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PathFinders Limited

Written Submission

to

HKSAR Legislative Council's Panel on Manpower in advance of a meeting on 18 July 2017

regarding

Review of Statutory Maternity Leave

Submitted on 17 July 2017

Background

PathFinders Limited is a Hong Kong-registered charity with tax-exempt status;

We ensure that the most vulnerable children born in HK, and their migrant mothers, are respected and protected;

The focus and purpose of this submission is to give a voice to the pregnant Foreign Domestic Workers (“FDWs”) and their children;

From inception in 2007 to date, PathFinders has helped over 4,600 babies and their migrant mothers. The majority, but not all, of the women we help are current or former migrant FDWs. In 2016, 88% of the babies’ biological fathers were in Hong Kong;

Given that 1 in 7 women of reproductive age in Hong Kong is employed as a foreign domestic worker, it should be both anticipated and expressly provided for that some women will have their children while employed here. However, pregnancy and maternity policy frameworks and practical guidelines for dealing with the related employment and immigration impact for this population are lacking, thereby rendering these women and their largely undocumented babies open to abuse and exploitation;

This extremely vulnerable population deserves significantly more help and attention. Every child deserves a fair start in life;

Introduction

Hong Kong’s current laws, contracts and policies regarding maternity protections for FDWs fail adequately to provide for what should happen when a FDW is pregnant;

Quite correctly, and as for all other employed women in Hong Kong, pregnant FDWs are protected by law from employment termination and discrimination on the grounds of pregnancy;

However, the absence of policy and guidelines stipulating how a happy, healthy pregnancy is to be successfully and lawfully managed by the FDW employee, their employer, the employment agencies, the Labour Department and the Immigration Department has devastating human consequences for both mother and infant;

To date, PathFinders has helped manage, support and ensure the safe arrival of over 1,400 babies into Hong Kong’s policy, healthcare and social welfare void. There is no other organisation doing this work. PathFinders receives no government funding;

This is unacceptable. It is a globally acknowledged and indeed enshrined in our own laws that all children deserve a fair start in life;

This submission:

1. explains the key gaps of the current laws and policies on statutory maternity leave (“ML”) for pregnant FDWs; and
2. provides recommendations as to how those gaps might be filled with a view to ensuring that every child has a fair start in life.

Problems encountered by PathFinders’ pregnant FDWs

1. Inadequate Protection and Enforcement of FDW’s Pregnancy and Maternity Rights

Statutory ML is currently governed by Part 3 of the Employment Ordinance, Cap. 57 (“EO”). This statutory scheme inadequately accommodates the interests of both the pregnant FDWs and their employers in the following ways:

a) Knowledge and awareness of pregnancy and maternity rights

Part 3 of the EO not only provides that a pregnant, female employee is entitled to statutory ML, it also provides that she cannot be dismissed by her employer unless for reasons justifying summary dismissal. The Sex Discrimination Ordinance (“SDO”) further protects a pregnant employee from being discriminated against by reason of her pregnancy;

However, FDWs and employers are often unaware that pregnancy and maternity protections apply to FDWs. Many believe that, as in Singapore, FDWs are not ‘allowed’ to be pregnant. In 2015, a survey of 589 Filipino and Indonesian FDWs conducted by PathFinders together with Professor Anju Mary Paul revealed that only a third (33%) understood their maternity rights correctly. Almost as large a group (30%) thought they had no pregnancy protections whatsoever;¹

This lack of knowledge of their rights and obligations on the part of both FDWs and their employers has devastating consequences on the future of the pregnant FDWs and their unborn children. FDWs are frequently dismissed or are forced to resign once the pregnancy becomes known to the employer. They are very unlikely to be able to secure other employment before their visa expires and they are often unable to return home

¹ Anju Mary Paul, *“Am I Allowed To Be Pregnant?”: Awareness of Pregnancy Protection Laws Among Migrant Domestic Workers in Hong Kong*, currently under review by the Journal of Ethnic and Migration Studies

because of the advanced state of the pregnancy or fear to return home pregnant with a mixed race child born out of wedlock;

