickey by that time were as follows:

- (a) to provide input to and to co-ordinate the efforts of the Transport Department () and other relevant departments to rationalize bus services to solve the congestion problem in the Central Business Districts;

- (b) to examine working papers and proposals of and to attend meetings on the consultancy study on the co-ordination of public transport services with new railways, and to monitor the implementation of the policy to improve the co-ordination of different public transport modes;
- (c) to draft replies to enquires from transport operators and the general public on matters relating to franchised bus services and inter-modal co-ordination, to collate background information for preparation of replies to questions from members of the Legislative Council and briefs and lines to take for the relevant meetings of the Chief Secretary for Administration's Committee and the Legislative Council Transport Panel; to monitor the progress of bus service improvement measures; to examine the agenda items for the monthly board meetings of franchised bus companies and to develop recommendations for the Government Directors sitting on those boards in consultation with the relevant colleagues in the TB and the TD; to participate in the consultant selection exercise and pre-study preparation for the Consultancy on Trolley Bus Feasibility Study; and to perform other duties such as to alternate with the other Assistant Secretaries in the TB in acting as the secretary of the bi-weekly Bureau Directorate Meetings (BD Meetings). It is common ground that the workload in the TB by that time was heavier than that in the HAB, and Mickey and other AOs in the Bureau would usually have to work until late in the evenings and during Sundays. However, there is no evidence to suggest that the workload there was heavier than that of other bureaus or departments. Unfortunately, Mr. Ho was again not satisfied with the work performance of Mickey. On the other hand, Mickey complains that Mr. Ho was bad-tempered and was hostile to him. One of the duties of an Assistant Secretary of the TB was to take turn to be the secretary of the BD Meetings. However, by reason of his disabilities, Mickey claims that he had great difficulty in preparing the papers for such meetings, in particular if the works involved formatting of documents and preparation of visual presentations such as diagrams and charts. Further, Mickey's work often involved collection and analysis of a lot of data about bus routes. These data were often presented in visual forms which caused Mickey great difficulty. There was also a dispute between Mr. Ho and Mickey about the arrangement of Mickey's secretarial support. Mickey's secretary was one Ms. Judy Ho, but Mickey complained that she was inefficient and made a lot of mistakes in typing and preparation of documents. Mickey therefore sometimes sought the assistance from Ms. Lavin Lai who was the secretary of Mr. Ho. After learning about the same, Mr. Ho told Mickey that it was not desirable for him to do so. As Mickey's case was identified as one which required close monitoring, Mr. Poon called up Mr. Ho in November 1999 to discuss Mickey's progress. During that telephone conversation, Mr. Ho expressed his dissatisfaction about the work performance of Mickey. With that comment, Mr. Poon noted in the file that Mickey's case required close monitoring in the future. Mr. Poon was posted out of the CSB in March 2000, and his successor was Mr. Tony Cheng (Mr. Cheng) who happened to have worked under Mr. Ho previously in the Constitutional Affairs Branch. In April 2000, Mr. Ho approached Mr. Cheng expressing his disappointment of Mickey's work performance at the TB. On 11 April 2000, Mr. Cheng had a meeting with Mickey to discuss such issue. One of the

subjects of discussion was the difficulties faced by Mickey in his work. Mr. Cheng also warned Mickey that if his performance did not improve, a PRC might be held and recommendation might be made for the termination of his employment. It was also decided that Mickey would be put under observation for a period of one month, and if his performance did not improve by the end of that period, his employment with the Government might be terminated. Further, Mr. Cheng asked him to submit a performance improvement plan in a week's time. Apart from the aforesaid, the contents of the conversation are matters of some dispute. On 17 April 2000, Mickey had another meeting with Mr. Cheng to discuss Mickey's work performance. During the meeting, Mr. Cheng shared with Mickey his own experience of taking 3 months of sick leave as a result of work stress. Apart from that, there is again dispute between the parties as to the contents of the conversation at that meeting. After the completion of the observation period of one month in mid-May 2000, Mr. Ho was again not satisfied with the work performance of Mickey. Mr. Cheng duly reported the matter to his supervisor, Ms. Linn, and they both agreed to convene a PRC in respect of Mickey's case. On 23 May 2000, Mr. Ho completed a performance appraisal report of Mickey's performance in the TB covering the period from 29 July 1999 to 28 January 2000 (the 3rd Appraisal Report). In this report, Mr. Ho made the following comments about Mickey's work performance: [Mickey] is a diligent officer who worked long hours and stayed up late in the office. However, he was unable to put the time and efforts spent to good value. He took very long response time to act on each assignment, including simple tasks like routine updating based on previous proforma reports. He was absent-minded and very often failed to meet deadlines despite repeated reminders, irrespective of whether the deadline was a matter of days or weeks. He was poor in organization and time management and very often he was unable to work in accordance with the set priorities. .. At times, [Mickey] showed inability to grasp the policy objectives of certain initiatives/measures. He required frequent and detailed coaching to help him understand his role. He spent too much time on operational and clerical tasks and his work lacked intellectual quality. On the other hand, he seldom approached his supervisor or senior officers for advice/steer even in doubt. And he was not always able to deliver even with detailed guidance. At times, he simply failed to follow up on actions required. [Mickey] is a very quiet man. He did not quite blend with his colleagues in the Bureau and the Department. He kept his own thoughts and had little communication with others. Also, he had difficulty in expressing his ideas clearly whether orally or in writing. Quite often, this resulted in wasted efforts of himself and his colleagues. On the other hand, he needed to be more thorough in his background and research work. He also needed to develop positive thinking in problem solving. (p. 7 of the report) Like Mr. Wan in the 1st Appraisal Report, Mr. Ho gave Mickey a poor Grade 5 for his overall performance, which means performance falls seriously short of requirements. Mr. Ho was also of the view that Mickey was unlikely to become fitted for confirmation to the Administrative Grade. As Ms. Linn and Mr. Poon recommended to convene a PRC in respect of Mickey's case, a report was then made to Ms. Anissa Wong who was by that time the Deputy Secretary for the Civil Service and the supervisor of Ms. Linn. In support of such recommendation, a written submission in the form of a memo was

prepared by Mr. Cheng and Ms. Linn on 25 May 2000. After outlining the complaints by Mickey's 2 supervisors, Mr. Cheng wrote the following in the said memo: [Mickey] felt very stressful in the past few months: could not sleep well, always feeling tired and could not concentrate at work. Recently, he has stomach ache, cold and flu. From all these, it is obvious that he is under severe stress.

10. As reflected in his detailed appraisal reports, there is no doubt that [Mickey's] performance falls well short of requirements for a probationary AO. His weaknesses were identified at a very early stage and intensive coaching and guidance have been given by his supervisors and the grade management. While he did show some eagerness to try to improve, there is regrettably no indication that he has the ability to do so. His non-performance has adversely affected his teammates and also the work in TB. It is apparent that he is now under severe stress and it is not known how much longer he can stand. In view of these factors, it will be in the interest of the grade and [Mickey if he] leaves the grade, the earlier the better. As this is a case of non-performance as a result of lack of ability rather than disciplinary recourse, it will be more appropriate to give one month notice instead of one month salary for termination.
13. Having considered all the above factors carefully, I recommend that: [Mickey's] appointment be terminated with one month notice; We explain to [Mickey] explicitly the option of resignation; Before the PRC, Ms. Anissa Wong had consulted Mr. Lam Woon Kwong (Mr. Lam), who was then the Secretary for the Civil Service, about Mickey's case. Ms. Wong informed Mr. Lam about the poor comments by Mickey's 2 supervisors and the likelihood of a recommendation for the termination of Mickey's employment. Mr. Lam endorsed the assessment and the convening of the PRC. On 26 May 2000, the PRC was held to discuss Mickey's case. It was attended by Ms. Anissa Wong who was the convenor of the PRC, Ms. Linn, Mr. Cheng, Mr. Wan and Mr. Ho. During the conference, Mr. Wan and Mr. Ho expressed their dissatisfaction about the work performance and ability of Mickey. After the discussion, the participants of the conference recommended to terminate Mickey's employment. In fact, para. 6 of the notes of the PRC summarizes the recommendation as follows: The Conference considered that the nature of [Mickey's] two postings were typical for AOs and that the extent of supervision which [Mickey] received should be comparable to that of his peers. Judging from the oral and written feedback received, [Mickey's] performance fell well below the standards required of a probationary AO. There were consistent problems with both his abilities and personality. Despite close supervision and repeated counseling, he failed to make any improvement and there was little prospect of him improving in the foreseeable future, whether he stayed in the same posting or was to be transferred elsewhere. Hence, the Conference recommended that his service should be terminated. After the conference, Mickey was interviewed by Ms. Anissa Wong, Ms. Linn and Mr. Cheng. There is again dispute about the contents of the conversation in that interview, but it is common ground that the CSB officers informed Mickey that the Government was going to terminate his employment as a probationary AO, and it would be in the interest of Mickey to tender the resignation himself. After the interview, Mickey was

given time to consider his options. In the morning on 2 June 2000, Mickey was not in the office and Mr. Cheng tried to contact him repeatedly by phone. After arriving at the office in the afternoon, Mickey tendered his resignation letter indicating that the effective date of his resignation was 2 July 2000. Later on 12 June 2000, Mickey sent another letter to the CSB requesting to change the effective date of his resignation to 5 July 2000. Around that time, Mickey sought treatment from a psychiatrist Dr. Peter Yu. Mickey received from Dr. Yu 2 certificates recommending sick leave from 15 to 28 June 2000. The diagnoses in the 2 certificates were anxiety disorder and anxiety state respectively. On 26 June 2000, Mickey, relying on such certificates, applied for sick leave from 6 to 20 July 2000. On the same day, Mickey sent another letter to the CSB requesting to change the effective date of his resignation to 25 July 2000. Both requests were denied by the Government. Mickey's last day of work was 27 June 2000, though he formerly left the Government on 12 August 2000 because of his leave entitlement. After leaving the Government, Mickey had 7 jobs over a period of about 6 years. In order not to disclose too much details which may lead to the identification of Mickey, I would not name Mickey's employers after he left the Government, but the other details of his post-government employment are as follows: Average Employer Period of employment monthly salary Consulting 7/9/2000-25/5/2001 \$30,000 Company A Public Institution B 15/11/2001-14/11/2003 \$30,000 Public Institution C 1/12/2003-7/1/2004 \$36,989 Non-Governmental 8/1/2004-7/4/2005 \$33,632 Social Services Organization D Insurance 1/9/2005-1/2/2006 on commission Company E Consulting 13/1/2006-28/2/2006 \$30,800 Company F Public Financial 19/5/2006-28/9/2006 \$32,000 Institution G Mickey was able to obtain good reference letters from 2 of his employers, Consulting Company A and Non-Governmental Social Services Organization D. However, Mickey experienced difficulty in the last 2 employments. According to him, he had problems in preparing visual presentations for the clients of his employers and his supervisors became frustrated. Mickey claims that after his supervisors had learnt about his disabilities, they were not understanding and were even hostile to him. As a result of such alleged discriminatory conducts, he had to quit both jobs. At the time of the trial, Mickey was unemployed.

MEDICAL CONDITION OF MICKEY At this stage, one would wonder why Mickey performed so badly as an AO. Was he suffering from any disability? In this part of the judgment, I will set out the medical findings about Mickey made by the various experts engaged by the parties. Professor Peter Lee, an experienced clinical psychologist engaged by the Government, conducted a series of worldwide-established tests to assess the emotional, cognitive and memory functioning of Mickey. After such tests, Professor Lee made the following findings:

- (i) Mickey is a person of relatively high intelligence; there is a marked discrepancy between Mickey's verbal and non-verbal intelligence, and Mickey performs poorly on tasks involving visual scanning, perceptual details and tasks requiring ability to see and to assemble whole concept or pictures from their individual parts; Mickey's verbal learning and memory functions are normal but his non-verbal learning and memory functions are remarkably weak; Mickey has difficulty in performing tasks without specific instructions; Mickey has

difficulty in making decisions under pressure; and Mickey is prone to anxiety. According to Professor Lee, the highly unusual drop of IQ points in Mickey's non-verbal intelligence indicates a significant discrepancy between the functioning of both sides of the cerebral hemisphere of Mickey's brain. Had there been reported accident involving head injury, Professor Lee would suggest that such specific weakness in cognitive functioning was the result of brain injury. However without a specific cause, Professor Lee cannot offer an explanation for such deficiency. On the other hand, Professor Lieh-Mak, an experienced psychiatrist engaged by Mickey, describes such deficiency as visual short-term memory deficit. It is accepted by all the medical experts that Mickey had experienced all such problems long before he joined the Government, though Mickey was somewhat able to compensate such deficit by various means, for example, avoiding choosing academic subjects or assignments which involved a lot of visual presentations. With such kind of cognitive weaknesses, one can easily understand why Mickey had difficulty in the work at the TB. After looking at some visual images, he would soon forget the contents of such images. By that time, one of his duties was to deal with the problem of traffic congestion caused by the public buses in the central business districts. In working out the solution to such problem, Mickey needed to analyze a lot of data presented in visual forms such as diagrams and charts. Further, in taking turn to be the secretary of the BD Meetings, Mickey needed to prepare a lot of papers involving diagrams and flow-charts, and he experienced the same difficulty. However, such kind of cognitive weaknesses do not explain why Mickey performed so poorly when he worked in the HAB. Mickey also had problem in motivating others to work, for examples, in obtaining the necessary information from the TD and in supervising his own secretary to carry out the work. It seems that such kind of problem was caused by Mickey's poor working ability rather than by any of his disabilities. Dr. Benjamin Lai, another psychiatric expert engaged by Mickey, is also of the view that Mickey has obsessive compulsive personality traits, which include tendency towards perfectionism, excessive suppression of emotion, obsession with details and excessive devotion to work. Although it is pleaded as some kinds of disability in the Re-Amended Particulars of Claim, I consider that these traits are not disabilities by themselves but only a reflection of Mickey's personality. However, the problem escalated when Mickey started to suffer from a psychiatric or psychological disorder known as GAD or adjustment disorder. Mickey's experts, Dr. Lai and Professor Lieh-Mak, are of the view that Mickey was suffering from GAD, while the Government's experts, Professor Lee and Dr. Chung See-yuen, make the diagnosis of adjustment disorder. As I see it, the difference lies on the different interpretation and application of the diagnostic criteria of the two leading guides to the classification of mental and behavioural disorder known as DSM-IV and ICD-10. However, so long as all the medical experts agree that both kinds of disorder can be regarded as a psychiatric or psychological illness, it is not necessary for me to make a specific finding as to whether Mickey was suffering from GAD or adjustment disorder when he worked in the Government. There is an issue, however, as to when Mickey started to suffer from such psychiatric disorder. The problem arises because even a person free from disability but working under stress may display symptoms associated with such disorder, and so it is not

easy for the experts to tell whether the anxiety suffered by someone exceeds the threshold of becoming an illness. All the medical experts agree that the diagnosis of such disorder would depend on the durations, frequencies and severities of the symptoms. Mickey's expert, Dr. Lai, after reviewing Mickey's account of the events, is of the view that the psychiatric illness had an insidious onset in 1999. Towards the end of 1999 and in the first half of 2000, his psychiatric illness had worsened to a degree that his thought process, emotion and judgment were affected. Obviously, the experts' diagnoses of the disorder would depend on the subjective complaint of Mickey about the symptoms, and so ultimately when he first started to suffer from the illness would depend on the creditability of his evidence. However even based on Mickey's own case, it seems that he was only suffering from the psychiatric disorder to the extent of affecting his work performance and judgment in the end of 1999 and the first half of 2000. Mickey's another expert, Professor Lieh-Mak, is of the view that Mickey had symptoms of the GAD way back in 1995, but it was probably in December 1998 that Mickey's anxiety passed the threshold to become a disorder. Dr. Chung, however, is of the opinion that Mickey might have suffered from psychiatric disorder in 2000. As I see it, all the medical experts agree that there were a number of factors interacting with each other causing Mickey to develop the psychiatric disorder. These factors include: (i) the specific weaknesses in his cognitive functioning; (ii) his personality; (iii) his proneness to anxiety; (iv) the difficulties and the pressure encountered by him in his work; and (v) the tension with his supervisor, and it is difficult to isolate the effect of a particular factor in contributing to the development of the disorder. However, as his work at the HAB was less affected by his cognitive weaknesses and the workload by that time was not particularly heavy, I am more inclined to accept the opinion of the majority of the experts that Mickey's anxiety had not passed the threshold of being a disorder until mid-1999 when Mickey started to work at the TB. In any event, it is clear from the medical evidence that Mickey was not suffering from any psychiatric or psychological illness in the first few months when he worked in the HAB in 1998. Since leaving the Government, Mickey continued to receive psychiatric treatment except for the period between mid-2001 and early 2004.

MICKEY'S ALLEGATIONS OF DISCRIMINATORY AND HARASSING CONDUCTS AND THE CONFLICTING VERSIONS OF EVENTS As commonly found in discrimination cases involving employers and employees, there are considerable factual disputes between the parties as the allegations by the complainants usually cover a series of incidents which occurred over a period of time. The same happens in the present case. In this section, I will set out the alleged acts and omissions relied on by Mickey as constituting unlawful discrimination and harassment on the part of the Government and the various officers who had handled his case. For easy reference, I will also list out in this section the conflicting evidence adduced by the parties if there are disputes about the incidents concerned.

