LegCo Panel on Public Service
2002 Civil Service Pay Adjustments
Follow-up to the meeting on 23 May 2002

Purpose

This paper sets out Legal Adviser's comments on questions raised by the Panel at the meeting on 23 May 2002 and the Administration's written response to points raised at that meeting, issued on 27 May 2002 vide CB(1) 1832/01-02(02).

Comments on the Administration's response to the points raised by Members at the meeting on 23 May 2002
(Item numbers and paragraph numbers under each item are those used in the Administration's paper.)

Item 1
(Paragraphs 2 to 6)

2. The issue here is not on the merits of the legislative proposal to reduce civil service pay. The question is why the reduction should be done through legislation. Remarks such as "the only viable means to achieve such certainty", "the only safe way to achieve a lawful cut", "the chance of a successful challenge reduced" and "to ensure that a justified decision …. can be implemented fairly and with certainty" have been used by officials to describe the reasons justifying the use of legislation to implement the policy decision to reduce civil service pay .

Item 2(a)
(Paragraph 7 to 9)

3. The Administration highlights the fact that there may be differences in terms and conditions of service among civil servants for various reasons. This was acknowledged by the Court of Appeal in the case of *Lam Yuk Ming v. Attorney General* as a situation which justifies the need for a variation clause in order to allow Government to achieve uniformity in terms and conditions of service in the civil service when it is considered necessary.

Item 2(b) and (c)
(Paragraphs 10 to 14)

4. Synopsis of and comments on the four cases referred to are at Annexes A to D.

5. It might appear that the case of *Fynn v Attorney General* shows signs of a possible departure from the principles of law declared by the Court of Appeal in the case of *Lam Yuk Ming v Attorney General*. But, it should be noted that *Fynn v Attorney General* was decided by a single High Court Judge when determining an appeal against a Master's decision made at interlocutory proceedings.

6. The two U.K. cases were decided in the context of U.K. employment law which is quite different from that in Hong Kong although principles relating to the law of contract are quite similar.

Item 3
(Paragraph 15)

7. In view of the proposed extent of pay reduction, it is unlikely that there will be issues relating to a possible contravention of Article 100 of the Basic Law.

Items 4 and 5
(Paragraphs 16 to 20)
8. No comments.

Panel Questions for Legal Adviser

Whether there is a need, from the legal point of view, to implement civil service pay reduction by legislation

9. Generally speaking, government policies can be implemented through legislative or non-legislative means or a combination of both. In the case of the Chief Executive in Council's decision to reduce civil service pay, it has been decided that it should be implemented by way of legislation. This method of implementing that decision is not legally imperative.

Whether the variation clause in the Memorandum on Conditions of Service (MCOS) applicable to civil servants is not sufficient for enabling the Government to reduce the pay of civil servants, as claimed by the Administration.

10. According to the Administration, the variation clause has been the contractual basis for the Government to adjust civil service pay annually for some decades. The actual adjustment made each year depends on the outcome of applying the pay adjustment mechanism. Application of this mechanism may lead to an upward or downward adjustment of pay. If there had not been the variation clause, agreement of all parties to the contract would be required for any variation in the terms and conditions of service including for adjusting upwards the level of pay.

11. According to the Administration, the standard MOCS applicable to civil servants provides that the Government reserves the right to alter any of the officer's terms of appointment, and/or conditions of service set out in the MOCS or letter of appointment, should the Government at any time consider this to be necessary.

12. The terms of this standard variation clause are clear. The Hong Kong Court of Appeal has given effect to it in the case of *Lam Yuk Ming and Others* v. *Attorney General* in 1980. However, in view of the Administration's claim that it has obtained Leading Counsel's advice which led to its conclusion that decided cases indicate the courts are unlikely to accept this general power of variation applies to such a fundamental term as the salary and that it would not be safe to regard that provision as authorising a unilateral pay reduction, Legal Adviser would not attempt to offer any conclusive view without studying all the relevant materials relied on by the Administration.

If the variation clause in MCOS is not sufficient for enabling the Government to reduce the pay of civil servants, whether this means that there is no legal basis for the Government to reduce the pay of civil servants, and whether such reduction in pay would contravene Article 100 of the Basic Law.

13. A unilateral reduction of pay without a sufficiently effective variation clause may mean that the Government would be exposing itself to claims for breach of contract. If a reduction of pay were made without lawful basis, whether or not the reduction would contravene Article 100 of the Basic Law would not seem relevant.

The interpretation of "no less favourable than before" under Article 100 of the Basic Law.

14. There has not been any established authoritative interpretation of "no less favourable than before" in the context of Article 100 of the Basic Law. In view of the extent of the proposed reduction in civil service pay announced on 28 May 2002, it may not be necessary to examine this issue for the time being.

Whether the implementation of civil service pay reduction by legislation would deprive civil servants of the right to claim for compensation, damages or other remedies.

15. If it is accepted that there is a contractual right under the variation clause for the Government to reduce pay, there would be no question of deprivation of rights to claim compensation, damages and other remedies.

16. If the civil service pay reduction could not be done lawfully without the proposed legislation, implementation of the legislation would appear to have the effect of depriving civil servants rights that they would otherwise be able to exercise under the contract.