They and their unborn child are left homeless and without any source of income or access to healthcare. In the recent case of Waliyah,² an Indonesian FDW won her case against her former employer for sex and pregnancy discrimination because the employer forced her to take a pregnancy test and when it tested positive, fired her. Waliyah's case is not isolated one. PathFinders' Access to Justice Programme has assisted in nearly 40 cases involving unlawful employment termination due to pregnancy and pregnancy discrimination;

b) Notice requirement

Section 12 (4) of the EO requires an employee to give "*notice of pregnancy and intention to take maternity leave*" before taking leave. It further states that the presentation of a medical certificate confirming her pregnancy constitutes "notice." The Labour Department's Maternity Protection Guide³ states that a pregnant employee is only required to produce a medical certificate if required by the employer.⁴ It also suggests that she uses the sample form of Pregnancy Notice provided in the Guide when serving the notice of pregnancy;⁵

The above is unsatisfactory as it does not directly or adequately address what constitutes "*notice*" under Section 12(4), what constitutes "*presentation*" of medical certificate, what are the other acceptable methods of "*notice*" aside from presentation of medical certificate and what practical steps a pregnant FDW can take to prove "*notice*";

This lack of guidance presents considerable difficulties to pregnant FDWs in practice. For the majority of FDWs their only day off is Sunday when it is difficult, if not impossible, to find a doctor or clinic open and able to provide the medical certificate required by the employer;

If the employer discovers that their FDW is pregnant before the FDW manages to procure a medical certificate, PathFinders' experience is that some employers then engineer a situation purportedly justifying summary dismissal or force the FDW to

² *Waliyah v Yip Hoi Sun Terence* [2017] 1 HKLRD 1082

³ <http://www.labour.gov.hk/eng/public/wcp/MaternityProtection.pdf>

⁴ At p.3

⁵ At p. 7

resign. This often happens when an employer suspects that the FDW is pregnant and takes her to a clinic for check-up but no medical certificate is issued. In our experience, it is also common for the employer to discover the FDW is pregnant as part of the routine medical check-up during contract renewal but often no medical certificate is provided by the doctor. In other cases, FDWs only show the medical certificate to their employers or agents but do not know that they need to provide the employer with a copy in order to attract statutory protection under the EO. Language barriers further exacerbate matters. When the FDW then attempts to bring a case for unlawful termination due to pregnancy, the Labour Department and Labour Tribunal only regard a written Pregnancy Notice as sufficient “notice” under the EO whilst ignoring the FDWs’ other attempts to inform their employer and/or agency of their pregnancy;

c) Entitlement to ML

The EO stipulates a pregnant employee’s entitlement to ML as absolute provided the notice requirement is satisfied. In practice, FDWs and their employers too often find themselves in situations where the ML protections and entitlements are less clear cut;

For example:

1. It is unclear whether the FDW is entitled to the full 10-week statutory ML if parts of it fall outside/straddle the FDW’s two-year contract period;
2. It is unclear whether the employer breaches the EO’s maternity provisions if the employer is required to terminate the FDW’s contract prior to the commencement of the FDW’s ML for reasons out of their control e.g, the relocation of the employer to another country;

d) Live-in Rule and Impact on Pregnant and Nursing

A live-in requirement applies to FDWs during their employment. Strangely, there are no exceptions to this requirement to cater for pregnancy and the critical periods post-birth, and during maternity leave and while nursing a new life. There are no laws or policies specifically addressing the interplay between ML and the so-called live-in rule, breach of which attracts criminal penalties for both employer and FDW;

The Labour Department has informed PathFinders that it does have the ability to grant exemptions from the live-in rule if there are ‘exceptional circumstances’ but exemptions are rarely if ever granted and there is no information as to what constitutes ‘exceptional circumstances’ and specifically whether this includes ML. PathFinders has assisted

clients and their employers in applying for exemptions but none of the applications has been successful to date;

The insistence that the live-in rule apply during statutory ML creates significant problems for both the FDWs and their employers (a typical case can be found in **Annex 1**);

