

**LegCo Panel on Manpower
(for Meeting on 4 July 2001)**

Terminal Payments for Unreasonable Dismissal

Introduction

This paper seeks to clarify the meaning of the relevant provisions on employment protection for employees against unreasonable dismissal under the Employment Ordinance.

Background

2. At the Manpower Panel meeting on 15 March 2001, some Members pointed out that certain employees were unsuccessful in their claims against their employers for unreasonable dismissal because the Labour Tribunal (LT), in adjudicating such cases, would not award terminal payments to the employees if the employers' intention to evade their liabilities under the Employment Ordinance cannot be established. Members also had the impression that employees who had not attained the qualifying years of service for statutory benefits such as long service payment would not succeed in claiming remedies even though a case of unreasonable dismissal had been established by the LT. Members asked the Administration to clarify the meaning of the relevant provisions, explain how they operate in practice and provide statistics on cases of award of terminal payments made by the Labour Tribunal.

Employment protection against unreasonable dismissal under the Employment Ordinance

3. Part VIA of the Employment Ordinance (EO) on employment protection was enacted in 1997. It was introduced to strengthen the employment protection for employees against unreasonable dismissal,

unreasonable variation of the terms of the employment contract, and unreasonable and unlawful dismissal, such that employers may not dismiss their employees or vary their employment terms in order to evade their liabilities to their employees under the EO. Under Part VIA of the EO, it is provided that an employee may make a claim, and be granted remedies if he can fulfil the qualifying requirements¹, unless the employer can prove that the dismissal or variation is due to one or more of the valid reasons². It is further provided that an employer will be presumed to have had the intention of extinguishing or reducing a statutory right, benefit or protection conferred on the employee by the EO, unless he can prove that a dismissal or variation was for any of the valid reasons. The remedies include reinstatement/re-engagement or terminal payments. In the case of unreasonable and unlawful dismissal, an award of compensation of up to \$150,000 may be awarded if no order of reinstatement/re-engagement is made.

4. Under section 32A(1)(a) of Part VIA of the EO, there are two requirements for a claim against unreasonable dismissal. The first requirement is the qualifying length of service of two years. The second requirement is the employer's intention to extinguish or reduce the employee's right, benefit or protection under the EO. For this second requirement, there is a statutory presumption under section 32A(2) of the EO which provides that unless there is a valid reason for the dismissal under section 32K of the EO, an employer will be presumed to have intended to extinguish or reduce the employee's right, benefit or protection under the EO. Section 32M(1) further provides that if the court or LT finds that the employer has not shown a valid reason for the dismissal as specified under section 32K, the employer is deemed to intend to extinguish or reduce the employee's right, benefit or protection

¹ The qualifying length of service for claiming remedies against unreasonable dismissal is continuous contract for a period of not less than 24 months. However, the qualifying period does not apply to unreasonable and unlawful dismissal or unreasonable variation of terms of employment contract.

² The valid reasons are specified under section 32K of the EO. They include the conduct of the employee; the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do; the redundancy of the employee or other genuine operational requirements of the business of the employer; statutory requirement (i.e. where it would be a contravention of the law by the employer, and/or the employee, if the employee were to continue to work in his original position, or if the employee were to continue with the original terms in his employment contract); or any other substantial reason as determined by the court or the LT.

under the EO and the dismissal is deemed to be unreasonable.

5. The statutory presumption in section 32A(2) shifts the burden of proof from the employee to the employer. Furthermore, it is a conclusive presumption, which means if there is no valid reason shown for the dismissal under section 32K, the EO conclusively presumes that the employee must have been dismissed because the employer wanted to deprive him of a statutory benefit under the EO. The effect of section 32A(2) and section 32M(1) is that it is for the employer to show whether there is a valid reason for the dismissal under section 32K, and where he cannot prove that he has a valid reason, he is taken to have dismissed the employee because he wanted to deprive the employee of his statutory benefit.

6. Hence, in deciding whether there is unreasonable dismissal and whether to award terminal payments, the court or the LT is only required to determine whether there was a valid reason for the dismissal under section 32K shown by the employer. It is not necessary for them to make any specific finding about the intention of the employer. Therefore, in law and in practice, for a claim for remedies under Part VIA of the EO to be successful, the deciding factor is the employer cannot show a valid reason for the dismissal under section 32K, which is much easier to establish than the employer's intent to evade liabilities. Once the employer fails to prove that he had a valid reason, the employee may be awarded remedies. The question of employees being unsuccessful in their claims because the LT could not establish the employers' intent to evade liabilities would not therefore arise.

7. Section 32O(4) of the EO provides that the court or the LT may make an award for terminal payments under subsection (1) or (5) which shall be reckoned according to the actual length of time that the employee has been employed under that contract of employment with the employer notwithstanding that the employee has not attained the qualifying length of service required for entitlements under the Ordinance. Section 32O(1) empowers the court or the LT to make an award of terminal payments as it considers just and appropriate in the

circumstances. It is clear from these provisions that the court or the LT may, if it considers just and appropriate, award terminal payments to an employee even though he has not attained the qualifying length of service for the benefits.

Statistics on cases

8. In the three years since the operation of the employment protection part (i.e. 1998, 1999 and 2000), out of the cases heard by the Presiding Officer of the LT, 976, 1,519 and 993 were settled by mutual agreement between employers and employees; 265, 349 and 129 cases were withdrawn by the claimants; 55, 104 and 124 cases were awarded terminal payments/compensation; and 166, 276 and 267 cases were dismissed.

9. Operational experience suggests that some employees have a tendency of filing alternative claims for both severance payment and, where they have not attained the qualifying length of service for long service payment but have worked for two years or more for their employer, a claim against unreasonable dismissal. Some other claimants appear to have been under the impression that once they have been dismissed and their years of service are over two years, they will be entitled to terminal payments. In actual fact, terminal payments are not supposed to be available to every employee with two years or more service who has been dismissed, but only to those who have been dismissed unreasonably i.e. the employer had the intention to extinguish or reduce the employee's right, benefit or protection under the EO.

10. Hence, where the employer does have, and is able to show, a valid reason for dismissing the employee (e.g. conduct of the employee, capability or qualifications of the employee for performing work of the kind which he was employed, redundancy of the employee or other genuine operational requirements of the employer's business etc.), the employee's claim for terminal payments on the ground of unreasonable dismissal will not succeed. This explains the relatively small numbers of cases where terminal payments were awarded under the employment

protection part in the past three years.

Advice Sought

11. Members are requested to note the content of this paper.

Education and Manpower Bureau

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