

# Court of Final Appeal Finds in Favour of Gay Civil Servant on Benefits and Tax Assessment

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- Superseding an earlier ruling by the Court of First Instance, on 6 June 2019, the Court of Final Appeal (CFA) unanimously allowed the appeal of Angus Leung Chun Kwong and ruled in Leung's favour for his rights as part of a same-sex couple to enjoy the same civil servant spousal benefits as those of his heterosexual counterparts, and to elect for joint salaries tax assessment.
- Following the CFA's decision, it is expected that same-sex married couples may now be entitled to other benefits or policies that have previously been enjoyed exclusively by married heterosexual couples.



In *Leung Chun Kwong v Secretary for the Civil Service and Commissioner of Inland Revenue* (2019), the Court of Final Appeal (CFA) considered the case of a same-sex couple who had married in New Zealand. Senior immigration officer Angus Leung took the Government to court after the Secretary for the Civil Service refused to grant spousal benefits to his husband. He also challenged the Inland Revenue Department for not allowing him and his spouse to submit a joint tax assessment. Leung is a Hong Kong permanent resident of Chinese nationality. He has been employed by the Government of the HKSAR as an

immigration officer since 2003. In 2014, Leung married his gay partner, Scott Adam, in New Zealand, where same-sex marriage is legal. The judgment is the latest landmark victory for Hong Kong's LGBTQ community, following another high-profile CFA judgment in *QT v Director of Immigration* (2018), on the right of same-sex partners to apply for a dependent's visa, handed down less than a year ago.

## The benefits decision

As a civil servant, Leung is entitled to medical and dental benefits provided by the Government under the Civil Services Regulations (CSRs). These

benefits are extended to a civil servant's family including his/her spouse. Having regarded that same-sex marriage is not recognised in Hong Kong, the Civil Service Bureau denied Leung's right to update his marital status and, as a result, Adam was denied access to the spousal benefits under the CSRs. Leung complained to the Secretary for the Civil Service (SCS). The SCS maintained Leung's same-sex marriage with Adam was not a marriage under the definition of Hong Kong law, hence Adam was not Leung's "spouse" for the purpose of CSRs and accordingly was not entitled to spousal benefits.

## The Tax Decision

Under section 10 of the Inland Revenue Ordinance (Cap. 112) (IRO), salaries tax of spouses is to be paid separately unless they elect to be jointly assessed. Leung filed his tax return and sought to elect for joint assessment of salaries tax with Adam's. The election was refused by the Commissioner of Inland Revenue (CIR) on the ground that Leung and Adams were not husband and wife for the purpose of the IRO (Tax Decision).

## The rulings of the Court of First Instance and the Court of Appeal

Leung brought a judicial review against the SCS regarding the Benefits Decision and the CIR regarding the Tax Decision. Leung claimed that the decisions unlawfully discriminated against him on the ground of his sexual orientation.

The Court of First Instance (CFI) ruled in favour of Leung on the Benefits Decision but against him on the Tax Decision on the basis that construing "marriage" under the IRO as including same-sex marriage, would be inconsistent with its meaning under the Hong Kong statutes. The Court of Appeal (CA) overturned the CFI's ruling on the Benefits Decision, and held that although differential treatment may constitute indirect discrimination against same-sex married couples on the ground of sexual orientation, it was reasonably necessary to achieve the legitimate aim of protecting and not undermining the status of marriage in Hong Kong, being a voluntary union of a man and a woman. The CA upheld the CFI's ruling that "marriage" in the IRO should not be widened to include same-sex marriage by statutory construction. The CA unanimously found the Benefits Decisions and Tax Decisions justified and rational. Subsequently, Leung appealed the CA's judgment to the CFA.

## The CFA's judgment

In an unanimous judgment, the CFA (comprising Chief Justice Ma, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Tang NPJ and Mr Justice Gleeson NPJ) held that neither the Benefits Decision nor the Tax Decision are rationally connected to the legitimate aim of

protecting the institution of marriage in Hong Kong, and that the differential treatment is not justified but constitutes an unlawful discrimination.

The CFA agreed that protection of the traditional family institution serves a legitimate aim. However, the issue in this appeal was whether the differential treatment of Leung was rationally connected to the legitimate aim of the protection of the traditional family in the circumstances of the present case.

The CFA did not accept that denying Leung's spousal employment benefits — the Benefits Decision — and his right to elect for joint tax assessment — the Tax Decision — are rationally connected to protecting the institution of marriage in Hong Kong. In particular, the CFA rejected the CA's analysis that restricting the benefits to opposite-sex married couples was justified on the ground that heterosexual marriage is the only form of marriage recognised under the laws of Hong Kong, and considered this analysis as "circular".

Also, the CFA did not agree that heterosexual marriage would be undermined by the extension of the employment and tax benefits, which were merely to acknowledge the economic reality of the family unit or to encourage the recruitment and retention of staff, to same-sex married couples. Besides, the CFA remarked that the Benefits Decision contradicts the Government's published policy as an equal opportunities employer.

## Key takeaways for HR practitioners

The CFA's judgment marks a landmark victory for Hong Kong's LGBTQ community. The CFA's ruling enables Hong Kong employers to offer more options when recruiting talent from overseas where candidates are in a same-sex marriage. Following the CFA's decision, in addition to joint salaries tax assessment, it is expected that same-sex married couples may now be entitled to employment benefits or policies that have previously been exclusively enjoyed by married

heterosexual couples, such as medical and dental benefits as well as insurance policies and work-related benefits.

Since the CFA did not accept that denying Leung's spousal employment benefits is rationally connected to protecting the institution of marriage in Hong Kong, HR practitioners and employers should review their employment benefits or policies to ensure that employees in a same-sex marriage will be able to enjoy the same spousal benefits as those of their heterosexual counterparts. Otherwise, the employer could face the possibility of being accused of unlawfully discriminating against employees in same-sex marriages on the ground of their sexual orientation.

While the CFA's decision supports the rights of same-sex married couples to elect for joint salaries tax assessment, the CFA's decision does not imply that same-sex marriage will be recognised in Hong Kong. In its judgment, the CFA repeatedly emphasised that it was only dealing with the benefits to same-sex married couples but not legalising same-sex marriage in Hong Kong. The CFA in fact acknowledged that the traditional family institution in Hong Kong constituted by marriage, defined as the voluntary union for life of one man and one woman to the exclusion of all others, should be protected.

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