- (i) Mr. Wan's hostile reactions to Mickey's disabilities It is pleaded that shortly after Mickey started his work at the HAB on 26 October 1998, Mr. Wan reacted adversely to Mickey's disabilities. Mr. Wan frequently reacted in a hostile manner when Mickey talked to him anxiously about his work, and on some occasions, including the performance appraisal

interview on 13 July 1999, Mr. Wan drove Mickey out of the office. Mr. Wan also showed strong hostilities when Mickey appeared to be under-react in their conversations, including yelling at Mickey and asking Mickey why he was not responsive and telling Mickey that his lack of response was a sign of confusion and lack of motivation. Mickey claims that such conducts amount to direct discrimination and harassment. Mickey gives oral testimony in support of such allegations at the trial. According to him, Mr. Wan's hostilities had worsened his disabilities, causing him to have anxiety and poor concentration. Mr. Wan, who testifies at the trial, disputes such allegations. He denies that he had ever talked to Mickey in a hostile manner or yelled at him. Though there might be occasions when Mickey came to his office for urgent consultation when he was having a meeting, Mickey was then asked to leave and waited until he finished his meeting. In fact, Mr. Wan tried to offer assistance to Mickey about his work, but Mickey did not respond positively to such offer. After learning from Mickey that he preferred jobs with precedents and step-by-step procedures to follow, Mr. Wan even restructured the works of Mickey. However even with the reduced workload, Mickey's performance was far from satisfactory. Further, he was not aware that Mickey was suffering from any disabilities when he was working in the HAB. (ii) Unfavourable comments about Mickey's performance by Mr. Wan to Mr. Poon It is pleaded that in January 1999, Mr. Wan gave unqualified poor comments on Mickey to Mr. Poon without referring to or making allowance or adjustment for Mickey's disabilities, thereby causing or influencing the CSB to form the view that the performance of Mickey was poor. Mickey claims that such act constitutes direct and indirect discriminations. It is common ground that Mr. Wan did make such comments to Mr. Poon. However, Mr. Wan maintains that he was not aware of Mickey's disabilities by that time and those comments were his genuine assessment of the work performance of Mickey. (iii) Mickey's treatment at the pastoral visit in March 1999 It is pleaded that on 26 March 1999, Mr. Poon simply concluded at the pastoral visit to Mickey that the latter appeared to lack motivation without considering that Mickey's disabilities were adversely affecting his performance at work. Further, Mr. Poon refused to consider and rejected Mickey's request for assistance or accommodation for the difficulty he had at work with Mr. Wan, thereby constituting direct and indirect discriminations. At the trial, Mickey gives evidence about such interview with Mr. Poon. However, in answer to the question as to what sort of accommodation Mickey was requesting from Mr. Poon because of his disabilities, as opposed to the personality problems that Mickey encountered in his work at the HAB, Mickey admits that not much had been said in that regard. Mr. Poon also testifies at the trial. According to him, he told Mickey about Mr. Wan's poor assessment of his work performance, and he warned Mickey that there might be early termination of his service if he did not improve. As Mr. Poon had met Mickey during the recruitment interview in Vancouver, Mr. Poon believed that Mickey could do much better in his work. Regarding Mickey's allegations, Mr. Poon testifies that Mickey did not make any specific request in the meeting. Whilst on the subject of his work, Mickey mentioned that he would like to have a schedule with more well-defined tasks, but Mr. Poon told him that such job expectation was unrealistic in the working environment of an AO. Mr. Poon also tried to give some other advice to Mickey about his work. Like Mr. Wan, Mr. Poon also denies knowledge of any

disabilities on the part of Mickey. Mr. Poon made a record of the said conversation with Mickey in his note dated 7 July 1999, which in turn supports Mr. Poon's evidence at the trial. In the final section of such note, Mr. Poon wrote down the following observation: A worrying case, and [Principal Assistant Secretary] and [Assistant Secretary (Administrative Service) 1] have been informed. [Mickey] appeared to have some problems in his working attitude and his adaptation to the working environment. There was also room for improvement in his social skills. He must acquire a better grasp of his role as an [Assistant Secretary] and seek improvement as quickly as possible. Otherwise, he would have to be further counseled and could be a possible case for [performance] review conference. (iv) Request by Mr. Wan to transfer Mickey out of the HAB and the unfavourable appraisal in the 1st Appraisal Report It is pleaded that in or about July 1999, Mr. Wan requested Mr. Poon to transfer Mickey out of the HAB. Further, Mr. Wan completed the 1st Appraisal Report on Mickey which failed to recognize that Mickey was a person with disabilities. It is also alleged that the report was highly critical of Mickey's performance so as to ensure that Mickey would be transferred out of the HAB. Mickey claims that such acts constitute direct and indirect discriminations. It is not disputed that Mr. Wan requested the CSB to transfer Mickey out of the HAB, and Mr. Wan completed the 1st Appraisal Report on Mickey with the observations mentioned in the earlier part of this judgment (see: para. 16 above). The issues are whether Mr. Wan was aware of Mickey's disabilities by that time and whether the comments in that report were genuine appraisal of Mickey's performance.

- (v) Mr. Ho's hostilities towards Mickey It is pleaded that shortly after Mickey started his work at the TB, Mr. Ho was unable to tolerate Mickey's disabilities. When Mickey was anxious and unable to respond, became tired easily, had difficulty in concentration, appeared blank or displayed lack of manual dexterity, Mr. Ho then yelled at him, threw things at him, or pounded the desk in front of him even when other people were present. It is claimed that such conducts amount to direct and indirect discriminations and harassment of Mickey. In the trial, Mickey gives a very detailed account as to the alleged hostilities of Mr. Ho towards him. Mickey claims that Mr. Ho disliked him personally, and he considers that as a reason for the hostilities. Mr. Ho disputes Mickey's account of the events. As he was not aware of the previous appraisals of Mickey's work performance by the CSB and the HAB, he had no reason to dislike Mickey personally. Though he considers himself to be a person demanding high standard, he always treated Mickey in a professional manner. Further, he often tried to offer assistance to Mickey when the latter experienced difficulties, and Mickey in fact got far more time, supervision and guidance from him than any of the other AOs that he had supervised. Mr. Ho admits that, whilst he might at times during the latter part of Mickey's posting in the TB been impatient with him because of his poor work performance and he had made known to Mickey his dissatisfaction, Mr. Ho had never acted in a hostile manner towards Mickey. He had not yelled or thrown things at Mickey or pounded the desk, whether alone with Mickey or in the presence of others. Further according to Mr. Ho, he was not aware that Mickey was suffering from any disabilities when he worked in the TB. (vi) Lack of secretarial support for Mickey Mickey claims that the lack of secretarial support was one of

the reasons causing the tension between Mr. Ho and himself. It is pleaded that from December 1999, Mr. Ho prohibited Mickey from using the competent secretarial service of Ms. Lavin Lai who was Mr. Ho's secretary, and restricted Mickey to using the inadequate service of his own secretary, Ms. Judy Ho, thereby forcing Mickey to spend unnecessary time on secretarial tasks, in particular the preparation of the papers for the BD Meetings, at the expenses of his designated duties. Mickey claims that such denial of secretarial support amounts to direct and indirect discriminations and harassment. In the trial, Mickey testifies that, by reason of his disabilities, he experienced difficulty in preparing diagrams and charts and other forms of visual presentations. At the TB, one of his responsibilities was to serve as the secretary for the BD Meetings. The secretary had the duty to prepare the papers for the meetings, and a lot of such papers involved diagrams, flow-charts, tables and other forms of visual presentations. As he had problems with such work, he needed competent secretarial support in this regard. Mickey shared a secretary, Ms. Judy Ho, with another AO in the office, but Mickey claims that she was incompetent. He therefore sought the assistance of Ms. Lavin Lai who was Mr. Ho's secretary. However after Mr. Ho learnt about the same, he did not allow Mickey to use the secretarial service of Ms. Lai. Mr. Ho also testifies in some length about the arrangement of secretarial support. As Mickey's supervisor, Mr. Ho noticed that Mickey lacked the ability to motivate others to work with him, and he was also weak in supervising his staff. Further, when facing a difficult problem, instead of tackling it, Mickey would try to avoid the problem by taking the easy way out, and Mickey also had a tendency to put the blame on others for something which might be the result of his own shortcomings. Hence, when Mr. Ho learnt that Mickey was asking his own secretary to do certain works, he was concerned. In order to help Mickey to develop the potential of a good AO whose duties included the supervision of staffs, he advised Mickey that he should work with his own personal secretary and to give clear instructions when giving assignments to her. This was also for the good administration of the office and was a fair arrangement for Ms. Lai. Although Ms. Judy Ho was not an impressive secretary, she was able to deliver with proper instruction and supervision. Mr. Ho considers that he was only discharging his duty as the supervisor of Mickey, and it is regrettable that Mickey considers that as a harassment by reason of his disabilities. Further, it is the Government's case that Mickey should not be entitled to preferential treatment in this regard. Whilst every AO in the in the Bureau had their own secretary, there was simply no reason for Mickey to ask for more favourable treatment by having the service of other secretaries in the office. (vii) Mr. Ho's treatment of Mickey after December 1999 It is pleaded that after December 1999, the difficulties and the pressure arising from the lack of secretarial support had worsened Mickey's disabilities. Mickey felt restless and needed to walk around the office to calm himself from time to time. He lost his appetite and had flu-like illness. He became tremulous during meetings and developed palpitations on seeing Mr. Ho. On the other hand, Mr. Ho escalated his hostility against Mickey thereby constituting direct and indirect discriminations and harassment of Mickey. Mickey testifies that he displayed the aforesaid symptoms when he worked in the office, and Mr. Ho continued to be hostile to him. On the other hand, Mr. Ho denies the hostilities and he was not aware of the alleged symptoms or disabilities on the part of

Mickey. (viii) Mr. Ho's expectation of Mickey. It is pleaded that after December 1999, Mr. Ho expected Mickey to achieve performance which AOs without disability might have achieved but which Mickey was unable to do so because of his disabilities, and reacted in a hostile manner when that performance was not achieved by Mickey. It is claimed that such conduct amounts to indirect discrimination and harassment of Mickey. It is common ground that Mr. Ho was not satisfied with Mickey's work performance. In making the assessment, Mr. Ho was not aware that Mickey was suffering from any disabilities, and so he concluded that the poor performance was caused by Mickey's weak working ability, poor working attitude and personality problems. Further, Mr. Ho had already made allowance for the fact that Mickey was a junior AO who was in the learning process. Mr. Kevin Ho, the then Deputy Secretary for Transport and the supervisor of Mr. Ho, who had the opportunities to work with Mickey occasionally, agreed with the appraisal of Mickey's performance by Mr. Ho. There are two Mr. Ho in the present case: Mr. Kevin Ho and Mr. Patrick Ho. For easy reference, I will simply refer to Mr. Patrick Ho as Mr. Ho and Mr. Kevin Ho with the full name. (ix) Request by Mr. Ho to transfer Mickey out of the TB and the unfair comments in the 3rd Appraisal Report. It is pleaded that in April 2000, Mr. Ho requested the CSB to transfer Mickey to another post elsewhere. Further, it is alleged that Mr. Ho wrote a very bad, unfair and misleading 3rd Appraisal Report on Mickey, conveying to the CSB that Mickey's performance was so bad that it justified termination of his employment so as to avoid continuing to work with Mickey, without recognizing that Mickey was a person with disabilities. Mickey claims that such conducts amount to direct and indirect discriminations. It is common ground that Mr. Kevin Ho did make a request to the CSB to transfer Mickey out of the TB. In respect of the assessment in the 3rd Appraisal Report, Mr. Ho maintains that it was a genuine appraisal of the work performance of Mickey, having taken into account the fact that Mickey was a junior AO in the first two years of his job. Further, although it is Mickey's case that both of his supervisors should have made qualifications in the appraisal reports with reference to his alleged disabilities, it is not clear as to what Mickey expects Mr. Wan and Mr. Ho should have done. During cross-examination, Mickey accepts that their supervisors would not have put down something like he cannot perform the work because of GAD, but he expects his supervisors to have noted down the symptoms that they had noticed and how those symptoms had affected his performance at work. However, if the Government's officers were not aware that those symptoms were symptoms of disabilities, one cannot in those circumstances expect the appraising or countersigning officers to tone down the appraisee's poor performance with reference to a reason not within their knowledge. Although it is not pleaded as part of the discriminatory conduct, Mickey complains that there was deliberate delay on the part of Mr. Ho in completing the 3rd Appraisal Report. However, it was the established procedure that the appraisee was required to fill in the information about his particulars in the first part of the report before the same was passed to the appraising officer for writing the appraisal. As Mickey did not fill in the required information, that caused the delay in the completion of the report. Although Mickey maintains that Mr. Ho should have chased him for the report, there is simply no factual basis to substantiate Mickey's complaint about the delay.

- (x) Mr. Cheng's threat of dismissal and his refusal to provide the assistance requested by Mickey. It is pleaded that in the meeting on 11 April 2000, Mr. Cheng told Mickey that his performance would be reviewed in a PRC, following which procedures might be commenced which would lead to the dismissal of Mickey. Further, it is alleged that Mr. Cheng denied Mickey's request for assistance and accommodation, and he threatened Mickey that the Government could terminate his employment by simply issuing a memorandum. Mickey claims that these conducts amount to direct and indirect discriminations. Both Mickey and Mr. Cheng testify about the contents of the conversation in that meeting, which was the first time that they met. They discussed the difficulties faced by Mickey in the course of his work. Getting the impression that Mickey was always trying to put the blame on others for his poor performance, Mr. Cheng advised Mickey that he should try to focus on overcoming his own weaknesses. Mr. Cheng also offered other advice for his work. Mr. Cheng denies that he had ever said to Mickey that the Government could terminate his employment by simply issuing a memorandum. However, he did mention to Mickey that if the latter's work performance did not improve, the Government might terminate his employment. In this regard, Mr. Cheng also explained to Mickey the mechanism of convening a PRC. Apart from the aforesaid, Mr. Cheng testifies that Mickey had not asked for other specific assistance or accommodation in that meeting. (xi) Mr. Ho's reluctance to grant sick leave to Mickey. It is pleaded that on 14 April 2000, Mr. Ho approved Mickey's application for sick leave after showing great reluctance, thereby deterring Mickey from taking any more sick leave even though he was at times so sick that he felt he would faint. Mickey claims that such conduct constitutes indirect discrimination and harassment. In his testimony, Mr. Ho denies that he had ever refused Mickey's application for sick leave or had shown reluctance in doing so. On the contrary, Mr. Ho processed Mickey's applications for sick leave immediately upon receipt of such applications and approvals were given to Mickey once the necessary internal procedures were completed. (xii) Mr. Cheng's refusal to provide assistance to Mickey after 17 April 2000. It is pleaded that in a meeting on 17 April 2000, Mickey told Mr. Cheng about his difficulties at work, and he also complained about the lack of effective clerical assistance. After the meeting, Mickey requested Mr. Cheng to provide for adequate clerical assistance, but no one from the Government actually listened to his request. Mickey complains that the denial of his request amounts to direct and indirect discriminations. Mr. Cheng agrees that Mickey did mention some of the difficulties faced by him in his work, and he told Mickey that he would convey the message to Mr. Ho. However, Mr. Cheng considered that a lot of the problems were caused by Mickey's own weaknesses, and he therefore advised Mickey that he should learn to cope with the pressure and the colleagues in his work. Mr. Cheng does not recall that Mickey had made any specific request for clerical assistance or other forms of accommodation. Further, in order to gain the trust of Mickey, Mr. Cheng even gave Mickey the number of his mobile phone so that Mickey could call him anytime for advice. (xiii) Rumour about Mickey leaving the Government. It is pleaded that between 18 and 26 April 2000, Mr. Cheng spread the rumour that Mickey was going to leave the Government, and as a result, someone warned Mickey that his time with the Government was running short.

Mickey claims that such conduct amounts to direct and indirect discriminations. Mickey testifies that the rumour was spread by the Government's officers with a view to pressurize him to leave the civil service. In order to step up the pressure and to humiliate him, though it is not expressly pleaded, Mickey claims that Mr. Ho reduced his work portfolios in May and June 2000. On the other hand, Mr. Cheng denies that he had ever spread any rumour about Mickey's departure. About the adjustment to Mickey's work portfolios, Mr. Ho explains that a senior AO of the TB had completed a large-scaled project by that time, and so arrangement had been made within the TB to transfer some of the portfolios under the supervision of Mr. Ho, which were then very heavy, to that AO to maximize the use of spare manpower. Such arrangement had nothing to do with the work performance of Mickey. After Mickey had tendered his resignation, arrangement might have been made to avoid Mickey from gaining any further access to certain confidential information in the course of his work, but such arrangement was only for operational need and was not directed against Mickey personally. (xiv) Mr. Ho's assessment in the 3rd Appraisal Report It is pleaded that on or about 24 May 2000, Mr. Ho completed the 3rd Appraisal Report on Mickey which made no reference to Mickey being a person with disabilities and which was highly critical of his disabilities as if they were merely aspects of poor performance, thereby constituting direct and indirect discriminations of Mickey. Again, it is the Government's case that Mr. Ho was not aware that Mickey was suffering from any kinds of disability when the latter was working under his supervision, and the assessment in the report was a genuine appraisal of Mickey's performance when he worked at the TB. (xv) The decision to terminate Mickey's employment and the treatment received by Mickey in the PRC on 26 May 2000 It is pleaded that in the PRC on 26 May 2000, Ms. Anissa Wong, Ms. Linn and Mr. Cheng told Mickey that they had decided to make the recommendation to terminate his employment. They also suggested that Mickey should resign himself, otherwise he would be dismissed and a record of dismissal would be included in his testimonial and certificate of service which might affect his future career. According to Mickey, the Government's officers also suggested him to seek the assistance of counseling service, which he had to arrange for himself. Finally, they misled Mickey by falsely representing to him that he would not be allowed to resign after the CSB had commenced the termination procedures, and he was given 3 days, later extended to 7 days, to tender his resignation. Mickey claims that such conducts on the part of the Government's officers amount to direct and indirect discriminations and harassment. There is no dispute that the CSB had recommended to terminate Mickey's employment, and we have seen the memo by Mr. Cheng dated 25 May 2000 outlining the reasons for doing so (see: para. 32 above). As a result of Mickey's poor performance, a PRC was convened on 26 May 2000. Ms. Anissa Wong, Ms. Linn and Mr. Cheng first met Mr. Wan and Mr. Ho, and they all agreed with the recommendation. After the meeting, the CSB officers met Mickey, and they informed Mickey about the Government's decision to terminate his employment. However, in order to avoid citing dismissal as the ground for terminating his employment, which might affect his future career, Mickey was offered the option of resigning himself. However, the CSB officers dispute that they had ever advised Mickey to seek counseling service, and they had not told Mickey that he would not be allowed to resign after the CSB

had commenced the termination procedures. After the meeting, Mickey was given time to consider his options. (xvi) Advice by Mr. Cheng to Mickey to leave the Government It is pleaded that on 26 May 2000, Mr. Cheng advised Mickey that he should leave the civil service on account of his health problems, and this, Mickey says, constitutes direct and indirect discriminations and harassment. To be precise, according to Mickey's first statement, Mr. Cheng had said that Mickey was very ill and had become much thinner after joining the Government, and it would be better for Mickey to leave the civil service. Mr. Cheng, on the other hand, accepts that he might have spoken something like that to Mickey, but not necessarily at the meeting with Mickey on 26 May 2000 after the PRC. However, he was only referring to illnesses such as stomach ache, colds and flus which Mickey had earlier on told Mr. Cheng about. Mr. Cheng genuinely believed that Mickey was not right for the job of an AO and that his failing attempts to cope with a job that was beyond his ability put pressure on him and affected his health, and hence a change of the working environment would be beneficial to Mickey. Again, Mr. Cheng was not aware that Mickey was suffering from any other disabilities apart from the said general illnesses. (xvii) CSB's failure to give the necessary warning as required by the Civil Service Regulations It is pleaded that the CSB had failed to give Mickey any written warning that he might be unsuitable for confirmation in his grade in breach of clause 180(3) of the Civil Service Regulations (), which provides that a warning must be given to an officer if there are indications that he may not be suitable for confirmation, and that in such case he should be helped as much as possible. Mickey claims that the failure to give such warning amounts to direct discrimination. It is difficult to understand Mickey's allegation in this regard. Even according to his own case, various CSB officers had on a number of occasions warned him about the possibility of the Government in terminating his employment by reason of his poor performance at work. It is true that such warnings were not given in writing, but I cannot understand how the technical breach of such provision of the CSR would by itself amount to discrimination. Further, it is also the Government's case that it had provided all the necessary assistance to Mickey, including, inter alia, the counseling by the various CSB officers and the pre-mature reassignment of Mickey to a new post after his work at the HAB. (xviii) Pressure by Mr. Cheng to Mickey to resign by making repeated telephone calls It is pleaded that on 2 June 2000, Mr. Cheng phoned Mickey 5 times to pressurize him to resign, thereby constituting direct discrimination and harassment of Mickey. Mr. Cheng admits that he had tried to contact Mickey a number of times on that day. Mr. Cheng originally planned to call Mickey to see if he had made any decision after the PRC. As Mickey did not report to work that morning without prior notice, Mr. Cheng was concerned. He was even afraid that Mickey might do something stupid such as committing suicide, and that was the reason why he had made repeated phone calls to Mickey that morning. (xix) Constructive dismissal by the Government It is pleaded that on 2 June 2000, the CSB constructively dismissed Mickey by causing him to tender his resignation in response to harassment and intimidation, thereby constituting direct discrimination of Mickey. There is no dispute that the CSB's officers had informed Mickey of their recommendation to terminate his employment. However, they claims that such decision was made only because of the poor work performance of Mickey

throughout his employment as AO and nothing else. (xx) Failure of the Government to review Mickey's case after the tendering of the sick leave certificates. It is pleaded that on or about 24 June 2000, despite the sick leave certificates stating that Mickey was suffering from anxiety disorder and anxiety state, the CSB failed to review Mickey's case including the decision to require him to leave the civil service, thereby constituting direct discrimination of Mickey. This is a new allegation which Mickey tried to introduce by way of amendment of the pleading in the early stage of the trial. Under s. 82(1) of the DDO, a claim for disability discrimination should be instituted within 2 years from the date when the act complained of was done, and so the Government opposed the amendment on the ground that it was made beyond the limitation period. However under s. 82(3), the court has a discretion to entertain a claim out of time if it considers that it is just and equitable to do so. After hearing submissions from the parties, I allowed Mickey's application to introduce such new allegation by way of amendment of the Particulars of Claim and to extend the time for him to make such claim. In my judgment, the DDO is a piece of social legislation with a view to eliminate disability discrimination. As the local jurisprudence is still in the early stage of development, it would be quite understandable for a complainant to discover new argument in the course of preparing the case. Further, as the new allegation forms part of a series of events leading to the termination of the employment relationship, I do not find that there would be any real prejudice caused to the Government if its officers have to deal with such new allegation at the trial. To me, the court should try to ensure that all the relevant issues relating to such discrimination dispute be decided on the merits, and it is quite undesirable to bar a party from advancing a related argument simply because of limitation of time. I therefore allowed Mickey's application in this regard. The Government's answer to this new claim is a simple one. By submitting the sick leave certificates, Mickey was only applying for a period of sick leave in July 2000. As he did not ask for a review of his case, there was no obligation on the part of the Government to do so. (xxi) Refusal by the CSB to grant Mickey further sick leave in July 2000. It is pleaded that on 26 June 2000, despite the submission of the sick leave certificates, the CSB refused Mickey's application for sick leave for 2 weeks, which Mickey says, amounts to direct and indirect discriminations. It was recommended in the 2 certificates that Mickey be given sick leave from 15 to 21 June 2006 and from 22 to 29 June 2000. However in submitting the certificates, Mickey was actually applying for sick leave from 6 to 20 July 2000, a period which was covered by neither certificates. Hence, the Government contends that the sick leave certificates did not support the application. Further, according to resignation letter tendered by Mickey, the effective date of his resignation was 2 July 2000. In such circumstances, it was not necessary for Mickey to apply for sick leave from 6 to 20 July 2000.