1. First, there is a lack of guidance on what ‘live-in’ actually requires and entails. How many hours of living-in satisfies the live-in rule? PathFinders has encountered cases where the employer only allows the breastfeeding FDW to be absent from the house for 8 hours a day in order to feed her newborn infant. Does hospitalization/sick leave/annual leave outside Hong Kong breach the live-in rule?
2. Secondly, the live-in rule might not be practical for employers. For example some employers are concerned as to whether the accommodation they provide is safe for the pregnant FDW, e.g., if only a bunk bed is available or there is lack of easy access to toilet and washing facilities. Other employers might not have space in their residence to accommodate both the pregnant FDW and a temporary domestic worker/FDW who has been hired to cover the FDW’s ML;
3. Thirdly, the ill-defined live-in rule brings great inconvenience to the FDW mother and their newborn baby. There is no obligation for the employer to accommodate the new baby and yet currently, the Labour Department insists that the FDW must live in the employer’s residence during ML - the impact is draconian and separates an infant from its mother during those critical first few weeks of life. PathFinders has cases where the mother has had to make a four hour return trip each day to visit her newborn and return each evening to sleep at her employer’s home. Mothers who breastfeed their babies would not be able to do so in the evening and night time;
4. Last, employers are often unaware that a pregnant FDW can return to her country of origin for ML and to give birth and believe that the live-in rule is an impediment to doing so. For FDWs whose spouses are in their home country, this uncertainty meant that they could not give birth in their own country and had to give birth alone in Hong Kong without any support from their spouse/family;

Given the above it is hardly surprising that we frequently see cases where employers end up dismissing the pregnant FDWs or forcing them to resign and replacing them because of the difficulties arising out of the live-in rule;

e) Length of ML

Hong Kong has one of the shortest periods of statutory ML in the world. The EO prescribes a minimum period of 10 weeks of ML. The Maternity Protection Convention C183 of the International Labour Organization (“ILO”) requires 14 weeks’ ML as a minimum condition.⁶ In its latest Concluding Observations, the United Nations Committee on the Elimination of Discrimination Against Women expressed concerns that the 10-week ML period in HK does not comply with ILO standards.⁷ ILO’s 2014 report found that 74 countries, or 45 per cent, of the 167 countries studied, provided cash benefits of at least two-thirds of earnings for at least 14 weeks. Specifically in the Asia region, about one-quarter of the 26 countries and territories meet the ILO standard, with the average duration standing at 12.7 weeks;⁸

China allows 14 weeks’ ML at 100% pay;

In 2016, the Organization for Economic Co-operation and Development (“OECD”) found that, mothers in OECD countries were entitled to an average of 18 weeks’ paid ML with almost all OECD countries offering paid ML of at least three months;⁹

Specifically in the context of migrant FDWs, the 10-week ML period is short and impractical;

For FDWs who give birth in their home country, the 2-4 weeks pre-delivery ML period is insufficient. While the EO allows employees and employers to reach mutual agreement on the exact date of commencement of ML, ML can only commence at most 4 weeks prior to the expected delivery date. By that time the FDW is 36 weeks’ pregnant and prohibited by most if not all airlines (and most doctors) from flying. Unless the

⁶ Article 4(1), Maternity Protection Convention 2000 (No. 183),

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C183

⁷ United Nations Committee on the Elimination of Discrimination Against Women, *Concluding observations on the combined seventh and eighth periodic reports of China*, 11 November 2014,

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fCHN%2fCO%2f7-8&Lang=en, at paragraphs 62-63

⁸ ILO, *Maternity and paternity at work: Law and practice across the world*, 2014,

http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_242615.pdf; see also South China Morning Post article *Weighing up maternity leave: Hong Kong lags behind international standards*, 7 May 2016,

<http://www.scmp.com/news/hong-kong/education-community/article/1942178/weighing-maternity-leave-hong-kong-lags-behind>

⁹ OECD, *OECD Family Database Public Policies for Family and Children (PF) PF 2.1 Key characteristics of parental leave system*, last updated 15 March 2017, http://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf, at p.

employer grants unpaid leave and/or the FDW has accrued annual leave, the FDW will be unable to return to her country of origin to give birth. This has grave practical and emotional consequences for the women who wish to entrust their baby to their spouse/family in their home country before they themselves then return to HK to work;

For FDWs who give birth in Hong Kong, the 6-8 weeks ML period post-delivery is insufficient. After the birth of their child, the mother needs to apply for a Hong Kong birth certificate, register the birth with their respective consulate in Hong Kong, apply for a passport for their child, purchase an air ticket to send the child to the mother's country of origin, settle the child with the family in the home country and then return to Hong Kong to report duty to their employers. All these steps take time and are difficult to complete all within 6-8 weeks post birth, in addition to attending to the babies' and mothers' physical and emotional needs;

f) Payment of ML

Sections 14(2) and 14(3A) of the EO provide that female employees are entitled to paid ML at four-fifths of their average wages, provided they have been employed for at least 40 weeks prior to taking ML. Section 14(4) of the EO provides that the payment for ML should be made in the usual manner and on the employee's usual pay day;