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<u>Encl.</u>

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<u>Annex A</u>

Harold William Newnham Fynn
v.
Attorney General

[1991] 1 HKLR 315

Facts

This was an interlocutory appeal by the Attorney General, who was the defendant. The Plaintiff was a Police Research Officer remunerated contractually at a level equivalent to a Superintendent of Police. In April 1988, the pay scale of the Police was revised resulting in an increase in remuneration for police officers. The Plaintiff and his colleagues were deemed to be holding civil jobs and were excluded from the new pay scale. The Plaintiff sued the government for breach of contract. The AG applied to strike out the action for disclosing no cause of action. The application was successful before a Master. The plaintiff appealed.

High Court Decision

Mayo J allowed the appeal because the defendant applicant was not able to show that the plaintiff had no prospect whatever of success in the litigation and it was by no means certain that the plaintiff would not succeed in his claim.

Comments

The judge followed the case of Lam Yuk-ming and others v. Attorney General [1980] HKLR 815, and opined that to alter the basis upon which an employee was remunerated was such a basic alteration that it was doubtful that the Government could do so unilaterally.

Annex B

Lam Yuk-ming & Ors v. Attorney General
[1980] HKLR 815

Facts

The appellants were 26 dispensers, who were at the relevant time, in the employment of the Hong Kong Government. They sought to appeal against the judgement of Cons J. whereby he dismissed their action for a declaration and held that the Governor of Hong Kong had under Article XVI of the Hong Kong Letters Patent the authority to suspend their officers without pay. The authority under which the Secretary for the Civil Service purported to suspend the appellants from office without pay lay in regulation 611 of the Civil Service Regulation ("CSR 611").

Issues

Two issues (amongst other things) were addressed:

(a) (i) Is there a contract of service between the Crown and the public officers?

(ii) If there is, do Colonial Regulations and CSR 611 form part of that contract?

(b) If there is a contract of service between the Crown and public officers, can the conditions of that contract be varied unilaterally by the Crown, with the variations becoming part of the contract?

Court of Appeal Decision

Appeal dismissed.

(a) There is a contract between the Crown and its servants and its terms are mutually enforceable, even though this contract contains one anomalous provision (the power of dismissal at pleasure) which overrides the contract, and, if used, effectively negates the usual relationship of employer and employee. The Crown, by the form of the contract which it offers to its employees, has chosen to incorporate all Government Regulations into the contract of service.

(b) There is a contract between the Crown and public officers, which is variable at the will of the Crown if the public officer's initial terms of service indicate to him that such a power is reserved to the Crown.

(c) It follows that CSR 611 became a condition of service of every such public officer on its promulgation in October 1977.

Comments

The following observation of Roberts, C.J. in this judgement was cited by Mayo J. in ***Fynn v. A-G*** [1991] 1 HKLR 315:

"… With hesitation, we conclude that that principle is applicable also when any term is capable of unilateral variation, and that such a clause does not destroy the contractual relationship between the Crown and public officers, however vulnerable the latter may be as a result…."

Mayo J. said that "[t]here seems to be little doubt that there is nothing to prevent the Government from effecting changes and modifications to the various regulations relating to employment. However, it is doubtful whether a basic alteration could be made by the Government unilaterally such as changing the basis upon which the employee is remunerated." (at p.318)

United Association for the Protection of Trade Ltd.
and
Killairn
(17 September 1985, unreported)

Facts

This was an appeal to the Employment Appeal Tribunal against the decision made by the Industrial Tribunal in the United Kingdom. At the hearing of the case by the Industrial Tribunal, the Tribunal considered a clause in the employment contract concerned which reserved to the employer the right to make alterations to the contract of employment. The Industrial Tribunal decided that the employer had been unreasonably timid not to exercise the reserved power of variation under the employment contract which would have entitled them to re-organize their undertaking. The employer appealed against the decision on the ground that the Tribunal's construction of the employment contract was erroneous.

Issues

One of the issues was the proper construction of the clause reserving to the employer the right to make alterations to the contract of employment.

Decision of the Employment Appeal Tribunal

The reserved power of variation should be construed narrowly. A clause reserving to an employer the right to alter a contract of employment did not give the employer a free hand to re-write the employment bargain throughout the workforce. The Industrial Tribunal had, therefore, misdirected themselves in law and it was a material and significant misdirection.

Comments

The Appeal Tribunal's decision would suggest that even though there is an express power for an employer to make alterations to a contract of employment unilaterally, the power would not extend to giving the employer a right to introduce new terms of a significant substantial or fundamental character without the consent of the employee.

<u>**Annex D**</u>

Wandsworth London Borough Council
v.
D'Silva and another
[1998] IRLR 193

Facts

Wandsworth London Borough Council has a code of practice on staff sickness which includes procedures for monitoring and reviewing different categories of absence. In 1995, the employers notified the employees of certain changes to the code.

Issues

Whether the relevant provisions of the code could be amended by the employer unilaterally.

UK Court of Appeal Decision

The Court examined the language of the relevant provisions and held that they did not provide an appropriate foundation on which to base contractual rights. They did no more than provide guidance for both supervisors and employees as to what was expected to happen in certain circumstances. Therefore, the employers were entitled to amend the provisions unilaterally.

Comments

(1) The approach mentioned in paragraph 11 of LC Paper CB(1)1832/01-02(02) is an obiter dictum.

(2) Being a test case, the Court found it might be useful to give some general guidelines on the situation in which an employer could amend the employment contract unilatrally:

  (a) The general position is that contracts of employment can only be varied by agreement.

  (b) However, if one party intends to reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party, clear language is required.

  (c) The court is unlikely to favour an interpretation which does more than enable a party to vary contractual provisions with which the party is required to comply.