ASSESSMENT OF THE FACTUAL EVIDENCE In the above, I have set out the background of this case and the disputes between the parties about certain incidents. As I see it, it is common ground that Mickey's performance was not satisfactory when he worked at the HAB and the TB, and the main factual disputes between the parties bolt down to the following issues:

- (i) whether Mr. Wan and Mr. Ho had shown hostilities to Mickey in the manner as alleged by him, for examples, driving Mickey out of the office, yelling at him or pounding the desk? whether the CSB officers had misled Mickey about the termination procedures or were in any way hostile to him? whether Mickey had displayed all the symptoms of his psychiatric illness as alleged by him in his testimony, or the symptoms were just limited to the ones observed by the various Government officers, some of which were included in the various appraisal reports and memos? and (iv) whether the Government's officers dealing with Mickey were aware that he was suffering from some kind of psychiatric illness when he worked as an AO? In answering these questions, I need to assess the creditability of the factual witnesses.
- (i) The evidence of Mickey The oral testimony of Mickey has lasted for over 6 days, which provides me with ample opportunity in assessing the creditability of his evidence. After hearing Mickey's testimony, I can make the following observations. Firstly, I am impressed by the analytical skill demonstrated by Mickey in answering all the questions put to him during the trial. He answers the questions carefully, and he always qualifies his answers in order to protect his own interest. When he is not sure about the meaning of a particular question, he would ask for clarification before answering the same. To my surprise, he can provide answers to every question put to him about the details of the events which happened 6 to 8 years ago, and every time when he is asked about a particular incident, he always has some new details to add. Mr. Harris SC, counsel for Mickey, urges me to accept Mickey's evidence. As he is an intelligent person and working in the Government was a painful experience for him, he should be able to remember the details about the various incidents without too much difficulty. As compared with the witnesses of the Government who were treating Mickey as one of the many cases that they had to handle in the course of their works, the court, as submitted by Mr. Harris, should prefer Mickey's evidence over that of the other factual witnesses of the Government. Despite such submission, I myself have grave reservation about the reliability of Mickey's evidence. According to my observation, Mickey has an obsession that the termination of his employment was the fault of his 2 supervisors and the CSB officers who had handled his case, and as a result his evidence becomes very biased, and a lot of his evidence is very much his own subjective perception of the events without the support of any factual evidence. In such circumstances, it is very dangerous for the court to rely on his testimony. Perhaps I should elaborate on the reasons why I say so. As I see it, Mickey is very critical about the temperament of his 2 supervisors when he worked as an AO, and he always queries the reasonableness of his supervisors' instructions. After leaving the Government, he took up 7 jobs in a period of 6 years, and he makes similar comments about at least 2 of his supervisors in the post-Government jobs. He is always obsessed with the idea that there was certain conspiracy against him, and he always interprets the conducts on the part of his supervisors and the CSB officers as unfriendly without proper justification. As he proceeds on the basis that his supervisors, in particular Mr. Ho, were unfriendly, biased and hostile to him, Mickey regards that a lot of the actions taken by Mr. Ho were directed against him personally, including: (i) the

reassignment of Mickey's works or portfolios around the time when Mickey tendered his resignation; (ii) the refusal of Mr. Ho to allow Mickey to use the service of his secretary; and (iii) the delay on the part of Mr. Ho in writing his appraisal report. However, after listening to the explanation by Mr. Ho, it is clear that these decisions and actions were taken with sound reasons and were not directed against Mickey personally. For the rearrangement of Mickey's portfolios in June 2000, Mickey complains that this was done with a view to humiliate him and to pressurize him to leave the civil service. However, it is clear that there was another AO of the TB who then completed the work under a large-scaled project, and there was spare manpower to take up some of the works under Mr. Ho's portfolios, which they all agree were very heavy by that time. I consider that as a sensible decision on the part of the management of the TB for the good administration of the Bureau, but yet Mickey, quite unnecessarily, regards this as a hostile act. In respect of the secretarial support, it is clear that Mickey had problem in motivating others to work with him. For examples, he had difficulty in obtaining the necessary information from the TD when Mr. Ho required some factual data for his works, and Mickey's own secretary could not deliver her works for Mickey when she had no problem in working with others in the TB. In my judgment, this shows the weakness of Mickey as an administrator, and as a responsible supervisor, Mr. Ho should have asked Mickey to motivate his own secretary to do the works, rather than asking other staffs to do the same for him which would be unfair to those staffs. This was exactly what Mr. Ho did in the present case, but unfortunately, Mickey regards this as a hostile reaction on the part of Mr. Ho in view of his disabilities. For the delay in completing the 3rd Appraisal Report, Mickey claims that Mr. Ho had deliberately refused to complete the report. However, the evidence clearly shows that the delay was caused by Mickey himself, and yet he put the blame on Mr. Ho. The list does not end here. In his testimony, Mickey draws a number of inferences which turn out to be his own subjective deductions without the support of any objective factual evidence. For example, he mentions that there was an agreement or understanding between Mr. Ho and Mr. Cheng to drive him out of the civil service. Whilst I appreciate it is Mickey's case that Mr. Ho disliked him personally, there is no basis to suggest that there was such a conspiracy. As he suspects that all the senior AOs were hostile to him, the conspiracy was simply Mickey's own imagination. Further, when Mickey was having difficulties with his work, the CSB officers including Mr. Cheng tried to offer him assistance and counseled him. However, Mickey claims that Mr. Cheng only wanted him to leave the civil service as soon as possible, and so all the assistance and counseling were only superficial efforts on the part of Mr. Cheng, and he does not regard the same as a kind gesture on the part of the CSB officers. With the greatest respect to Mickey, there is simply no basis for him to say so. The CSB officers were given the responsibility of monitoring the performance of probationary AOs. As shown by the written records, it was not an easy task for them to deal with the problem of Mickey's poor performance. As I see it, the CSB officers had already tried their very best to counsel Mickey, hoping that he would improve and that it was not necessary to have a pre-mature termination of his employment. Yet because of his deep prejudice against the various Government officers, Mickey loses his objectivity which in turn affects the reliability of his evidence. According to Mr. Ho and Mr.

Cheng, Mickey has a tendency to blame others for something which may be the result of his shortcomings. I can only say that the observations above echo such comment. What is further disturbing is the alarming remark by Mickey that, according to his experience, senior Government's officers would not consider it as compromising their integrity if they have to lie, whether in court or on other occasions. In other words, Mickey is saying that the factual witnesses of the Government are all lying in court, and for them lying is not a serious matter. Mickey says so from his own experience, and so it suggests that senior Government officers would lie in the course of their works if necessary. This is indeed a very serious allegation. Obviously, I am not suggesting that the evidence of senior government's officers, by reason of their ranks, is more reliable than that of a junior officer, but there is simply no basis to support such a serious allegation. According to my observation, such remark only highlights the deep prejudice that Mickey has against all the senior Government's officers who were his supervisors or had handled his case. Further, I find it incredible that Mickey is able to recall all the minute details of the various incidents about 6 to 8 years ago.

Although Mickey is an intelligent young man and he has an obsession with details, he always has something new to add every time when he is asked about a particular incident. In fact, some of these details are obviously crucial to the issues of the case, and one would wonder why Mickey had not listed out such details in his witness statements in the first place. In my judgment, Mickey has exaggerated his evidence at trial with a view to substantiate his case. Another factor which may affect the reliability of Mickey's evidence is Mickey's obsession that he was medically unwell when he worked as an AO. With all the knowledge of the disabilities subsequently gained from the various medical reports, it would be quite easy for Mickey, either consciously or unconsciously, to exaggerate his symptoms and conditions with the benefit of such hindsight. Indeed, if the symptoms were so obvious by that time, why did Mickey not tell the symptoms to his own doctor? The facts reveal that Mickey had consulted his doctor, Dr. S. F. Fung, for more than 10 times between January and June 2000. He did not mention to Dr. Fung any of the symptoms that he now relies on except upper respiratory tract infection, epigastric pain, sore throat, runny nose and coughing, and Dr. Fung was not alert enough to treat Mickey's condition as anything more than flu or upper respiratory tract infection or asthma. Further, Mickey did not raise with Dr. Fung complaints about poor concentration and feeling stressful until 5 June 2000 which was after his resignation. Even then, he just mentioned these 2 and not other symptoms, and he told his doctor that he had suffered such symptoms for over a month, and not for about 2 years as alleged by him in his evidence. Hence, the symptoms could not have been obvious by that time. By reason of the aforesaid analysis, I find that Mickey has exaggerated his evidence at the trial and I therefore reject his evidence as unreliable. (ii) The evidence of the Government's officers On the other hand, I find all the factual witnesses of the Government, including Mr. Wan, Mr. Ho, Ms. Linn, Mr. Poon, Mr. Cheng, Ms. Anissa Wong, Mr. Kevin Ho and Mr. Lam, to be honest and reliable witnesses. The statements of Ms. Anissa Chan and Ms. Jenny Chan, who were respectively the Chief Executive Officer and the Assistant Secretary of the HAB at the relevant time, are admitted without any dispute. Having considered their evidence, I find that all the Government's officers had treated Mickey in a

professional manner. After observing Mickey's poor work performance, they tried to offer assistance to him. Mickey's supervisors, Mr. Wan and Mr. Ho, adjusted Mickey's working schedule by providing a more structured work plan. Although they might at times expressed their dissatisfaction about the poor performance of Mickey, without knowing that he was a person under disability, it was only a normal reaction on their part. Further, the CSB's officers who had handled his case, in particular Mr. Poon and Mr. Cheng, also tried to counsel Mickey on the difficulties faced by him in the course of his work. Based on their evidence, I find that the Government's officers had tried their best to tackle Mickey's problems. Further, the evidence of the witnesses of the Government, in particular that related to the important meetings such as the pastoral visit on 26 March 1999, the interview between Mickey and Mr. Cheng on 11 April 2000, the PRC and the subsequent interview on 26 May 2000, is all supported by detailed reports and memos made by the relevant officers after the respective meetings. If there was anything which might indicate to the officers that Mickey was suffering from some kind of psychiatric or psychological illness, there had had to be some reference to the possibility of such sickness, and yet there was none shown in the documents. Further, the Government's officers did not have any direct financial interest regarding the employment of Mickey. To them, they had fixed rules and procedures to follow, and I do not see the difference to them if they had to recommend the early termination of Mickey, which had to go through the procedure of obtaining the endorsement of the Public Service Commission (), or to arrange a replacement to relieve Mickey because of medical reasons. Hence, I see no reason for them to be hostile or biased towards Mickey. In particular, I would like to make the following observations about certain witnesses of the Government. Firstly, Ms. Linn impresses me as a conscientious officer who dealt with various matters concerning the welfare of the officers in the Administrative Service. As Ms. Linn says in her testimony, the fact that Mickey's case was only one of many tasks that she and her CSB colleagues had to handle did not mean that they dealt with it causally. Speaking for herself, the making of a decision to, inter alia, invite a colleague to leave the service was a heavy one, and it was not her nature to force a colleague to leave or to take the easy way out for her own convenience or that of her colleagues in the CSB. I have no reason to doubt Ms. Linn's evidence in this regard. Further, Ms. Linn maintains that there was nothing in the year 1999 or 2000 which showed that Mickey was suffering from any kind of disability by that time. On the other hand, Mr. Harris put considerable effort in attacking the creditability of Mr. Cheng mainly because of his somewhat unusual background. Prior to his posting in the CSB, Mr. Cheng had taken 3 months of sick leave. According to him, he then suffered from certain physical but not psychiatric or psychological illness which was related to the stress of the work as an AO. By reason of such experience, Mr. Harris submits that Mr. Cheng should have had a better understanding of the relationship between stress arising from work and the health condition of a particular person, and so he should have known that Mickey was suffering from some kind of disability when he worked as an AO. In fact, Mr. Cheng is much more qualified than that. When he was studying in the university, he did take psychology as one of his subjects. After leaving the Government, he became a hypnotherapist whose job includes, inter alia, the

relieving of tension on the part of his clients. Yet after studying Mickey's case, he maintains that Mickey's incompetence and working attitude were the culprits for his poor work performance. He also observes that Mickey had a tendency to blame others for something which was the result of his own weakness. As Mickey's performance had remained poor since he started his work as an AO in the HAB, I see no reason to doubt the genuineness of such assessment by Mr. Cheng. Further, the evidence of Mr. Cheng illustrates 2 things. Firstly, as the display of symptoms was not obvious, even someone with the background of Mr. Cheng might not be aware that Mickey was suffering from any psychiatric or psychological disability when he worked as an AO. Secondly, Mr. Cheng's past experience shows that even a person free from disability but who happens to work under stress may display certain symptoms which may be indicative of psychiatric or psychological illness, and yet the display of such symptoms may not mean that the person concerned is actually suffering from such kind of illness. This happened to Mr. Cheng himself when he was taking 3 months of sick leave due to the stress from work. Further, I cannot accept that the CSB officers had lied to Mickey that he would lose the opportunity to resign once the termination procedures were invoked. It would be foolish and risky to the extreme if they had done so, because Mickey would not be so naïve as to not checking out the relevant regulations when it came to such a serious matter affecting his employment at the Government. Indeed, to find it in favour of Mickey on the factual disputes, the court would have to find, not only that the CSB officers did not do the jobs for which they were paid properly, but that they had actually conspired together to: (a) coerce Mickey into resigning even by lying to him in the interview after the PRC; (b) make up a false minutes of such interview; and (c) perjure themselves in this action. Bearing in mind that the CSB officers had no financial interest to gain by early termination of Mickey's employment and who did not have time to work closely with Mickey, I do not accept that they would have gone to such an extent to force Mickey to leave the Government as soon as possible. In fact, Mickey agrees that the CSB officers got nothing personal against him, and the only motives which Mickey can attribute to them for acting in such a dishonourable, dishonest, stupid and risky manners are that they could be saved the troubles of taking his case to the PSC, and finding a posting for Mickey pending the PSC's endorsement. However, neither of such motives is supported by a single thread of objective evidence. (iii) Findings of fact Having made the said observations, I accept the evidence of the factual witnesses of the Government and reject the testimony of Mickey. In particular, I make the following findings of fact:

- (i) the appraisals in the various reports were genuine assessments of the work performance of Mickey; (ii) the symptoms of Mickey's disabilities were limited to the ones mentioned in the various documents, including the appraisals reports and memos, prepared by the relevant Government's officers and in their testimonies; various Government's officers who had dealings with Mickey genuinely and subjectively did not know that Mickey was suffering from any disabilities when the latter was working as an AO in the Government; although Mr. Wan and Mr. Ho might at times be frustrated with the poor work performance of Mickey and expressed their dissatisfaction, they had not been hostile to Mickey in the manner as alleged

by him; and the CSB officers had not been hostile to Mickey and they had not misled Mickey in any way. With these findings of fact, some of the claims by Mickey must fail, for examples, those relating to the showing of hostilities by Mickey's supervisors and the misrepresentation about the termination procedures by the CSB officers. However, as it is common ground that Mickey was invited to resign from the Government and his work performance had been assessed without particular reference to his alleged disabilities, I need to deal with Mickey's claims even if he fails on the factual issues. In this regard, I turn to the legal principles involved in this case. WHETHER MICKEY WAS A PERSON UNDER DISABILITY? Before Mickey can succeed in his claim, he must be able to prove that he was a person under disability at the time when he worked in the Government. Disability is defined in s. 2(1) of the DDO to mean:

- (a) total or partial loss of the person's bodily or mental functions;
- (b) total or partial loss of a part of the person's body; the presence in the body of organisms causing disease or illness; the presence in the body of organisms capable of causing disease or illness; the malfunction, malformation or disfigurement of a part of the person's body; a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or a disorder, illness or disease that affects a person's thought process, perception of reality, emotions or judgment or that results in disturbed behaviour, and includes a disability that presently existed; previously existed but no longer exists; may exist in the future; or is imputed to a person. It is a very wide definition, as observed by HH Judge Muttrie at paras. 38 and 44 of his judgment in *L v. Equal Opportunities Commission*, unreported, DCEO 1 & 6 of 1999 (decision on 13 November 2002): 38. The definition in section 2 seems to allow for any partial loss of bodily or mental function, however insubstantial and however temporary, to be regarded as a disability. Further, the origin of the loss of function seems to be irrelevant. So, if a doctor found a loss of bodily or mental function it would follow that for the purposes of the DDO there was a disability. Alternatively, if the doctor found a disorder, illness or disease that affected the plaintiff's thought processes, perception of reality, emotions or judgment or that resulted in disturbed behaviour it would follow that there was a disability. 44. As I have indicated the definition of disability is very wide. Just about anything will do. The loss of function or the effect of the disorder on thought process or emotions need not be substantial or long-term. The way is open for claims based on minor and temporary disability which a really disabled person, such as a paraplegic, would no doubt find ludicrous; but that is the way the legislation is drawn. It is Mickey's case that he was suffering from the following disabilities when he worked in the Government: GAD; dyslexia; attention deficit syndrome; obsessive and compulsive disorder or obsessive compulsive personality traits; and visual short-term memory deficit. As I have mentioned in the earlier part of this judgment, obsessive and compulsive personality traits, with symptoms such as tendency towards perfectionism, excessive suppression of emotion, obsession with details and excessive devotion to work, are no more than the fact that these elements form part of the personality of Mickey (see: para. 45 above). As I see it, no medical expert has classified these weaknesses as an illness,

and hence even adopting the wide definition in the DDO, I do not accept that these personality traits can be regarded as disabilities in themselves. The expert evidence in the present case does not support that Mickey was suffering from dyslexia or attention deficit syndrome at the relevant time. In fact, in dealing with Mickey's weaknesses in visual memory and communication, all the medical experts refrain from using the term dyslexia to describe such deficit. In this regard, Professor Lieh-Mak adopts the diagnosis of visual short-term memory deficit while Professor Lee makes the diagnosis of specific weakness in his cognitive functioning. As such kind of deficit may cause partial loss of body or mental function, it may be caught by the wide definition of disability under the DDO. However, such kind of disability cannot be easily observed by others, and even Mickey himself did not know that he was suffering from such deficit until he was examined by Ms. Hannah Chung, a clinical psychologist, after he left the Government. Further, Mickey had declared himself to be a person free from disability in the application form for AO, and when he was in Vancouver, he was able to perform well in the recruitment exercise despite such deficit. Hence, it is difficult to expect the Government's officers to know that Mickey was suffering from such kind of disability by that time. With such deficit, one can easily understand why Mickey had experienced difficulties in his work, in particular those tasks relating to formatting of documents and preparation of visual presentations. Before Mickey joined the Government and when he was in school, he was able to cope with such deficit by, for example, avoiding choosing academic subjects or assignments which involved visual presentations. However, when Mickey started to work as an AO, he had less control over his work and his deficit began to affect him. There is also no dispute that Mickey was suffering from some kind of psychiatric disorder in the latter half of his employment with the Government, whether such disorder should be labeled as or adjustment disorder. According to Professor Lee, Mickey's proneness to anxiety, the pressure from his work, the tension with his supervisors, his specific cognitive weaknesses and obsessive personality traits all contributed to the development of such illness. However, as I have said in the earlier part of this judgment under the section of the Medical Condition of Mickey, I find that Mickey can only be regarded as suffering from such disorder, to the extent that the anxiety had affected his emotion and judgment, from mid-1999 when he started his work at the TB (see: paras. 40-50 above). In the light of the wide statutory definition and the medical evidence above, it is very difficult for the Government to argue that Mickey was not a person under disability when he worked in the Government. Indeed, Ms. Wong SC, counsel for the Government, does not seek to challenge Mickey's case in this regard. I therefore so find.