These provisions present difficulties for both the FDWs and their employers, especially in cases where the FDW gives birth and takes ML in her home country;

1. there is no guidance as to who is responsible for paying the airfare to travel to and back from the mother's home country for ML, especially where the employer actively encourages such an arrangement. We often see cases where the employer deducts the cost of the airfare from the FDW's wages;
2. there is no guidance as to how payment for ML is to be effected while the FDW is in her home country during ML when in Hong Kong she is normally paid by her employer in cash. We often see cases where the employer deducts the costs of the banking transfer fees from the FDW's wages or withholding wages by paying wages due during ML in a single lump sum only once the FDW returns to HK. This is cruel for many reasons, not least given that the FDW needs to pay for her and her baby's medical care and living expenses and, at the end of the ML, pay for childcare in her home country once she returns to her work in Hong Kong;

g) Sick leave entitlement during pregnancy and ML

Part 3 of the EO does not deal specifically with an employee’s entitlement to sick leave during pregnancy and ML. The Labour Department’s Maternity Protection Guide states that if an employee is absent from work to attend a medical examination in relation to her pregnancy, such days will be counted as a “sickness day” for which she may be entitled to sickness allowance.¹⁰ However, it does not address the more immediate and practical question as to whether and when a live-in FDW will be allowed by her employer to take a day or even a few hours off to attend a medical appointment during the working day when doctor’s offices and medical centres are in operation;

2. Lack of statistics and data collection

Given 1 in 7 of women in Hong Kong of childbearing age are FDWs, it should be expected that some FDWs will have children at some point during their employment in HK. There are over 360,000 FDWs in Hong Kong, and they are predominantly female;

However, there is a lack of data available explaining the magnitude and nature of employment and other issues faced by pregnant FDWs in Hong Kong;

To date, departments, agencies and other related organizations including the Immigration Department, Labour Department, Police Force, Social Welfare Department, Public Hospitals and Family Planning Association have not provided or published any information as to:

1. how many FDWs give birth in Hong Kong;
2. how many pregnant FDWs managed to negotiate a satisfactory ML with their employers in compliance with live-in rule;
3. how many pregnant FDWs were unlawfully dismissed or forced to resign after their employers discovered their pregnancy;
4. how many FDWs were replaced after they returned from ML;
5. how many pregnant FDWs returned to their country to give birth and what were the ML arrangements that were put in place;

Requests by PathFinders for this type of information have typically resulted in the department/agency stating that such data is either not collected at all or not by that specific department;

PathFinders’ own data shows that the numbers of pregnant FDW women and their Hong Kong-born infants is significant. In 2016 alone, PathFinders helped over 900 new people. Are there other babies and women who need help to have a fair start in life? No one seems to know the size of this population - and that is shocking given that we are dealing with the very young

¹⁰ <http://www.labour.gov.hk/eng/public/wcp/MaternityProtection.pdf>, at p. 3

and very vulnerable lives of an extremely at-risk population;

Recommendations

PathFinders recommends that:

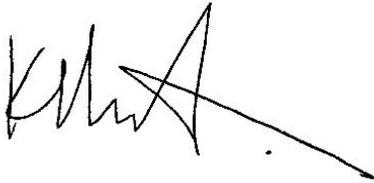
1. HKSAR Government reviews, creates (where currently absent), clarifies, clearly communicates and enforces laws, practices and policies to enable lawful, safe and healthy pregnancies free from harmful treatment for FDWs and their unborn babies. In particular they should:
 - A. Introduce a concerted education programme about the maternity rights, obligations and protections for FDWs to all key stakeholders including FDWs, employers, employment agencies, Labour Department, Immigration Department, Health Authority, Police, Social Welfare Department, Prisons and relevant consulates;
 - B. Relax the live-in rule during statutory ML and specifically explain the expected management of ML and the so-called live-in rule;
 - C. Extend statutory ML period to 14 weeks in line with the ILO convention, and allow for flexibility in the statutory ML period especially for FDWs returning to their country of origin to take ML and give birth;
 - D. Devise detailed and practical policy guidelines stipulating how to lawfully manage the pregnancy and statutory ML of FDWs. These should include detailed guidance about exceptions (if any) to the ML entitlement, who should pay for flights to the FDWs' home country, time off for medical checks during pregnancy, the banking/payment arrangements for ML, sick leave entitlement during pregnancy, information for employers who wish to hire temporary helpers/FDWs during their regular FDW's ML, and set out the criminal sanctions for non-compliance; and
 - E. Add a specific line to the FDWs' standard employment contract stating that pregnant FDWs are entitled to pregnancy, maternity and non-discrimination legal protections. Clause 6 lends itself well to adding this clarification.¹¹ The employment contract was recently amended to include a clause regarding cleaning windows - adding a few words to ensure we protect the women and their unborn children should be possible;

2. HKSAR Government departments and their agencies collect and publish relevant data to assess the magnitude of problems faced by pregnant FDWs, their babies, their employers and all other relevant stakeholders. This should include:
 - A. The number of FDWs in Hong Kong who become pregnant;

¹¹Employment Contract for a Foreign Domestic Worker Form ID407
<http://www.immd.gov.hk/eng/forms/forms/id407.html>

- B. The number of FDWs who give birth in Hong Kong;
- C. The number of FDWs who managed to negotiate a satisfactory ML with their employers in compliance with live-in rule;
- D. The number of FDWs who returned to their home country to give birth and what their ML arrangements were;
- E. The number of unlawful dismissals and forced “resignations” of FDWs due to pregnancy; and
- F. The number of criminal investigations, prosecutions and convictions for unlawful termination and discrimination due to pregnancy;

Thank you for considering PathFinders’ submission.



Kay McArdle
CEO, PathFinders Limited

Annex 1

Difficulties for different stakeholders regarding the implementation of live-in rule during a FDW's maternity leave

1. Summary of the case

Farah¹² is from Indonesia. She worked in Hong Kong for around 9 years and for 4 years for the same employer. She lives in a public estate located in Tai Wai, in an approximately 400 square feet two-bedroom flat with the employer's brother and parents. The father of the child lives in Kam Tin. Farah just started her 10 week maternity leave and is allowed to leave her employer's residence at 7.30am and is required to return by 8.30pm. After the birth, the baby will stay with his father in Kam Tin.

2. Difficulties for Farah's employer

Since the **employer's house is small**, it is inconvenient for the employer to have Farah in the house. The employer inevitably has to arrange for Farah to sleep in the living room with grandpa. It may be uncomfortable for the employer and his family since Farah does not have a room to rest in the daytime and has to stay in the living room. The employer's grandma also does not have a place to sit during the day, as Farah is resting on the sofa that grandma usually sits on. A part-time helper is then hired to cover Farah's maternity leave, resulting in an even more crowded apartment.

3. Difficulties for Farah's child

Farah will not be able to **breastfeed** her baby in the evening and night time. Farah can only pump and store the breast milk for the long duration when she is away, which is impractical and difficult since she does not have her own fridge. World Health Organization¹³ and UNICEF¹⁴ recommends exclusive breastfeeding for the first six months.

Furthermore, Farah's child will not be able to spend **bonding time** with Farah since she has to return to her employer's residence every evening. According to a study conducted by the UC Davis Medical Center, the first few days of life are crucial for mother-infant bonding. This bond is extremely important in a child's future development and their ability to form healthy relationships.¹⁵

¹² Name, dates and locations have been changed

¹³ <http://www.who.int/features/factfiles/breastfeeding/facts/en/index1.html>

¹⁴ http://www.unicef.org/nutrition/index_24824.html

¹⁵ http://www.ucdmc.ucdavis.edu/medicalcenter/healthtips/20100114_infant-bonding.html

4. Difficulties for Farah

Farah will **need to travel** from Tai Wai to Kam Tin daily, totalling about 3 hours' travel every day to see her baby. This long commute will undoubtedly be difficult, burdensome, costly and tiring, especially for a new mother like Farah who is still recovering from childbirth and is exhausted. It will significantly cut down the time she spends with her newborn.