WHETHER THE GOVERNMENT WAS GUILTY OF DISABILITY DISCRIMINATION OR HARASSMENT? The statutory provisions relating to disability discrimination and harassment apply in the context of employment relationship. For our present purposes, ss. 11(2), 22(2) and 22(3) of the DDO are relevant: 11(2) It is unlawful for the employer, in the case of a person with a disability employed by him at an establishment in Hong Kong, to discriminate against that person

(c) by dismissing that person, or subjecting him to any other detriment. 22(2) It is unlawful for a person, in the case of a person with a disability employed by him at an establishment in Hong Kong, to harass that second-mentioned person. It is unlawful for a person who is employed by another person at an establishment in Hong Kong to harass a third person with a disability who is seeking to be, or who is, employed by that second-mentioned person. Further, according to the statutory framework in the DDO, there are two kinds of discrimination: direct and indirect discriminations which are defined in ss. 6(a) and 6(b) respectively. On the other hand, harassment is defined in s. 2(6) of the DDO. To oppose the claim on direct discrimination and harassment, the Government is basically contending that the Government's officers who had dealings with Mickey were not aware that the latter was suffering from any kind of disability. Hence, whatever treatment received by Mickey was the result of his poor work performance and nothing else. As such line of defence is common to both the claims on direct discrimination and harassment, I will deal with these claims together, and after that I will address the other claim on indirect discrimination. Direct Discrimination and Harassment The statutory definitions in the DDO Direct discrimination is defined in s. 6(a) as follows:

6. A person discriminates against person in any circumstances relevant for the purposes of any provision of this Ordinance if
 - (a) on the ground of that other person's disability he treats him less favourably than he treats or would treat a person without a disability; (emphasis added) In determining the issue of direct discrimination, s. 6(a) requires the court to compare the treatment of the complainant and that would be received by another person without disability. In this regard, s. 8 provides: A comparison of the cases of persons with or without a disability under section 6 shall be such that the relevant circumstances in the one case are the same, or not materially different, in the other. On the other hand, harassment is defined in s. 2(6) of the DDO: For the purposes of this Ordinance, a person (howsoever described) harasses another person if that first-mentioned person engages in unwelcome conduct (which may include an oral or written statement) on account of that second-mentioned person's disability, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the second-mentioned person would be offended, humiliated or intimidated by that conduct. (emphasis added) Direct discrimination and harassment are respectively defined as less favourable treatment or unwelcome conduct on the ground of or on account of a person's disability. Hence, it is the Government's contention that, in order to give effect to the plain and ordinary meaning of these statutory provisions, the complainant must be able to establish a causal link that the alleged discriminator or harasser did have knowledge of the complainant's disability. In the present case, it is common ground that Mickey had not informed any of the Government's officers of his disabilities, in terms of any of the pleaded or other diagnoses, at any time prior to his resignation from his position as an AO on 2 June 2000, not even in general terms that there might be something wrong with his mental health. Indeed, Mickey was not diagnosed as suffering from any anxiety disorder until his consultations with Dr. Peter Yu in June 2000, by which time Mickey had already

resigned. Neither was Mickey diagnosed as suffering from any learning disability until September 2000 when he was examined by Ms. Hannah Chung. However, Mr. Harris submits that there was sufficient display of the symptoms of disabilities by Mickey during the time when he worked as an AO, and so the Government had had the requisite knowledge for it to be liable for direct discrimination and harassment under the DDO. Ultimately, it is a matter of statutory interpretation of the DDO as to degree of knowledge that is sufficient to constitute direct discrimination and harassment. Indeed, the DDO is a piece of social legislation which was drafted after considerable study of the anti-discrimination statutes in other jurisdictions, in particular Australia and England. The wordings used in our DDO may not be the same as those in the other legislations, and one can only say that the particular choice of wordings in our DDO was deliberate and the differences may reflect the particular view of our legislature in tackling the problem of disability discrimination in Hong Kong. Before I proceed to discuss the corresponding jurisprudence in other jurisdictions, I should perhaps set out the statutory provisions dealing with the issue of direct discrimination in Australia and England. Corresponding statutory provisions in Australia and England In Australia, s. 5 of the Australian Commonwealth Disability Discrimination Act 1992 (DDA (Cth)) provides the following meaning of direct discrimination :

- (1) For the purpose of this Act, a person (discriminator) discriminates against another person (aggrieved person) on the ground of a disability of a disability of the aggrieved person if, because of the aggrieved person s disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.
- (2) For the purpose of subsection (1), circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability. In England, there is no clear distinction between direct and indirect discriminations, and s. 3A of the Disability Discrimination Act 1995 (DDA (UK)) defines discrimination as follows:
 - (1) For the purpose of this Part, a person discriminates against a disabled person if
 - (a) for a reason which relates to the disabled person s disability, he treats him less favourably than he treats or would treat others to whom the reason does not or would not apply, and
 - (b) he cannot show that the treatment in question is justified.
 - (2) For the purposes of this Part, a person also discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled person.
 - (3) Treatment is justified for the purposes of subsection (1)(b) if, but only if, the reason for it is both material to the circumstances of the particular case and substantial.

- (4) But treatment of a disabled person cannot be justified under subsection (3) if it amounts to direct discrimination falling within subsection (5).
- (5) A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person.
- (6) If, in a case falling with sub-section (1), a person is under a duty to make reasonable adjustments in relation to a disabled person but fails to comply with that duty, his treatment of that person cannot be justified under subsection (3) unless it would have been justified even if he had complied with that duty. The duty on the part of employers to make reasonable adjustments for the needs of disabled employees is also provided for in s. 4A(1) of the DDA (UK): Where a provision, criterion or practice applied by or on behalf of an employer, or any physical feature of premises occupied by the employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have taken in order to prevent the provision, criterion or practice, or feature, having that effect. A comparison of these legislations shows that the wordings of our DDO are very similar to those of the Australian DDA (Cth). The requirements of the comparison exercise and that the different treatment must be made on the ground of the complainant's disability show that the object of the Hong Kong and the Australian legislations is to ensure equality of treatment. It tries to prevent anyone from making a coloured decision affected by the disability of the complainant. On the other hand, the English legislation adopts a more aggressive approach. In *Purvis v State of New South Wales* (HCA) [2003] 217 CLR 92, Gummow, Hayne and Heydon JJ made the following observations about the different approaches adopted by the various jurisdictions to tackle the problem of disability discrimination:
200. Since the [DDA (Cth)] was enacted in Australia, legislation enacted in other jurisdictions has sought to give effect not just to a principle requiring equality of treatment but to what is sometimes called a substantive conception of equality, in which the purpose is to prevent or compensate for disadvantages. (Many of the international instruments to which we were taken must also be understood in that way.)
201. Concepts of difference disability and disadvantage all depend upon comparison. They assume that there is a person, or a group of persons, with whom it is useful and relevant to draw the comparison which is implicit in describing one person as different or disabled, or disadvantaged. Obviously, the utility and relevance of the comparison depends upon why it is being made. Different comparisons may have to be drawn according to whether the purpose is limited to ensuring that persons situated similarly are treated alike, or the purpose is wider than that. In particular, if the purpose of legislation is to ensure equality of treatment, the focus of inquiry will differ from the inquiry that must be made if the relevant purposes include ensuring equality in some other sense, for example, economic, social or

cultural equality. 202. Substantive equality directs attention to equality of outcome or to the reduction or elimination of barriers to participation in certain activities. It begins from the premise that in order to treat some persons equally, we must treat them differently.

Obviously, there are many ways in which substantive equality can be defined and there are many different ways in which legislatures may seek to achieve it.

203. The principal focus of the [DDA (Cth)], however, is on ensuring equality of treatment. In this respect it differs significantly from other, more recent, forms of disability discrimination legislation. In particular, for present purposes, it is important to notice that, unlike the [DDA (UK)], the Americans with Disabilities Act 1990 (the ADA) or the European Community Directive for establishing a general framework for equal treatment in employment and occupation, the [DDA (Cth)] does not explicitly oblige persons to treat disabled persons differently from others in the community. The [DDA (Cth)] does not, for example, contain provisions equivalent to ss 5 and 6 and ss 28B-28G of the [DDA(UK)] which expressly oblige employers and educational authorities to make reasonable adjustments to accommodate disabled persons.
206. Considerable care must be taken, therefore, before applying what has been said about either the aims or the effect of other forms of disability discrimination legislation from other jurisdictions to the construction of the [DDA (Cth)]. Even more care must be taken before adopting the necessarily general forms of aspirational, as distinct from normative, statements found in international instruments as an aid to resolving the particular questions of construction which now arise. Aspirational statements are commonly concerned to state goals, not to identify the particular methods by which the stated goals, not to identify the particulars methods by which the stated goals will be achieved. Those international instruments to which were referred took this aspirational form. As the wordings of our DDO follow closely those of the DDA (Cth), the same observations can be made about the interpretation and the object of our DDO. In fact, HH Judge Muttrie expressed similar sentiment in *L v Equal Opportunities Commission*, *ibid.*: The purpose of the [DDO] is not, as the plaintiff seems to have been arguing, to make employers sympathetic or supportive to employees who suffer or claim to suffer from disability, but to make them treat them no less favourably they do their employees who suffer from none. (at para. 55) From the aforesaid dicta, one can easily note the different approaches adopted by the Australian and Hong Kong legislatures on the one hand, and the English legislature on the other, regarding the protection of disability discrimination. Apart from the difference in the comparison exercise which I will elaborate further in the latter part of this judgment (see: para. 157 below), the English legislation expressly requires affirmative action, ie. duty to make reasonable adjustments for disabled persons. Further, one should also note that there is a defence in s. 4A of the DDA (UK) regarding such duty to make reasonable adjustments, if the employer does not know or could not reasonably be expected to know that the employee has a disability. Bearing in mind the said objective of the DDO, I now turn to s. 6(a) itself. In my judgment, the wording of the section requires the court to conduct a two-stage inquiry: firstly to identify a suitable comparator for the purpose of comparing the

treatments between the complainant and the comparator; and secondly to examine whether the different treatment, if any, is made on the ground of the complainant's disability. In *Purvis v State of New South Wales* (HCA), *ibid.*, Gummow, Hayne and Heydon JJ described the former as the comparator question and the latter as the causation question. As I see it, whether the alleged discriminator has knowledge of the complainant's disability would affect both stages of the inquiry, and I will deal with each individual question in turn. The comparator question As I have mentioned above, the DDO, which mirrors substantially the DDA (Cth), is to be contrasted with the significantly different approach to the protection of disabled persons against less favourable treatment in employment in the DDA (UK). The definition of discrimination in the DDA (UK) does not contain an express provision requiring a comparison of the cases of different persons in the same, or not materially different, circumstances. As observed by Charles J in *London Borough Council of Hammersmith v Farnsworth* [2000] IRLR 691, the focus of the approach under the DDA (UK) is narrower: it is on the reason for the treatment of the disabled employee and the comparison to be made is with the treatment of others to whom that reason does not or would not apply. The others with whom the comparison is to be made are not specifically required to be in the same, or not materially different, circumstances: they only have to be persons to whom that reason does not or would not apply (see: para. 32 of the judgment in *Farnsworth*). I now turn to the comparison exercise under our DDO. In making the comparison, in the absence of an actual comparator being available, the court is entitled to choose a hypothetical one. Further, the comparator, whether actual or hypothetical, is not a person without the particular disability, but a person without any disability at all (see: *L v Equal Opportunities Commission*, *ibid.*, at paras. 55-61). Pursuant to s. 8 of the DDO, the comparison must also be made on the basis that the relevant circumstances in the case of the comparator are the same as, or not materially different from, those of the alleged complainant. This means that whilst the comparator identified for the purposes of s. 6(a) is a person without disability, he is not a person who, by reason of the absence of disability, does not engage in the conduct of the disabled person at all. This can be illustrated by the judgment in *Purvis v State of New South Wales* (HCA), *ibid.* In that case, a teenage male in foster care, Daniel, had suffered brain damage from severe encephalopathic illness when he was a baby, as a result of which Daniel had behavioural problems, in particular, violent and aggressive behaviour towards teachers and fellow pupils. Because of such disturbed behaviour, his school principal suspended Daniel and later excluded him from the school. It was claimed on behalf of Daniel that his suspension and expulsion from school amounted to discrimination under the DDA (Cth). It was also argued for him that the hypothetical comparator should be a student who did not engage in any violent behaviour, because the latter should be a person without disability and the violent behaviour was a result of the disability. The majority of the High Court of Australia, with McHugh and Kirby JJ dissenting, rejected this argument. Gleeson CJ succinctly pointed out the fallacy of such argument at paras. 11 to 12 of his judgment: 11. The fallacy in the appellant's argument lies in the contention that, because the pupil's violent behaviour was disturbed, and resulted from a disorder, s. 5 [of the DDA(Cth)] always requires, and only permits, a comparison between his

treatment and the treatment that would be given to a pupil who is not violent. Rather it requires a comparison with the treatment that would be given, in the same circumstances, to a pupil whose behaviour was not disturbed behaviour resulting from a disorder. Such a comparison requires no feat of imagination. There are pupils who have no disorder, and are not disturbed, who behave in a violent manner towards others. They would probably be suspended, and, if the conduct persisted, expelled, in less time than the pupil in this case.

12. If the appellant's argument is correct, the comparison required by [the DDA (Cth)] is purely formal. If the person without the disability is simply a pupil who is never violent, then it is difficult to know what context is given to the requirement that the circumstances be the same. No actual comparator has been identified in the present case, and so the comparison for the purpose of s. 6(a) has to be made with a hypothetical comparator. Applying the aforesaid principles, the hypothetical comparator whose circumstances were the same or not materially different from those of Mickey should:
 - (i) be a fresh AO starting on probation; (ii) be subjected to the same training and performance management regimes to which Mickey had been subjected; and (iii) have performed and behaved as Mickey did, though not for reason of a disability. Having identified such a comparator, it is not too hard to imagine that the comparator, with such poor work performance, would have received the same treatment as that of Mickey. In treating the comparator in such way, the court is also entitled to take into account the duty owed by the Government to the public to provide a good administration, just as the school in *Purvis* owed a duty to protect other pupils and teachers in the school. As Mickey fails in the comparison test, the Government simply cannot be guilty of direct discrimination under s. 6(a). In reaching such conclusion, I would also like to point out that in *Purvis*, the school was aware of the health condition of Daniel and its effect on his behaviour, and yet the court adopted a comparator whose behaviour was the same as that of Daniel. In the present case, the Government was not even aware of the disability of Mickey. Coupled with the fact that a person without disability might have performed in the same poor manner, I see no reason for the court to adopt a different comparator for the purpose of our comparison exercise, bearing in mind that the object of the DDO is to ensure equality of treatment. The causation question Even if the comparison reveals that Mickey was treated less favourably, which I do not accept it to be the case, a further question must be asked is whether that treatment was made on the ground of Mickey's disability. That is the causation question mentioned above. Obviously, the words on the ground of in s. 6(a) are inserted to require a causal link between the less favourable treatment, if any, and the disability itself. This is certainly consistent with the object of the DDO in ensuring equality of treatment between disabled and non-disabled persons. The DDO does not seek to achieve substantive justice in the sense that an employer has a duty to take care of the general welfare of a disabled employee. So far as I understand, Mickey's argument runs as follows. Firstly, the inquiry about the causal link is an objective one, and so a subjective or conscious intention or motive to discriminate is not a necessary condition of liability. In this regard, Mr. Harris is relying on cases such as *Birmingham City Council v EOC* [1989] 1 AC 1160 and *Waters v Public Transport Corporation*

[1991] 173 CLR 349. Secondly, for the Government to be liable, it is sufficient for Mickey to establish that he was invited to resign because of his poor performance, which was in turn caused by his disabilities. Thirdly, Mickey is relying on s. 3 of the DDO and argues that it is not necessary for him to prove that disability was the sole reason for the unfavourable treatment, so long as it remained one of the reasons. S. 3 reads: If-

- (a) an act is done for 2 or more reasons; and
- (b) one of the reasons is the disability of a person (whether or not it is the dominant or a substantial reason for doing the act), then, for the purposes of this Ordinance, the act is taken to be done for the reason specified in paragraph (b). On the other the hand, Ms. Wong for the Government relies on the case of Nagarajan v London Regional Transport [2000] 1 AC 501 and argues that in the causation inquiry, the court is bound to consider the mental process and the motive of the alleged discriminator as to why he treated the disabled person in a particular way. Further, the simple but-for test is not sufficient to deal with the issue of causation in the present case, and citing the cases of Chief Constable of the West Yorkshire v Khan [2001] 1 WLR 1947 and Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] 2 All ER 26 and Purvis v State of New South Wales, *ibid.* in support, the court is bound to look for the real reason (*causa causana*) for the unfavourable treatment. However, it seems to me that the cases mentioned above are focusing on an issue which may not be that relevant in the present case. Most of the cases cited above relate to sex and race discriminations, in which cases the prohibited grounds of discrimination, ie. sex and race, were known to the alleged discriminators. Purvis, on the other hand, was a case concerning disability discrimination, but the school had all along been aware of the health condition of the disabled pupil Daniel. In these cases, the alleged discriminators, whilst knowing that the individual person they had to deal with was of a particular race or sex or was suffering from certain disability, nevertheless tried to justify the treatments of the alleged victims by some other legitimate reasons. In order not to frustrate the object of the legislation, the courts in these cases adopted a more objective approach in ascertaining the reasons for the treatment of the alleged victims. However, if the alleged discriminator was not aware of the prohibited ground of discrimination, for example someone was suffering from a disability, then whatever treatment received by the alleged victim, it cannot be said that the same was made on the ground of that person s disability. That is simply against the plain meaning of the words on the ground of in our s. 6(a). Further, I do not accept the proposition that if the reason Mickey was invited to resign was because of aspects of his performance which were regarded as unsatisfactory and which were in fact caused by disability, that is sufficient for the invitation to resign to be an act of discrimination. In fact, similar argument was tried without success in Purvis. In that case, the argument ran as follows: the decisions to suspend and then ultimately to exclude Daniel were brought about by his disturbed behaviour. Since such behaviour was part of his disability, Daniel was treated as he was because of his disability, and as Daniel s behaviour was brought about by the disorder from which he suffered, it followed that he was treated less favourably than a person without disability. In dismissing such argument, Gummow, Hayne and Heyton JJ said the following

at para. 223 of the judgment: In requiring a comparison between the treatment offered to a disabled person and the treatment that would be given to a person without disability, s 5(1) [of the DDA (Cth)] requires that the circumstances attending the treatment given (or to be given) to the disabled person must be identified. What must then be examined is what would have been done in those circumstances if the person concerned was not disabled. The appellant's argument depended upon an inversion of that order of examination. Instead of directing attention first to the actual circumstances in which a disabled person was, or would be, treated disadvantageously, it sought to direct attention to a wholly hypothetical set of circumstances defined by excluding all features of the disability. Extension of liability based on the notion of constructive knowledge? As I find that the Government's officers were genuinely not aware of Mickey's disabilities, Mickey would have great difficulty in passing the causation test. However, Mr. Harris submits that there are some cases which tend to support the proposition that an employer would be liable for direct discrimination of a disabled employee if the former knew that the latter had some kind of disability, or as Mr. Harris emphasizes, a manifestation of a disability. With these cases, Mr. Harris argues that there was sufficient display of the symptoms of disabilities when Mickey worked in the Government, and such would make the Government liable for direct discrimination. I myself have some difficulty with such argument. As I see it, Mr. Harris is suggesting that the liability is somewhat based on the notion of constructive knowledge of the disability. However, if an employer did not have subjective knowledge of the employee's disability, how can we say that a particular treatment given by the employer to the employee was made on the ground of the latter's disability? The plain meaning of the words in s. 6(a) simply does not support such a proposition. Further, as I have mentioned above, the object of the DDO is to ensure equality of treatment. If the employer was not aware of the disability, the employer's decision for a particular treatment would not have in any way been influenced by the disability of the employee. The decision is not a coloured decision, and so why should the employer be liable? Nevertheless, I must agree that, apparently not to frustrate the object of the legislation, the courts may sometimes adopt a more objective approach in considering the causation question. Like in the cases of *Nagarajan v London Regional Transport*, *ibid.* and *Purvis v State of New South Wales (HCA)*, *ibid.*, where the alleged discriminators were aware of the prohibited grounds of discrimination but claim that the unfavourable treatments had nothing to do with the prohibited grounds, then the court is entitled to adopt a more objective approach on the causation question. However, when the court is venturing into an uncharted territory which is beyond the plain meaning of the statutory provision, the court must be cautious in not imposing an unjustified burden on people like employers. The issue in the present case is slightly different from the aforesaid cases on causation. The question here is, to quote the words of Sir Ronald Wilson in *X v McHugh* (1994) EOC 92-623, whether employers are required to be vigilant in their regard for circumstances affecting the interest of their employees (at p. 77,312). In considering whether the court should impose such a duty on the employers, we need to examine the cases relied on by Mr. Harris in support of Mickey's claim, including *Siu Kai Yuen v Maria College* [2005] 2 HKLRD 775, *London Borough of Hammersmith & Fulham v Farnsworth*,

ibid. and most important one *X v McHugh*, ibid. *Siu Kai Yuen* is the only local case touching on the issue. The plaintiff teacher suffered from rectum cancer and took sick leave for an operation. Before he resumed work, the defendant school terminated his employment. One of the issues raised in that case was whether the defendant was informed of the nature and extent of the plaintiff's illness prior to the dismissal. HH Judge C. B. Chan accepted the submission made by the Equal Opportunities Commission () on behalf of the plaintiff that the alleged discriminator's knowledge of the nature and extent of the complainant's illness is irrelevant for the purposes of the DDO, and Judge Chan said the following at para. 35 of her judgment: The plaintiff's legal representative submits that it is irrelevant whether the defendant knew the nature and extent of the plaintiff's illness. It is sufficient that the defendant knew the plaintiff had some kind of disability or a manifestation of a disability. She refers to the authorities *X v McHugh*, Auditor-General for the State of Tasmania (1994) EOC 92-623, *London Borough Council of Hammersmith and Fulham v Farnsworth* [2000] IRLR 691 in support. In my view, this must be so. However, Judge Chan's observation above is strictly obiter, as the learned judge found as a fact that the school principal of the defendant was informed that the plaintiff had suffered from rectum cancer and his operation was to remove the cancer. Hence, putting this case at the highest, it only supports the proposition that if the alleged discriminator was aware of the illness of the alleged victim, though the nature and extent of the illness might not be known, the alleged discriminator may still be liable for direct discrimination. The decision of the English Employment Appeal Tribunal () in *London Borough Council of Hammersmith and Fulham v Farnsworth*, ibid. and the decision of the Australian Human Rights and Equal Opportunity Commission (HREOC) in *X v McHugh*, ibid. were cited in support of Judge Chan's reasoning. In such case, we need to consider these two cases together with the other English and Australian authorities in some more details. The English decisions In *Farnsworth*, the complainant applied for the post of a residential social worker. She was given a provisional job offer but was referred to the Borough's occupational health physician for medical clearance. The physician then consulted the complainant's general practitioner and the hospital doctor, and found that the complainant had a history of mental illness. The physician reported the same to the Borough and expressed her reservation as to whether the complainant was fit for the job. The Borough therefore withdrew the offer of appointment and the complainant lodged an action for discrimination. The Employment Tribunal found in favour of the complainant, a decision which was upheld on appeal by the EAT. In the judgment of the EAT, Charles J seemed to suggest that the employer's knowledge of the applicant's disability was irrelevant for whether they treated her less favourably for a reason that related to her disability within the meaning of s. 5(1)(a) of the then DDA (UK). Further, Charles J held that the approach of the EAT in *O'Neill v Symm & Co* [1998] IRLR 233 that actual knowledge of the disability is required is no longer good law in the light of the decision of the English Court of Appeal in *Clark v TDG Ltd. trading as Novacold* [1999] IRLR 318. However, the Employment Tribunal found as a fact, which was upheld by Charles J in the EAT, that the occupational health physician had actual knowledge of the complainant's disability. As an agent of the Borough, her knowledge as such was imputed to the latter.

Further, regardless of the imputed knowledge, the Borough did have actual knowledge, from the physician's report, of the evidence of ill health on the part of the complainant over a number of years which at times had been severe and necessitated hospital admissions, and that the complainant might be liable to further recurrences in the future which would affect her performance and attendance at work. Hence, Charles J's decision on whether an alleged discriminator must have knowledge of the victim's disability is strictly obiter. More importantly, the decision in Farnsworth was made based on the interpretation of the then s. 5(1)(a) of the DDA (UK), which is substantially the same as the current s. 3A of the DDA (UK) but very different from s. 6(a) of our DDO. The then s. 5(1)(a) of the DDA (UK) provides that an employer discriminates against a disabled person for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply. The key words are which relates to the disabled person's disability, which are substantially different from the words in our s. 6(a), ie. on the ground of that other person's disability. Indeed, such statutory formulation played a key role in the reasoning of the English decisions. In *Clark v TDG Ltd.* trading as Novacold, *ibid.*, a case relied upon by Charles J in support of his decision, Mummery J made the following observation about such statutory formulation in para. 63 of his judgment: it is more probable that Parliament meant that reason to refer only to the facts constituting the reason for the treatment, and not to include within that the added requirement of a casual link with disability: that is more properly regarded as the cause of the reason for the treatment than as in itself a reason for the treatment. In Farnsworth, Charles J also cited for support another EAT's decision in *H J Heinz Co. Ltd. v Kenrick*, [1999] UKEAT 1082_98_0312. In this case, Lindlay J actually highlighted the significance of the linguistic difference at para. 27 of his judgment: The phrase, which relates to in the expression, in Section 5(1)(a), of for a reason which relates to the disabled person's disability widens the description of the reasons which may be relevant beyond what the case would have been had the Act said by reason of the disability. As we see it, the expression may include a reason deriving from how the disability manifests itself even where there is no knowledge of the disability as such. In my judgment, such linguistic difference is material. Undoubtedly, our DDO has been drafted after considerable study of the corresponding legislations in the United Kingdom and other Commonwealth countries, and so the usage of particular wording in our DDO is significant in determining the scope of protection against disability discrimination. As I have mentioned above, the DDA (UK) adopts a very different approach to tackle the problem of disability discrimination, and hence, apart from the fact that the alleged discriminator in Farnsworth did have actual knowledge of the complainant's disability, I am of the view that the English authorities provide very limited assistance in the interpretation of the meaning of direct discrimination in our s. 6(a). In this regard, I must also repeat the danger of blindly following the jurisprudence of other jurisdictions as sounded by Gummow, Hayne and Heydon JJ at para. 206 of their judgment in *Purvis v State of the New South Wales (HCA)*, *ibid.* (see: para. 153 above). The Australian decisions On the other hand, the wording of our s. 6(a) is very similar to that of s. 5(1) of the Australian DDA (Cth), which adopts the phrase because of the aggrieved person's disability. Hence, the Australian jurisprudence is

much more relevant for our present purposes. I would first start with *X v McHugh*, *ibid.*, which is a case heavily relied upon by Mr. Harris in support of Mickey's claim. I must say that the facts are very similar to those in the present case. The complainant was described as a brilliant student, who had excelled as an all-rounder at school and graduated from universities with various degrees. After working in a number of banks and finance companies, the complainant became paranoid and suspicious, believing that he was under surveillance and fearing for the safety of his life. He was then compulsorily admitted to hospital twice for psychiatric treatment. His condition gradually improved until 6 months later where treatment was no longer thought to be necessary. The complainant then worked as an auditor for the respondent subject to a probation period of 6 months. After the probation period, the supervisor did not recommend the confirmation of his appointment, because the complainant had problems which impacted on his performance as an auditor which cannot be addressed due to his apparent inability to accept the existence of such problems. The supervisor recommended an extension of the probation period to give the complainant an opportunity to receive counseling. The mental condition of the complainant then deteriorated and he was admitted to hospital as a compulsory patient for psychiatric treatment, and the psychiatrist diagnosed the complainant as having paranoid schizophrenia. The complainant then returned to work 2 weeks later, and the only medical certificate given to the respondent was a short statement certifying that the complainant was in hospital suffering from a medical condition and would be unfit to follow his daily operation for about 5 weeks. He continued medication after leaving hospital and began to feel control of his job. However, the complainant failed to make the improvement in his work performance as demanded by his supervisor. His supervisor recommended to terminate the complainant's employment. The complainant then made an immediate response to the respondent, asserting that many complaints against him were lodged during his first probationary period at a time when he was affected by a medical condition, which was subsequently supported by a more detailed medical report which stated that the complainant was suffering from a serious medical condition. Later, the respondent wrote to the complainant terminating his employment. After certain appeal proceedings, the complainant was allowed to continue his work. However, his supervisor again recommended the termination of the complainant's employment in the probation report one month later. The supervisor supplemented such report with a further memorandum which in part addressed the medical question. It mentioned that the complainant at no time, even after his hospitalization, had been prepared to inform the respondent of the possible impact of his medical condition on his performance. The supervisor also stated that [u]nfortunately, the damage had been done. It has been said that you never get a second chance at a first impression. The respondent considered these reports and then wrote to the complainant terminating his employment. In his claim for direct discrimination based on s. 5(1) of the DDA (Cth), or alternatively for indirect discrimination, the Australian HREOC ruled in favour of the complainant and held that he had been unlawfully dismissed on the basis of his disability. In his decision, the President of the Commission, Sir Ronald Wilson, held that it is not necessary for an employer to know of the existence of the employee's

disability, and it is enough if the employer is shown to have discriminated because of a manifestation of that disability. Sir Ronald said the following at p. 77312: The respondent may well feel aggrieved that there should now be an attempt to hold him accountable for conduct which lacked deliberate intention on his part at the time. But that is not the test. Intention or motive is not required, as the High Court has said. The objective of the [DDA (Cth)] is to eliminate, so far as possible, discrimination against persons on the ground of disability in areas of public life; it therefore proscribes, not merely deliberate discrimination, but thoughtless discrimination as well. Employers are required to be vigilant in their regard for circumstances affecting the interest of their employees. I agree, at least in the circumstances of this case, with the interpretation of the [DDA (Cth)] advanced by Counsel for the respondent, namely, that s. 5 is about objective discrimination. It is not necessary that an employer know of the existence of the disability. It is enough if an employer is shown to have discriminated because of a manifestation of a disability. (emphasis added) One should perhaps note that the employer in McHugh had actual knowledge, whether by reference to the medical certificate, the medical report and the written response from the complainant himself, that the latter was suffering from some serious medical condition, although the precise nature of the condition was unknown. Given these facts, whether the employer was aware only of the manifestations of disability but not the complainant's precise medical problems was simply a non-issue in McHugh, and the wide proposition put forward by Sir Ronald is therefore purely obiter. In fact, as submitted by Ms. Wong, such an understanding of McHugh is supported by the decision of the Australian Capital Territory Administrative Appeals Tribunal in *Re Prezzi & Discrimination Commissioner and Quest Group Pty Ltd* (1996) 39 ALD 729, in which the said Tribunal made the following observation at para. 37 of the decision: Where the impairment is due to some psychological or psychiatric condition, the manifestations of the impairment are less likely to point to the existence of impairment. Where the manifestations of an impairment are the necessary consequence of the impairment, then to treat a person unfavourably because of the manifestations means that the person is being treated unfavourably because of the impairment. This would seem to be the reasoning behind the statement in *[X v McHugh]* that It is enough if an employer is shown to have discriminated because of a manifestation of a disability. Indeed, this was the very issue in *[X v McHugh]*, since the employer did not know that the complainant was a paranoid schizophrenic. The employer did, however, have a report by the complainant's doctor which stated that the complainant suffered from a serious medical condition and that this condition contributed greatly to any relationship and interpersonal problems suffered by the complainant. To that extent, the statement that It is not necessary that an employer know of the existence of the disability may not have been necessary for the decision. (emphasis added) In *Prezzi*, the complainant was suffering from certain psychological impairment, and Quest Group Pty Ltd (Quest) was a contractor engaged by the Government to find work for persons who had been unemployed for a long time, of which the complainant was one. In the course of helping the complainant to find work, the complainant made abusive telephone calls to the staffs of Quest and that she made it clear that she would not cooperate with Quest in seeking

work. Quest had difficulty placing the complainant in employment and referred her back to the Commonwealth Employment Service (CES). By doing so, the complainant claimed that Quest had discriminated against her by reason of her impairment. The Administrative Appeals Tribunal dismissed the complaint as unsubstantiated, as there was no evidence to show that, when Quest referred the complainant back to the CES, it was aware or should have been aware that the complainant was suffering from a psychological impairment, nor did it base its action on a perception that the complainant was suffering from such an impairment. To me, the Tribunal in *Prezzi* had succinctly pointed out the difficulty in dealing with disability relating to psychiatric and psychological disorder. Most of the manifestations of such kind of impairment, that are the symptoms themselves, are equivocal and can be found in a normal person who just happens to work under stress. Hence in *Prezzi*, the Tribunal tried to restrict the application of *McHugh* by limiting the knowledge to those manifestations of the impairment which are the necessary consequences of the impairment. In this regard, it would also be interesting to note the observation and the criticism of the decision in *McHugh* by the Tribunal in para. 48 of the decision: it is clear that [Quest] terminated the relationship with [the complainant] because of her abusive and irrational behaviour, which had strong adverse affects on [Quest] staff and showed that it would be difficult to place her in employment. The relationship was not terminated because of any underlying condition which might have been the cause of her behaviour. It is, we think, necessary to be cautious about a general application of the principle apparently espoused by the Human Right and Equal Opportunity Commission in *[X v McHugh]*. In that respect, the decision is at odds with what seems to be a consistent approach in other jurisdictions. As was said by the NSW Equal Opportunity Tribunal in *Welsh v the Commission, Soil Conservation Service of NSW* (1991) EOC 92-330, in relation to a complaint about discrimination in employment: The Anti-Discrimination Act does not require that people be employed in inappropriate circumstances to do work which they cannot do it requires that people be given every opportunity to show what they can do, and be allowed their change in employment, without any pre-conceptions as to what their abilities are based merely upon a label which is put upon them. Lack of knowledge of the complainant's disability was also held to be material in *Tate v Rafin* [2000] FCA 1582. In this case, it was found that the revocation of the complainant's membership with a cricket club was due to his aggressive behaviour in an altercation with a fellow member and the club coach. On the basis that the complainant was suffering from the psychological effects caused by certain physical injuries suffered by him years ago, Wilcox J of the Federal Court of Australia accepted that the complainant's psychological status affected his behaviour in the altercation. However, it was held that the cricket club did not discriminate against the complainant on the ground of his psychological disability, because there was no evidence that any member of the club committee realized that the complainant was suffering from that disability. Without referring to *X v McHugh*, Wilcox J said the following at paras. 67 and 68 of his decision: 67. The psychological disability may have caused [the complainant] to behave differently than if he had not had a psychological disability, or differently to the way another person would have behaved. But the disability did not cause the club to treat him

differently than it would otherwise have done; that is, than it would have treated another person who did not have a psychological disability but who had behaved in the same way. It could not have done, if the club was unaware of the disability. 68. The focus of [the DDA (Cth)] is on the conduct of the alleged discriminator; not the effect on the alleged discriminatee. The dicta by Wilcox J also highlights the inter-relationship between the lack of knowledge of the complainant's disability and the application of the comparator test. Regarding the problems associated with the discrimination of psychiatric or psychological disability, one should also note the observations made by lower court in *Purvis v State of New South Wales*. In the first instance decision (*Purvis v State of New South Wales* (FCA) [2001] FCA 1199), Emmett J of the Federal Court of Australia, whose decision was upheld on appeal, cited *Tate v Rafin* in support of a distinction between a disability itself on the one hand and the behaviour that might result from or be caused by that disability on the other. In this regard, Emmett J said the following at paras. 35 and 36 of his judgment:

35. Psychological disabilities may constitute a disability within the meaning of [the DDA (Cth)]. Such psychological disabilities may cause a person to behave differently from the way in which a person who does not have that disability would behave. However, where an educational authority is unaware of the disability, but treats a person differently, namely, less favourably, because of that behaviour, it could not be said that the educational authority has treated the person less favourably because of the disability see *Tate v Rafin* [2000] FCA 1582 paragraphs [64]-[67].
36. Thus, there is a distinction to be drawn between a disability within the meaning of [the DDA (Cth)], on the one hand, and behaviour that might result from or be caused by that disability on the other hand. Less favourable treatment on the ground of the behaviour is not necessarily less favourable treatment by reason of the disability. The position might be different in a case where the disability necessarily resulted in the relevant behaviour. That is not the present case. The behaviour of the Complainant is not ipso facto a manifestation of a disability within the meaning of [the DDA (Cth)] nor of any disability of the Complainant within the meaning of the [the DDA (Cth)]. The case was finally appealed to the High Court of Australia. Most of the justices there, including McHugh, Gummow, Kirby, Hayne and Heydon JJ, did not favour such distinction between the disability and the behaviour associated with the disability, and according to them, the meaning of disability as defined in s 4(1) of the DDA (Cth) is not confined to the underlying condition to the exclusion of the resulting behaviour. Despite that, the majority, including Gleeson CJ, Gummow, Hayne, Heydon and Callinan JJ, still dismissed the complaint of disability discrimination, either based on application of the comparator test or the causation test mentioned above. In any event, the decision in the lower court highlights the problems associated with the discrimination of psychiatric or psychological disability, the symptoms of which may just be found in any other person without suffering from such disability. The dicta in *X v McHugh* was, however, cited with approval in other Australian cases including *Randell v Consolidated Bearing Company (SA) Pty Ltd* [2002] FMCA 44 and *Chinchen v NSW Department of Education and Training* [2006] NSWADT 180. However in *Randell*, the employer had actual

knowledge of the disability of the employee and the presiding Federal Magistrate distinguished *Tate v Rafin and Purvis* on that basis. As for the case of *Chinchen*, the dispute was whether an otherwise gifted child with motor dyspraxia, a learning disability which made it difficult for him to complete tasks, especially written ones, under a time constraint, had been discriminated against by his school which had removed him from its extension class. The New South Wales Administrative Decisions Tribunal rejected the school's submission that its lack of knowledge of the child's motor dyspraxia was fatal to the claimant's case, and held that a *prima facie* case of discrimination could still be made out provided that the identified characteristic of that disability, for example difficulty with the completion of tasks under a time constraint, was known to the school. *X v McHugh* was cited in support of the decision. However, one thing to note about this case is that it was concerned with the interpretation of s. 49B of the New South Wales Anti-Discrimination Act 1977 (the ADA (NSW)), which is worded differently from s. 5(1) of the DDA (Cth) and our s. 6(a) and which contains the characteristics extension in the definition of direct discrimination. Ss. 49B(1)(a) and (2) of the ADA (NSW) provide:

- (1) A person (the perpetrator) discriminates against another person (the aggrieved person) on the ground of disability if, on the ground of the aggrieved person's disability the perpetrator:
 - (a) treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person who does not have that disability;
- (2) For the purposes of subsection (1)(a), something is done on the ground of a person's disability if it is done on the ground of the person's disability, a characteristic that appertains generally to persons who have that disability or a characteristic that is generally imputed to persons who have that disability. (emphasis added) The proper legal principles to be applied It is not easy to reconcile these cases, and it seems that the law in Australia in this regard is still far from being settled. Mr. Harris is relying on *X v McHugh* and tries to establish the proposition that for an employer to be liable for direct discrimination, it is not necessary for the employer to know the existence of the employee's disability, and it is enough if the employer is shown to have discriminated because of a manifestation of a disability. Hence, the basic question is whether it is good law. In my judgment, I have grave reservation about this wide proposition. Firstly, it is strictly obiter because the employer in *X v McHugh* knew about the disability of the complainant. Secondly, there have been various attempts in the Australian courts and tribunals to limit the application of *X v McHugh*, for examples the decision of the Administrative Appeals Tribunal in *Re Prezzi & Discrimination Commissioner* and *Quest Group Pty Ltd.*, *ibid.* and that of the Federal Court of Australia in *Purvis v State of New South Wales (FCA)*, *ibid.* In particular, these cases highlight the difficulty concerning psychiatric and psychological illnesses, the symptoms of which may appear in any individuals without suffering from such disability. A direct application of the proposition may therefore sometimes lead to most unjust result. Thirdly, in reaching the decision in *X v McHugh*, Sir Ronald had not considered the comparator and causation

questions as required by s. 5(1) of the DDA (Cth). In fact, the Full Court of the Federal Court of Australia in *Purvis v State of New South Wales* [2002] FCA 503 made the same criticism about the judgment in *X v McHugh*: Whilst entitled to respect, the decision of HREOC in *X v McHugh* and the HREOC decisions which apply it arose in an employment setting under a previous statute and assert the result without setting any satisfactory comparative analysis such as is required by s5 or its equivalent. (at p. 10 of the Lexis transcript) As I have mentioned above and illustrated by cases such as *Nagarajan v London Regional Transport*, *ibid.* and *Purvis v State of New South Wales* (HCA), *ibid.*, even if the alleged discriminator was aware of the prohibited grounds of discrimination, for example the discriminatee was suffering from a disability, the court is still required to consider the comparator and causation questions as required by s. 5(1) of the DDA (Cth). With the greatest respect, Sir Ronald had simply failed to do so in *X v McHugh*. Based on all these reasons, I do not accept the alleged proposition in *X v McHugh* as a legal principle of general application. Hence, what should be the law? After reviewing the aforesaid authorities, I would set out in the following what I regard should be the proper legal principles to be applied in the present case, in particular about the degree of knowledge of the employee's disability that is sufficient to make the employer liable for direct discrimination under the DDO. Firstly, as I have mentioned above, the object of our DDO is to ensure equality of treatment between disabled and non-disabled persons. It tries to avoid the making of coloured decision, in the sense that treatment given to a person should not in any way be influenced by that person's disability, and equal opportunities should be made available to all individuals whether they are suffering from a disability or not. In such circumstances, there should be no discrimination if the alleged discriminator is not aware of the disability of the complainant. That is the reason why the words on the ground of that other person's disability and on account of that second-mentioned person's disability are used in the definitions of direct discrimination and harassment in our s. 6(a) and s. 2(6) respectively. Secondly, as established by the authorities such as *Siu Kai Yuen v Maria College*, *ibid.*, once an employer knew that his or her employee was suffering from a disability, for example the employee had to be hospitalized because of a medical condition, and unfavourable treatment was given to that employee, though the nature and extent of the disability were unknown, that would be sufficient to make the employer liable for direct discrimination if the other requirements are met. Thirdly, in determining whether the alleged discriminator did have knowledge of the disability, I maintain that the plain meaning of our s. 6(a) only supports a subjective approach, that is if the alleged discriminator genuinely did not know about the disability of his employee, he should not be liable. Indeed, we have already seen that there are various ways for the legislature to extend the meaning of direct discrimination, for examples, the use of the formulation for a reason which relates to the disabled person's disability in the DDA (UK) and the inclusion of the characteristics extension in defining direct discrimination in s. 49B of the ADA (NSW). If our legislature had intended to have a wider definition, it could have expressly so drafted the DDO, and yet our legislature decided to adopt the more restrictive wording of on the ground of that other person's disability in our s. 6(a). As the Hong Kong DDO was drafted after extensive study of the corresponding statutes and

jurisprudence in other jurisdictions, one must give effect to the intention of the local legislature by not extending the meaning of direct discrimination to an unnecessary extent. Fourthly, the court, however, is sometimes entitled to adopt a more objective approach in considering the question of knowledge, but there must be good reason for doing so. Assuming that an employee has symptoms which are so obvious as indicating some kind of disability, and yet the employer turns a blind eye towards the whole affair and treats the employee in an unfavourable manner, then I agree that, subject to the satisfaction of the other requirements, such recklessness is sufficient to make the employer liable for direct discrimination. To rule otherwise would frustrate the object of the DDO, and the imposition of such a light duty would not cause undue burden on the part of the employers. This is very similar to the necessary consequence test proposed by the Full Court in *Re Prezzi & Discrimination Commissioner and Quest Group Pty Ltd*, *ibid*. If the behaviour and the symptoms of the employee are the necessary consequences of the disability, then the symptoms must have been obvious and the employer may be liable under such circumstances. Mr. Harris, on the other hand, submits that the test should be whether the employer, on all the facts, including the nature and skills of the employer, could reasonably have been expected to suspect disability on the part of his or her employee. If the answer is yes, the employer is liable. Such concept of reasonableness is expressly provided for in s. 4A of the DDA (UK), but I myself have great reservation about adopting such test in the present case. Firstly, the Hong Kong legislature could have introduced such test in the DDO, and yet there is none in the statute. Secondly, I do not accept that it was the intention of the legislature to expect the employers to play the role of psychiatrists, psychologists or investigators, or to put the employers in a difficult position of requiring them to investigate every single case when there is some display of equivocal symptoms. It is one thing to ensure that employers should provide equal opportunities to all individuals, but it is quite another matter to impose a duty on them to take care of the general welfare of employees. The latter is very much a matter of substantive equality as observed by Gummow, Hayne and Heydon JJ in paras. 200-203 of their judgment in *Purvis v State of New South Wales* (HCA), *ibid*. (see: para. 153 above). Substantive equality may be a concept adopted by the DDA (UK), but in the absence of such concept and the reasonableness test in our DDO, I would maintain that nothing short of the obvious symptoms and recklessness on the part of the employer is sufficient. Fifthly, extra care should be given when dealing with amorphous forms of disability such as mental, psychiatric or psychological illness. I am not suggesting that persons suffering from such disability would lose the protection under the DDO. However, when we are talking about the manifestation of a disability, we are actually referring to the symptoms of the disability itself, and the symptoms of the amorphous forms of disability may cover a wide range of behaviour patterns that some of them are simply shared by individuals without disability at all. In the words of the Administrative Appeals Tribunal in *Re Prezzi*: Where the impairment is due to some psychological or psychiatric condition, the manifestations of the impairment are less likely to point to the existence of impairment. (at para. 37) Indeed, as agreed by all the medical experts in the present case, the display of certain symptoms may not result in a diagnosis of any psychiatric or

physiological disorder. A person who is free from disability but works under stress may have insomnia or constant stomach pain, and it is only the frequencies, durations and severities of the symptoms that count. In particular, employees with poor working ability may face extra pressure from his work, and it is very difficult for an employer to make a judgment as to what causes a particular employee to perform so poorly at work. Application of the legal principles to the facts of the present case With these observations, I turn to the facts of the present case. In my judgment, the facts here fall far short of establishing the necessary knowledge on the part of the Government or its officers. As I accept the factual evidence of the Government's witnesses, the display of the symptoms on the part of Mickey was not obvious to an extent that it would have alerted the Government's officers about the possibility of Mickey having disability. In fact, as I have mentioned above, even Mickey did not regard the symptoms as serious enough for the same to be revealed to his own doctor (see: para. 123 above). Further, if the symptoms were obvious, I find it surprising that the Government's officers, who all had had considerable experience in public administration, did not make reference to the possibility of any psychiatric or psychological disorder in any of the reports or memos, in particular when they had no real financial interest as to how to deal with Mickey's case. It is true that Mr. Wan did use the words slow and sluggish in the 1st Appraisal Report in appraising the work performance of Mickey, and Mr. Wan also referred Mickey as the most inert AO he had ever seen. On some occasions, Mr. Wan and Mr. Ho also found that Mickey appeared to have a blank face. But in my judgment, this is far from suggesting that Mickey was suffering from some kind of disability. These descriptions must be understood in the context of the whole report. While appraising his work performance, Mr. Wan was describing Mickey as a person with low efficiency and productivity. According to Mr. Wan, Mickey's lack of motivation and poor working ability and attitude were the main culprits for his poor performance. Further, as Mr. Ho has testified, an employee who does not understand the requirements of the job before him may put up a blank face in front of his supervisor, and this may not be a symptom of any kind of psychiatric disability. If Mr. Wan's and Mr. Ho's evidence is genuine, which I find it to be the case, they should be the best persons to explain why they used these particular descriptions in their appraisals, and in my judgment, the court should not adopt other interpretations or read those words out of the context of their use. Mr. Harris also relies on the facts that: (i) Mickey had on some occasions worn his sweater inside out; (ii) Mickey's office was messy; and (iii) Mickey's handwriting is like that of a primary school student. In my judgment, I cannot see how the poor handwriting of Mickey could indicate that he was suffering from some kind of psychiatric disorder at that time. Further, the wearing of the sweater inside out and the tidiness of the office, at most, show that Mickey was a sloppy person. I imagine that even a person without suffering from disability may have experienced the same embarrassment of wearing the wrong side of the sweater, especially if he or she is working under pressure with little attention devoted to take care of the daily details. In fact, I have the opportunity of looking at the relevant sweater produced by Mickey as exhibit. Except with the label, the sweater looks pretty much the same even if one is wear the sweater inside out. The Government's officers had from time to time noticed that Mickey was suffering from some

flu-like symptoms like runny nose and fatigue. However, this is far from saying that the display of these symptoms mean that Mickey was suffering from other kind of disability except for flu. Indeed, when Mickey was reciting these symptoms to his own doctor Dr. Fung, the same did not alert the said doctor that Mickey was suffering from anything other than flu. In the memo dated 25 May 2000, Mr. Cheng noted that Mickey was under severe stress for the past few months, and he expressed concern whether Mickey could stand much further. Such memo was subsequently read by other senior officers of the CSB. Later on 2 June 2000, after Mr. Cheng failed to contact Mickey by telephone, Mr. Cheng was also concerned that Mickey might do something stupid such as committing suicide. In his submission, Mr. Harris argues that the reference to the suicidal idea was a damning admission on the part of the Government's officers. With this background, would it have occurred to them that Mickey might be suffering from some kind of psychiatric or psychological disorder? It is always easy now to analyze the situation critically with the benefit of hindsight and all the medical findings obtained after the commencement of these proceedings. However, I accept Ms. Wong's submission that the observations mentioned above must be understood in the context of the circumstances facing Mickey by that time. Looking at it from the point of view of the Government's officers, Mickey had persistently encountered marked difficulties with all aspects of the job of an AO so much so that his suitability for the post was called into question right from the beginning. Further, according to Dr. Chung, anxiety may be considered normal if it is appropriate to the stress. In particular, anxiety may not be regarded as excessive if the person suffering it has a reason to worry. In Mickey's context, he had every reason to be anxious as he was worried about his poor work performance and the likelihood of dismissal, and so Mickey's anxiety might be understandable adverse psychological reaction in response to the stress of doing a job that was beyond him and possible dismissal from the job. In other words, even a person free from disability would be worried when he or she was facing the same situation, even to the extent of having suicidal idea. Hence, these observations, reading them in the light of Mickey's performance in the Government, only suggest that Mickey was under intense stress by that time but not necessarily suffering from any kind of disability. Mr. Harris further argues that various Government's officers should have regarded to the facts that Mickey managed to obtain second class honours university degree and to pass the competitive AO recruitment exercise, his poor performance would then be a symptom indicative of some form of disability. His argument is somewhat supported by the expert opinion of Professor Lieh-Mak. However, if Mr. Harris argument is correct, there would be no point for the Government to set up the probation system in the first place. One must appreciate that candidates who achieve good academic performance and perform well in interviews and examinations, which are conducted in more or less structured environment, may not be able to perform well as an AO. The demands and the pressure associated with the actual job may be different and so the whole point of imposing a 3-years probation period is to weed out unsuitable appointees. There had been previous occasions in which the appointment of AO was not confirmed and Mickey might just be one of those cases. Further, the recruitment boards noted the following weaknesses of Mickey, including that he

was weak in oral English expression, his arguments and points were not particularly perceptive and there was room for improvement for his social skill. In such circumstances, Mickey's poor performance might just be caused by such weaknesses. Further, even if I were to accept Mickey's evidence about the display of symptoms, I do not think that it would advance his case any further. According to him, there is a long list about the alleged symptoms, including, inter alia, showing a high level of anxiety, poor concentration, chronic fatigue, stomach ache, inability to respond or appearance of under-reaction or having a blank mind, sleeplessness, lack of manual dexterity, loss of appetite, flu-like symptoms, fever, feeling of restlessness, palpitations and becoming tremulous, indecisiveness and excessive fear of making mistakes. The list may look impressive. However, some of these symptoms would only have been known to Mickey himself. In this testimony, Mickey seems to suggest that his colleagues should have known about his disabilities by reason of his look, but there is simply insufficient basis to support such inference. Mickey insists that the people around him saw what he is now convinced to be symptoms, when they might not even registered it or might have registered it but drew a different conclusion. Further, it is always easy now to analyze the situation critically with the benefit of hindsight, but the facts remain that Mickey had been working in the Government for about 20 months, and during that time, he worked closely under the supervision of his colleagues. In such circumstances, occasional display of such symptoms, observed a few times over a long period of time when Mickey worked with them, might not suggest anything abnormal. Even Mickey's medical experts accept that anxiety is a normal state of being, and only when it oversteps the threshold, then it becomes a disorder. Psychiatrist and psychologist would look at the severities, frequencies and durations of the symptoms to decide whether someone is suffering from GAD or other kind of psychiatric or psychological disorder, however I do not accept that it was intention of the legislature to expect lay employers to play the role of psychiatrists and psychologists. Based on the aforesaid analysis, I do not find that the symptoms displayed by Mickey when he worked as an AO were obvious to an extent as indicating that he was suffering from some kind of disability. One must understand that working as an AO is a stressful job, and it would be quite normal to expect certain AOs to display symptoms of stress, which is quite different from saying that they are suffering from some kind of disability. The Government certainly did not turn a blind eye or was in any way reckless about Mickey's condition. Even if I were wrong and that the court were to apply the reasonableness test as submitted by Mr. Harris, I am of the view that the result would be the same. As the symptoms were not obvious and were equivocal in nature, it would not be reasonable to expect the Government to speculate as to the reason why Mickey performed so badly as an AO. In my judgment, this is too onerous a duty to be imposed on employer. As I have mentioned above, it is one thing to ensure that the employer would provide equal opportunities to all the employees, but it is quite another matter to impose a duty on the employer to take care of the general welfare of the employees, at least this is not the object of our anti-discrimination legislation. In such case, apart from the comparator and the causation questions, Mickey's claim must fail because the Government did not know that he was suffering from any disability. Nor did the Government treat Mickey under the

perception that he was suffering from the same. Government's knowledge of the disability in June 2000 On 24 June 2000, Mickey submitted to Mr. Ho 2 sick leave certificates by Dr. Peter Yu dated 14 and 20 June 2000, which respectively stated that Mickey was suffering from anxiety disorder and anxiety state and recommended sick leave from 15 to 21 June 2000 and from 22 to 28 June 2000. After learning about his disability, Mickey complains that the Government was guilty of discrimination by not reviewing his case of resignation and rejecting his application for sick leave from 6 to 20 July 2000. As the Government did have some degree of knowledge about Mickey's disability starting from 24 June 2000, I think that the alleged discriminatory and harassing conducts after that date deserve separate consideration. In this regard, one must understand that Mickey actually resigned his post by way of letter on 2 June 2000 with the effective date of resignation one month later on 2 July 2000. He also applied for leave from 28 June to 2 July 2000. His resignation was accepted and his leave application was also granted on the same day, ie. 2 June 2000. Mickey's last day in the office should therefore be 27 June 2000 and arrangements were made to relieve the duties of Mickey in TB with effect from 28 June 2000. On 12 June 2000, Mickey sought to unilaterally postpone the effective date of his resignation from 2 July to 5 July 2000. Mickey then took sick leave on 15 June 2000 and from 20 to 22 June 2000. On 24 June 2000, Mickey submitted the relevant 2 sick leave certificates to Mr. Ho. The only application that Mickey made in reliance upon these 2 certificates was that made on 26 June 2000, that was the day before his last day in the office, for sick leave from 6 to 20 July 2000, a period which was covered by neither certificates. Also on 26 June 2000, Mickey unilaterally sought to further postpone the effective date of his resignation from 5 to 25 July 2000, which was followed by a letter dated 27 June 2000 faxed by Mickey to the CSB to cancel his approved leave from 28 June to 1 July 2000. The Government put forward 2 reasons for refusing the sick leave application. Firstly, CSR 1273(2)(b) required sick leave exceeding 2 working days to be granted only upon the receipt of a medical certificate. As Mickey applied for sick leave in July whereas his certificates only covered certain periods in June, Mickey's application was not supported by the necessary sick leave certificates. Secondly, under the then current CSR 1273(4), an officer was not eligible for the grant of sick leave until his approved leave had expired. By 26 June 2000, Mickey's approved leave from 29 June to 2 July 2000 had not expired, and so he was not entitled to the sick leave applied for. By a letter dated 27 June 2000, Mr. Cheng informed Mickey that as arrangements had been made to relieve his duties on 28 June 2000, the CSB would not withdraw the approved leave and that since Mickey would not be required to report duty from 28 June 2000, he did not need sick leave after that date. As the sick leave certificates produced by Mickey did not cover the period in respect of which leave was being sought, the premise underlying the complaint about the rejection of Mickey's sick leave application is simply missing. In such circumstances, Mickey had not been subjected to less favourable treatment and his application was refused for want of compliance with the relevant provisions of the CSR and not on the ground of his alleged disability. The other complaint is that the Government had failed to review his case after its officers had learned about his disability. The short answer to such claim is that in submitting the sick leave certificates, Mickey did not ask for a review of his case, and hence, there is no

basis to support such claim. However, even if Mickey were to ask for a review or that the law, for whatever reasons, imposes a duty on the part of the Government to review Mickey's case, I do not think that the result would be different. As I have mentioned above, knowledge of the prohibited ground of discrimination is only a pre-requisite to liability. The complainant must also have to pass the comparator and causation tests as required by s. 6(a) of the DDO. As the hypothetical comparator would be one who performs as badly as Mickey though without suffering from any disability, Mickey cannot satisfy the comparator test as discussed in the earlier part of this judgment (see: paras. 157-164 above). For the causation test, I have a few more remarks to make. Firstly, as established by the cases such as *Nagarajan v London Regional Transport*, *ibid.* and *Chief Constable of the West Yorkshire v Khan*, *ibid.*, the court is required to ascertain the real reason for the unfavourable treatment. In my judgment, the real reason for the Government in terminating Mickey's employment was his poor performance as an AO. Mickey had been given the opportunity of serving two postings, and yet his performance had remained constantly poor. Despite the various efforts helping Mickey to improve, it failed to produce any fruitful result. This was even the case when Mickey's workload was relatively light when he started his work in the HAB, and by that time there was simply no reason for anyone to suggest that he was suffering from some kind of disability. Hence, poor performance was the only real reason for the termination of Mickey's employment. Further, dismissing Mickey was not an end in itself. To discharge its duty to the public, the Government had a duty to maintain the Administrative Service as a taskforce of officers who were all capable of discharging their duties in different posts effectively and efficiently. Just like the school in *Purvis*, it had a duty to ensure that Daniel would not pose as a danger to other pupils and staffs in the school, and that was the real reason why he was suspended and expelled. On this particular issue, Gleeson CJ said the following at para. 13 of his judgment: Similar considerations arise in respect of the related issue of identifying the ground of the first respondent's action, which is to be considered in the light of both ss5 and 10 of the Act. The fact that the pupil suffered from a disorder resulting in disturbed behaviour was, from the point of view of the school principal, neither the reason, nor a reason, why he was suspended and expelled. It is the school authority that is the alleged discriminator, and it is the reason or reasons for action of the responsible officers of the school authority that is or are in question, It is their conduct that is to be measured against the requirement of the Act. If one were to ask the pupil to explain, from his point of view, why he was expelled, it may be reasonable for him to say that his disability resulted in his expulsion. However, s 5, 10 and 22 are concerned with the lawfulness of the conduct of the school authority, and with the true basis of the decision of the principal to suspend and later expel the pupil. In the light of the school authority's responsibilities to other pupils, the basis of the decision cannot be fairly stated by observing that, but for the pupil's disability, he would not have engaged in the conduct that resulted in his suspension and expulsion. The expressed and genuine basis of the principal's decision was the danger to other pupils and staff constituted by the pupil's conduct, and the principal's responsibilities towards those people. Further, looking at it from the viewpoint of the Government's officers, the anxiety suffered by Mickey in mid-June 2000 might have been triggered by the recent event

of inviting him to resign. As I have mentioned above, Mickey by that time had every reason to be anxious about the possible dismissal by the Government. As the work performance of Mickey had remained poor since he first started to work as an AO, there was no reason for the Government's officers to change their view, even after receiving the 2 sick leave certificates, that Mickey's constant poor performance of about 20 months was caused by problems relating to his ability and working attitude and nothing else. As the real reason for terminating the employment of Mickey was his poor work performance and his treatment would be the same as that would be received by the comparator, even if the Government had some degree of knowledge of Mickey's disability in mid-June, it is not liable to Mickey for the alleged discrimination or harassment which took place after that date. Harassment As in the case of direct discrimination, the unwelcome harassing conduct must be made on account of the disability of the person alleged to have been harassed (see: s. 2(6) of the DDO). According to para. 48 of the judgment of Judge Muttrie in *L v Equal Opportunities Commission*, *ibid.*, the words on account of in s. 2(6) should carry the same meaning as on the ground of in s. 6(a). Since Mickey fails on the causation test in the claim for direct discrimination as the various Government's officers were not or should not have been aware of Mickey's disorder, and the real reason for his treatment was his poor work performance, Mickey's claim on harassment should likewise fail. Further, a lot of the complaints on harassment are based on Mickey's factual allegations, for examples the yelling at Mickey and the pounding on desk by Mr. Ho. As I reject Mickey's evidence on the facts, his claim for harassment cannot possibly succeed. INDIRECT DISCRIMINATION I then turn to the claim on indirect discrimination which is defined in s. 6(b) of the DDO:

6. A person discriminates against another person in any circumstances relevant for the purposes of any provision of this Ordinance if (a)
- (b) he applies to that other person a requirement or condition which he applies or would apply equally to a person without a disability but -
- (i) which is such that the proportion of persons with a disability who can comply with it is considerably smaller than the proportion of persons without a disability who can comply with it; which he cannot show to be justifiable irrespective of the disability or absence of the disability of the person to whom it is applied; and which is to that person's detriment because he cannot comply with it. Although the treatments by the employer of all the employees are the same, individual employee with a certain attribute may find it more difficult to comply with the requirements of the employer. Indirect discrimination is therefore an exception to the object of treating all persons equally, and by reason of the disability of an employee, it actually requires the employer to treat that employee differently. However, unlike the corresponding provision in the DDA (UK), our DDO stops short of requiring the employers to take affirmative actions to accommodate the needs of disabled employees, except for the purpose of relying on the defence of inherent requirements of the job which I will elaborate further in the latter part of this judgment (see: paras. 256-279 below). It is Mickey's case that the Government was guilty of indirect

discrimination by applying to him the same assessment criteria to which all other AOs were subjected (the Criteria), without making allowance for his disabilities or giving special assistance and accommodation to enable him to comply with the same. In other words, Mickey complains that by reason of his disabilities, he could not be expected to perform to the same standard as other AOs without a disability. Thus, his performance should not have been assessed by reference to such standard, at least not without him being given all the special assistance and accommodation he required to reach to such standard. The Government accepts that the Criteria did constitute a requirement or condition as referred to in s. 6(b). It is also not disputed that the conditions in ss. 6(b)(i) & (iii) are satisfied, in the sense that:

- (i) the proportions of AOs with disabilities who could comply with the Criteria were likely to be considerably smaller than the proportions of AOs without a disability who could also comply with the same (see s. 6(b)(i)); and (ii) the application of the Criteria to Mickey was obviously to his detriment because he could not comply with such Criteria (see s. 6(b)(iii)). However, the Government, relying on s. 6(b)(ii), claims that the application of the Criteria is justifiable irrespective of the disability or absence of disability of the persons to whom they are applied, ie. all the AOs. Hence, knowledge of the disability is no longer an issue in the claim on indirect discrimination, and the sole question here is whether it is justifiable for the Government to apply the Criteria in assessing the performance of all the AOs including Mickey. The burden of proving that the requirement or condition is justifiable rests with the Government, who must justify it objectively by reference to factors other than the prescribed grounds. In *Siu Kai Yuen v Maria College*, *ibid.*, HH Judge C. B. Chan, in following the dicta of the English EAT in *Board of Governors of St. Matthias Church of England School v Crizzle* [1993] IRLR 472, held that the following factors must be considered in deciding whether a requirement or condition is justifiable for the purpose of s. 6(b)(ii):
- (i) whether the objective of applying the requirement or condition is legitimate; (ii) whether the means used to achieve the objective are reasonable; and (iii) whether the requirement or condition is justified when balanced on the principle of proportionality between the discriminatory effect upon the employee and the reasonable needs of the employer. In order to justify the application of the Criteria, the Government seeks to establish the following features of the job of AO at the trial:
- (i) the Administrative Service is the linchpin in the operation of the Government and plays a pivotal role in the governance of the Hong Kong Special Administrative Region. It provides leadership in the civil service. It formulates policies, allocates resources and leads in the delivery of the Government's services; the Administrative Service is a small taskforce of only about 500 odd officers; each individual AO has designated responsibilities and portfolios to take care of; to match the heavy responsibility, the terms of employment of AOs are quite generous; what makes the career of an AO unique and different from any other jobs is, *inter alia*, the constant changes in posting, and officers in the Administrative Service must therefore be multi-skilled professional administrators and generalists capable of taking on

many roles and responsibilities and solving the most difficult problems; AOs must be able to adapt to new working environment quickly; due to the interface with the public and other departments and organizations within and outside the Government, AOs have to face multi-fold demands on a daily basis; the work of an AO may have a grave impact on the welfare of the general public; and heavy workload and long working hours are the norms for AOs. Based on the evidence adduced at the trial, I have no reason to query such peculiar features of the job of an AO. In fact, even Mickey in his cross-examination accepts that AO is a challenging job, and I do not find that the Government has exaggerated the importance and the demanding nature of such job. Having considered the said features, I am of the view that the Government has satisfied the 3 conditions as set out in the case of Crizzle. So far as the objective in applying the Criteria is concerned, the Government has to ensure that all AOs do possess the broad range of knowledge, skills and qualities required in most of the posts of the AO grade to a reasonable standard so that the duties of different posts will be discharged effectively and efficiently. In Crizzle, it was held that it is not for the court to redraft or to redefine the objective, and I accept that the court should not question the legitimacy of such objective given the central and crucial role and functions played by the officers of the Administrative Service in the governance of Hong Kong and the demanding nature of their works. Secondly, as reasonable measures to achieve the said objective, the Government must adopt a structured system for the assessment of the performance of AOs according to the Criteria. Indeed, the recruitment, confirmation and promotion of AOs are only for the best candidates, and the remunerations of AOs are on terms that are commensurate with the heavy responsibilities and demanding duties of the job. Thirdly, the application of the Criteria is justifiable upon a balance between the discriminatory effect on Mickey and the reasonable needs of the Government. As mentioned in the description of the works of the AOs, the Administrative Service is a small workforce and even junior AOs are entrusted with heavy duties, and hence one should not expect the Government to require for anything less of the officers who carry out public functions of such impact upon the well being of the society. In fact, even Mickey in his testimony concedes that the 25 core competencies are fair and reasonable requirements to be applied in the assessment of AOs, even those on probation, given their heavy responsibilities. Further, if an AO, even a junior one, cannot discharge his or her duties efficiently or effectively, it would seriously affect his or her colleagues in the office, with the result that it can cause undue pressure on the other colleagues, or even worse, the relevant bureau or department simply fails to carry out the function required of it. Hence in my judgment, the Government has satisfied the principle of proportionality. From the various appraisal reports and memos, it is clear that the work performance of Mickey was well below the standard set by the Criteria. Although Mickey had on some occasions shown improvement, his performance was still far from being satisfactory. As I accept that the appraisals were genuine and honest assessments of Mickey's performance, Mickey's claim on indirect discrimination must fail. One must also note that according to Mickey's case on the pleading, it is not that he had been under-assessed by his supervisors, rather what Mickey feels aggrieved about is that his supervisors and reviewing officers had failed to note and address the reasons for his poor performance, namely his

alleged disabilities. In fact, Mickey did not raise any objection about his assessments in the various appraisal reports or to the officers of the CSB, and he agrees in cross-examination that his work performance had put extra burden on his teammates in the office. I must also add that in the pleading, Mickey relies on some conducts as acts of indirect discrimination, for examples, the yelling and throwing of things by Mr. Wan and pounding the desk by Mr. Ho, the reluctance of Mr. Ho in granting sick leave and the suggestion by Ms. Anissa Wong, Ms. Linn and Mr. Cheng to Mickey to seek counseling service. However, it is unclear as to what unjustified requirement or condition is said to have been applied to Mickey in each of these situations. Hence for whatever reasons, Mickey's claim for indirect discrimination cannot succeed. THE DEFENCE OF THE INHERENT REQUIREMENTS OF THE JOB Even if the Government is guilty of discrimination against Mickey, there is still a defence available to the Government if it can establish that Mickey would be unable to carry out the inherent requirements of the job of an AO. S. 12(2) of the DDO provides: Section 11(1)(a) and (c) and (2)(c) shall not apply to an employer who discriminates against a person with a disability, if taking into account

- (a) the person's past training, qualifications and experience relevant to the particular employment; where the person is already employed by the employer, the person's performance as an employee; and all other relevant factors that it is reasonable to so take into the account, the person because of the person's disability-
- (i) would be unable to carry out the inherent requirements of the particular employment; or would, in order to carry out those requirements, require services or facilities that are not required by persons without a disability and the provision of which would impose an unjustifiable hardship on the employer. There is a lack of local jurisprudence on such area of the law. However since the wording of our s. 12(2) is similar to that of s. 15(4) of the DDA (Cth), we can obtain some guidance from the Australian authorities in this regard. The first one is *Qantas Airways Ltd. v Christie* (1998) 152 ALR 365 (HCA). In this case, Mr. Christie was employed by Qantas as an airline pilot, and he was a captain of B747-400 aircraft flying on international routes. The employment contract provided that a pilot could not be employed beyond the age of 60, but Mr. Christie challenged Qantas decision not to extend his employment after such age on the ground of age discrimination. Under s. 170DF(2) of the Industrial Relation Act 1988, the wording of which is similar to that of s. 15(4) of the DDA (Cth), it does not prevent age from being a reason for terminating employment if the reason is based on the inherent requirements of the particular position, and so one of the issues in the case was whether the reason for not extending Mr. Christie's employment was based on the inherent requirements of his position. At the relevant time, some of the countries covered by most of the routes structure of Qantas enforced the Rule of 60, which was based on a standard in an international convention prohibiting pilots of over 60 years of age of flying an aircraft to or over those countries. To make up the hours that were necessary for the qualification of a pilot, Mr. Christie could fly on short flights, flights that would otherwise be used to make up the hours of other B747-400 captains. However, the High Court of Australia held that it was an inherent requirement of the position which Mr. Christie

occupied as a pilot of 747-400 aircraft that such a pilot should not be excluded from flying those aircrafts to or over those countries which enforced the Rule of 60, and remitted the case back to the Full Court of the Industrial Relations Court to determine whether Mr. Christie, notwithstanding the limited destinations to which he could fly after he turned 60, could comply with Qantas roster system. In dealing with the issue of the inherent requirements of a particular employment, the following observations were made in the judgment: The question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also be reference to the function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organized on a basis which impermissibly discriminates against the employee, by reference to that organization. (per Brennan CJ)

36. A practical method of determining whether or not a requirement is an inherent requirement, in the ordinary sense of that expression, is to ask whether the position could be essentially the same if that requirement were dispensed with. (per Gaudron J) The second case is *X v Commonwealth of Australia* (1999) 167 ALR 529 (HCA). The claimant, X, was dismissed from the army after being tested HIV positive, and he complained that the dismissal was unlawful discrimination under the DDA (Cth). However, there is a defence under s. 15(4) of the Act, which provides that it is not unlawful discrimination by an employer against a person on the ground of the person's disability if taking into account [certain matters], the person because of his or her disability would be unable to carry out the inherent requirement of the particular employment. Nevertheless, HREOC held that X was able to carry out the inherent requirements of his employment and his dismissal was therefore unlawful. Upon appeal, the High Court of Australia disagreed and allowed the appeal. As to the question of the inherent requirements of a particular employment, the following observations were made in the judgment:
31. Whether something is an inherent requirement of a particular employment for the purposes of the [DDA (Cth)] depends on whether it was an essential element of a particular employment. However, the inherent requirements of employment embrace much more than the physical ability to carry out the physical tasks encompassed by the particular employment. Thus, implied in every contract of employment are obligations of fidelity and good faith on the part of the employee with the result that an employee breaches those requirements or obligations when he or she discloses confidential information or reveals secret processes. Furthermore, it is an implied warranty of every contract of employment that the employee possesses and will exercise reasonable care and skill in carrying out the employment. These obligations and warranties are inherent requirements of every employment. If for any reason mental, physical or emotional the employee is unable to carry them out, an otherwise unlawful discrimination may be protected by the provisions of s 15(4). .

37. Unless the employer's undertaking has been organized so as to permit discriminatory conduct, the terms of the employment contract, the nature of the business and the manner of organization will be determinative of whether a requirement is inherent in the particular employment. But only those requirements that are essential in a business sense (including where appropriate public administration) or in a legal sense can be regarded as inhering in the particular employment. The Commission must give appropriate recognition to the business judgment of the employer in organizing its undertaking and in regarding this or that requirement as essential to the particular employment. Thus, in *Christie*, Qantas had no obligation to restructure the roster and bidding system which it utilized for allocating flights to its pilots in order to accommodate Mr. Christie. In the end, however, it is for the Commission, and not for the employer, to determine whether or not a requirement is inherent in a particular employment. (per McHugh J)
102. The reference to inherent requirements invites attention to what are the characteristic or essential requirements of the employment as opposed to those requirements that might be described as peripheral. Further, the reference to inherent requirements would deal with at least some, and probably all, cases in which a discriminatory employer seeks to contrive the result that the disabled are excluded from a job. But the requirements are to be considered are the requirements of the particular employment, not the requirements of employment of some identified type or some different employment modified to meet the needs of a disabled employee or applicant for work. (per Gummow and Hayne JJ) The issue of inherent requirements was also raised in the case of *Cosma v Qantas Airways Ltd.* [2002] FCA 640. Mr. Cosma was employed by Qantas as a porter in the ramp services, and he injured himself in the course of his work. After attending certain rehabilitation programme, Mr. Cosma was assigned some clerical and other light duties, but his employment was subsequently terminated on the ground of disability. In respect of the claim for discrimination, the Federal Court of Australia held that Mr. Cosma was unable, by reason of his disability, to carry out the inherent requirements of his employment as being a porter. On this particular issue, Heerey J said the following in his judgment:
68. [s. 15(4)(b) of the DDA (Cth)] does not require the employer to alter the nature of the particular employment or its inherent requirements. Rather it is a question of overcoming an employee's inability, by reason of disability, to perform such work. This is to be done by provision of assistance in the form of services, such as providing a person to read documents for a blind employee, or facilities such as physical adjustment like a wheel chair ramp. The services or facilities are external to the particular employment which remains the same. On the same subject, Ms. Wong also refers me to the case of *Rabadi v Commissioner for Corrective Services* [2002] NSWADT 23. Mr. Rabadi was employed as a prison officer by the Department of Corrective Services in New South Wales in Australia. He was denied promotion to the rank of senior prison officer and was ordered to retire on medical ground. He lodged a complaint of disability discrimination against his employer and his case was heard by the Administrative Decisions Tribunal. Mr. Rabadi was suffering from depression and one of the issues in the case was whether Mr. Rabadi was, by reason of

his psychiatric disorder, would be able to fulfill the inherent requirements of the job. The Tribunal found that a senior prison officer would have to deal with physically challenging and mentally stressful situations. As it was an inherent requirement of such job to deal with physical and mental stress continually, the Tribunal found that Mr. Rabadi, by reason of his psychiatric disability, was unable to carry out the inherent requirements of the job. After referring to these cases, I can perhaps try to summarize the law on the inherent requirements defence under s. 12(2) of the DDO as follows:

- (i) whether a defendant can rely on the s. 12(2) defence involves a two-stage inquiry: firstly to identify the inherent requirements of the relevant employment, and secondly to ask whether because of the employee's disability the employee is unable to carry out those requirements; (ii) the inherent requirements defence does not impose an obligation on the employer to alter the nature of the particular employment so as to accommodate the disabled employee, and the court must give appropriate recognition to the business judgment of the employer in organizing its undertaking and in regarding this or that requirement as essential to the particular employment; when considering whether the requirements of the job are inherent or not, it is the requirements of that particular employment which must be considered, not the requirements of some different employments modified to meet the needs of a disabled employee. Further, the question must be answered by reference not only to the terms of the employment contract, but also by reference to the function which the employee performs as part of his undertaking; in identifying the inherent requirements of a particular employment, one must look at the characteristic or requirement of that employment as opposed to those requirements that are peripheral; in identifying the requirement, one practical method is to ask whether the employment would be essentially the same if the requirement were dispensed with; the ability to deal continually with mental and physical stress can be an inherent requirement of a particular employment; and in helping an employee to fulfill the inherent requirements, the employer must provide to the employee services or facilities that are external to the employment. However, the employer has no duty to ask some other staffs to do the work of the disabled employee. In the last section of this judgment dealing with the claim for indirect discrimination, I have already listed out some of the peculiar features of the job of an AO and it is only fair to say that working as an AO is a highly stressful job (see: para. 250 above). As their work closely relates to various aspects of the community, the pressure of the work not just comes from their supervisors, but from the many departments, organizations and institutions that they have to work with both inside and outside the Government. Furthermore, as the work of the Government would be closely scrutinized by the public, AOs must have to cope with the pressure from the media and the general public as a whole. This is certainly different from many other jobs in the private sector. Whilst it may be relatively easy for the Government to arrange for an understanding supervisor thereby minimizing some of the pressure, it would not be possible for the Government to control the pressure from other sources. The Government contends that it must be inherent requirements of employment as AO to demonstrate all-round capabilities to discharge the

duties in different posts effectively and efficiently under the most demanding conditions, whether as to time to complete the work or the volume of work, and encompassing not only the handling of issues but also of the people one has to work or to deal with. It is also an inherent requirement to withstand the physical and mental stress arising from the job. In view of the heavy responsibilities of the AOs, the limited work force, the duty owed by the Government to the public to provide a good administration, and the possible impact of the work of the AOs on the general public, it is, in my judgment, quite impossible for the court to query the legitimacy or the reasonableness of such requirements. The next stage of the inquiry is whether Mickey, by reason of his disabilities, would be able to carry out such inherent requirements of the employment. In this regard, Professor Lieh-Mak is of the opinion that Mickey, given appropriate medical treatment, should be able to take up the job of an AO. While recognizing Professor Lieh-Mak's considerable experience in public administration, I am afraid that I cannot agree with her opinion in this regard. Firstly, it is not disputed that Mickey had been tried out in 2 different posts and he failed badly in both. In fact, even Dr. Benjamin Lai and Professor Lieh-Mak agree that when Mickey started off as an AO in 1998, he was not suffering from any exceptional level of anxiety, and yet his performance was poor by that time. Further, all the medical experts agree that neither GAD nor visual short-term memory can be cured. In such circumstances, it seems unlikely that after developing a psychiatric disorder and then having treatment therefor that would not cure would put him in a better position than that at which he started to work as an AO in October 1998. Secondly, while Professor Peter Lee agrees that it would not be too difficult to treat GAD alone, Mickey's case is more pessimistic because of the presence of the following complications: Mickey's proneness to anxiety, his obsessive compulsive traits and specific weaknesses in his cognitive functioning. The last-mentioned weaknesses are said to affect Mickey's abilities to multi-task, to handle situations in which he would need to improvise, identify the underlying questions and work out a solution in the absence of clear instructions or guidelines, to make and commit to decisions, to stay on a task without being distracted, to handle multiple and different sets of data, in particular working under a time constraint. Professor Lee is of the view that these vulnerabilities would always be lurking. If Mickey is facing lesser degree of stress, these vulnerabilities would probably lie dormant and not really affecting Mickey's everyday life, but when the degree of stress becomes more intense, such vulnerabilities would surface. These would affect Mickey's choice of vocation to the extent that when these cognitive faculties or abilities are called into play, then together with Mickey's proneness to anxiety and obsessive compulsive traits, they can work against Mickey like a perfect storm when there is intense stress and can interact in a vicious cycle with one factor aggravating the other. To a certain extent, Professor Lieh-Mak agrees with such assessment by Professor Lee. I agree with the opinion of Professor Lee in this regard, which is, to a great extent, supported by Mickey's post-government employment history. In fact, he had 7 jobs in a period of about 6 years after he left the Government, which suggests that Mickey, even after receiving medical treatment, had not been able to hold down to a job, whether such job was in the public or private sector. Although Mickey is satisfied with his employment with Consulting Company A and Non-Governmental Social

Services Organisation D (see: paras. 38-39 above), Mickey was having the same problem with his supervisors in other two employments. In fact, history seems to have repeated itself here. According to Mickey, when he was experiencing difficulty with some of the works involving visual presentations, there was then tension developed between Mickey and his respective supervisors. As a result, Mickey had anxiety which eventually led to the termination of his employments. It might be true that Mickey's vulnerabilities were not exposed when he worked in Consulting Company A and Non-Governmental Social Services Organisation D where his cognitive weaknesses were not called into play, or there were some other factors favourable to Mickey by that time. However, taking into account that there are constant changes in the posting in the Administrative Service, and every new post is like a new job with different supervisor and colleagues, it is very likely that Mickey's vulnerability would surface at some stage, which would then affect his functioning as an AO. Further, all the medical experts agree that the only external cause identifiable as inductive of Mickey's anxiety was the stress at work as an AO. They also agree, to a certain extent, in order to prevent a recurrence of his work problems in 1999 and 2000, Mickey should be placed in a structured and supportive working environment. Although one may attach different meanings to this phrase, it seems that, taking into account what happened when Mickey worked for the Government and other employers after he left the Government, this working environment would mean at least:

- (i) a reduced workload; (ii) minimized distraction in the work place; (iii) the assignment of one task at a time with instructions and guidelines as clear as possible and deadlines as reasonable as possible; a pampered and protected working environment with a supportive and understanding supervisor and other colleagues who are ready to perform for Mickey tasks which he finds difficult, in particular, words processing, document formatting and other clerical tasks; and colleagues who are watchful of how they are communicating with Mickey, with no flare-up of anger or showing of any ambiguous signs of disapproval. However, as the work of an AO has a public interface and a lot of the work may be subject to pressure from outside sources, it is simply impossible for the Government to provide such kind of working environment for Mickey. As testified by the Government's officers, such job expectations are unrealistic for the job of an AO. By reason of the limited number of AOs working in the Administrative Service, it would be quite legitimate for the Government to expect an AO to work independently under extreme pressure, otherwise the Government would fail in its duty to provide a good administration for the public. Mr. Harris, however, submits that it is not open to the Government to argue that Mickey could not have continued to do the job, as there was a lack of investigation, when Mickey was still an AO, as to whether there was any posting which would be suitable to him taking into account his disabilities. However, the statutes and the case law do not impose such an obligation on the employers to carry out investigation by that time. Indeed, the court is entitled to consider the job nature, the duties of an AO and Mickey's disabilities in making an assessment as to whether he would be able to fulfill the inherent requirements of the job. I imagine that it is technically possible for the Government to allocate Mickey with a job which has no interface with the

public, to provide caring colleagues and a good and understanding supervisor who is not concerned about deadlines. However in such circumstances, I would not say that this is still a job for an AO. Mr. Harris further submits that the Government has exaggerated the uniqueness and difficulty of the job of an AO. He says that many jobs in management and business fields also involve a great deal of day to day pressure, ability to cope with changing work requirements, to work with different colleagues and to move periodically from one posting to another, and the job of AO is not unique in this regard. However, if a job in the private sector involves the same degree of stress and constant changes in posting like those of an AO, I also have grave doubt, taking into account Mickey's disabilities and shortcomings, whether he can cope with such job. Such worry is, to a certain extent, supported by the employment history of Mickey after he left the Government. In s. 12(2)(ii) of the DDO, it states that an employer must provide services or facilities to the disabled employee to enable the latter to carry out the inherent requirements of the job, provided that it would not impose an unjustifiable hardship on the employer. Mr. Harris therefore tries to argue that the inherent requirements defence is not open to the Government, as the DDO obliges the Government to make reasonable accommodation in relation to Mickey's disabilities which, if given, would have allowed Mickey to reach the standard required to be confirmed to the permanent establishment of an AO. However as I have pointed out in the earlier part of this judgment, unlike s. 4A(1) of the DDA (UK), the DDO does not impose a general obligation on the employers to positively make reasonable adjustments for a disabled employee (see: para. 155 above). Hence, one must distinguish between a general obligation to make reasonable adjustments to accommodate disabled employees on the one hand, from the provision of services or facilities to enable disabled employees to carry out the inherent requirements of the employment as stated in s. 12(2) on the other. It is only when an employer seeks to invoke the defence under s. 12(2) that the issue of whether he has provided those services or facilities arises. As shown in the cases mentioned above, the law does not require an employer to alter the nature of the particular employment so as to accommodate the disabled employee. Indeed, the imposition of such an obligation would render the inherent requirement defence nugatory. In making available this defence to an employer, it must be the legislative intent that the nature and inherent requirements of the employment are preserved. Hence, in the present context, there is no duty on the part of the Government to alter the inherent requirements identified above. Obviously, the Government would need to provide reasonable services and facilities that are external to the employment to enable Mickey to carry out such requirements. However, taking into account the disabilities of Mickey, I wonder what other services or facilities could the Government have provided in order to help Mickey to, say, to cope with the pressure of his work. In my judgment, if Mickey was expecting a super-secretary to carry out all the works relating to the preparation and analysis of visual presentations, and a supervisor who would not show any frustration even if he repeatedly missed the deadlines, Mickey was actually asking the Government to lower or alter the inherent requirements of the job. The law may perhaps require an employer to provide external aid to enable a blind employee to read the documents so that he can complete his work, but it is quite another matter to ask the

employer to engage another staff to do the actual work of the disabled employee. In any event, the provision of the services or facilities should not impose an unjustifiable hardship on the employer (see: proviso (ii) in s. 12(2)), and I would say that, in the present context, it is certainly an unjustifiable hardship on the Government to require it to do anything more in the circumstances. By reason of the aforesaid, even if the Government is guilty of discrimination by trying to terminate the employment of Mickey, I find that Mickey, by reason of his disabilities, would be unable to fulfill the inherent requirements of the job of an AO and the Government is therefore entitled to rely on the defence under s. 12(2) of the DDO.

LIMITATION ISSUES In view of my decision above, it is not necessary for me to consider whether Mickey's claim is time-barred under s. 82(1) of the DDO, which requires a claim under the DDO to be brought within 24 months from the time when the act complained of was done. Under s. 82(2A), the time taken by the EOC to investigate the complaint would be disregarded for the purpose of the limitation provision, and sub-section (3) empowers the court to entertain a claim out of time if it considers that it is just and equitable to do so. Although limitation is no longer a live issue, for the sake of completeness, I would also address this issue very briefly. As the time taken by the EOC for investigation would be disregarded, the remaining complaint by the Government is only two-fold. Firstly, the claim for harassment is time-barred. The last act of the alleged harassment was committed on 2 June 2000. Mickey did not lodge a complaint of disability harassment with the EOC until 18 March 2002, and the EOC discontinued the investigation on 3 January 2003. As the writ of summons herein was issued on 31 March 2004 and only the period from 18 March 2002 to 3 January 2003 would be disregarded under s. 82(2A), the claim for harassment is time-barred. On the other hand, Mickey lodged the complaint of disability discrimination much earlier on 19 December 2000, and so the time taken by the EOC for investigating such claim was much longer. That is the reason why the Government is not taking any limitation issue on the claim for discrimination. Secondly, the Government objects the new claim about the discriminatory conducts which allegedly took place after the Government received the 2 sick leave certificates in mid-June 2000. Mickey sought to introduce this new claim by way of amendment of pleading in the early stage of the trial. For the second issue, I have already dealt with the same in some details in paras. 102-105 of this judgment, and I have nothing further to add here. Regarding the first issue, the claim for harassment is technically time-barred. However, as Mickey is relying on substantially the same facts to substantiate both the claims on discrimination and harassment, it would be highly undesirable for the court just to entertain one claim and not the other, bearing in mind that the DDO is a piece of social legislation. Further, as both claims involve the same factual issues, it would not cause any real prejudice to the Government for it to deal with the additional claim on harassment at the trial. Hence if limitation is a live issue, which I do not find it to be the case, I would certainly exercise my discretion to entertain the claim on harassment out of time.

OTHER STATUTES AND MATERIALS PRAYED IN AID BY MICKEY In the Re-Amended Particulars of Claim, this action is also said to have been brought pursuant to Article 22 of the Hong Kong Bill of Rights Ordinance, Cap. 383 (HKBOR) and Article 39 of the Basic Law, which are in identical terms to certain articles in the International Covenant

on Civil and Political Rights and International Covenant on Economics, Social and Cultural Rights. But in my judgment, these statutory provisions, which contain general principles of equality before and equal protection of the law, only provide the constitutional basis for anti-discrimination on the ground of, inter alia, a person's disability. The DDO, on the other hand, is the specific legislation which lays down the regime whereby specified acts in prescribed fields on the ground of a person's disability are made unlawful and aggrieved persons may seek redress via a claim in tort. In such case, it is unnecessary for the court to go into either of the provision in the HKBOR or the Basic Law in deciding Mickey's claim. In this regard, I would repeat the observation of Gummow, Hayne and Heydon JJ at para. 206 of their judgment in *Purvis v State of New South Wales (HCA)*, *ibid.*, sounding out the caution in relying on some aspirational statements in international instruments in construing the provisions in local anti-discrimination legislations. In the trial, Mr. Harris also seeks to rely on the following 2 documents in support of Mickey's claim:

- (a) CSB Circular No. 20/80 dated 3 October 1980 on Processing of cases involving officers suspected to be mentally ill ; and (b) Employment of People with a Disability in the Civil Service issued by the CSB in 1999. Some of these documents may show that it is the Government's policy, where appropriate, to give certain preferential treatment to job applicants and employees with a disability. However, such policy is not the law. So far as the determination of liability for discrimination and harassment is concerned, there is only one set of law for all the employers, and so the determination should be governed solely by the provisions in the DDO, and how the Government deals or would have dealt with another employee with a disability in accordance with its policy is simply irrelevant. QUANTUM OF THE CLAIM In view of the aforesaid analysis, it is not necessary for me to assess the quantum of Mickey's claim. I have also considered, for the sake of completeness, whether I should proceed to make the assessment in the event that this case goes elsewhere and a contrary view is taken in respect of the liability of the Government. However, I decide not to do so. In considering the defence of inherent requirements , I have taken a certain view as to whether Mickey, in view of his disabilities, would be able to cope with demanding and stressful jobs even after medical treatment, and this would have a bearing as to the assessment of Mickey's damages in the future. In any event, I have not obtained very much assistance from the parties on the issue of quantum, and a lot of the supporting materials and quantification of the claim were only supplied to me after the commencement of the trial. If a contrary view is taken elsewhere about liability, I am of the view that a fresh hearing on assessment of damages would be necessary to explore a lot of the unaddressed issues on quantum. In fact, both counsel agree with my decision in the event that Mickey fails on the issue of liability. By reason of the aforesaid, Mickey's claim is dismissed. Pursuant to s. 73C(3) of the District Court Ordinance, Cap. 336, I make an order nisi that both parties shall bear its own costs of the action and that the Claimant's costs to be taxed in accordance with legal aid regulations. Since this case involves legal principles of some importance, to save the trouble of the parties in coming back before me applying for leave to appeal, I also make an order nisi that there be leave to appeal against my judgment in this

case. The order nisi shall be made absolute 28 days after the date of the handing down of this judgment. In the case of an appeal, I must remind the parties to comply with the requirements in O. 58 r. 2 of the Rules of the District Court, Cap. 336 and the time will start to run from the date when the order nisi is made absolute. CONCLUDING REMARKS

Working in the Government can be considered as an unfortunate event in Mickey's life, and the present litigation is certainly not a pleasant experience for him. However, Mickey can be regarded as an intelligent person, and it is only that he, by reason of his shortcomings and disabilities, is not suitable to work as an AO. As I see it, it is now time for Mickey to make a fresh start in his life. With more insight gained into his own problems, I am sure that Mickey can find a suitable job in the future which can benefit from his talent. In the present case, one of the reasons why an employer may be difficult to find out whether an individual employee is suffering from any kind of psychiatric or psychological disorder is that the symptoms of such disability may just be found in any other persons who happens to work under stress. This is certainly not a healthy phenomenon. Although I do not accept Professor Lieh-Mak's evidence in its entirety, I must agree with her observation that mental health of employees in working environment is a very much neglected issue in Hong Kong. Undoubtedly, Hong Kong is a very competitive society, and so employees inevitably have to bear with various degrees of stress arising from work. However, stress can also affect the health of individuals in various ways. Having made such observation, I am afraid that this is not a discrimination issue for determination by the court and I can leave it to the relevant authorities and professionals to address this difficult problem. Finally, I would like to extend my gratitude to both counsel for their able and meticulous submissions and the thorough research that they had conducted in this case. Indeed, this case raises a lot of issues which have not been canvassed in the local courts before, and I am sure that the efforts of counsel in this case would be most valuable in assisting the development of our own jurisprudence in this area of the law. It is often said that the development of the common law depends, to a significant extent, on the quality of the advocates, and the assistance I have derived from counsel in this case can only reflect the accuracy of such observation. (David Lok) District Judge Mr. Paul Harris SC, instructed by Messrs. Ho, Tse, Wai & Partners, for the Plaintiff Ms. Liza Wong SC, instructed by the Department of Justice, for the Defendant APPENDIX INDEX paragraph (page) Introduction 1 (1) Background of the case 6 (4) Medical condition of Mickey 40 (18) Mickey's allegations of discriminatory and harassing conducts and conflicting versions of events 51 (23)

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