For information
20 November 2003

Legislative Council Panel on Manpower

Proposed amendments to reinstatement and re-engagement provisions under the Employment Ordinance

Introduction

This paper informs Members of the progress on the Administration's proposal to amend the reinstatement and re-engagement provisions under Part VIA of the Employment Ordinance (EO), Cap 57.

Provisions on reinstatement and re-engagement under the EO

2. Part VIA of the EO on employment protection came into force on 27 June 1997. Under this part, an employee may claim for remedies against his employer in the following situations:

(a) unreasonable dismissal
where the employee has been employed under a continuous contract for not less than 24 months and he is dismissed other than for a valid reason (i.e. employee's conduct, employee's capability/qualification for performing the job, redundancy or other genuine operational requirements of the business, compliance with legal requirements or any other reason of substance);

(b) unreasonable variation of the terms of the employment contract
where the employee is employed under a continuous contract, the terms of his employment contract are varied without his consent and the employment contract does not contain an express term to allow such a variation, and the terms are varied other than for a valid reason; and

(c) unreasonable and unlawful dismissal
where the employee is dismissed other than for a valid reason and the

dismissal is prohibited by law (i.e. dismissal during pregnancy or paid sick leave, after work-related injury, or by reason of the employee giving evidence for the enforcement of labour legislation or exercising trade union rights).

3. If the employer fails to show a valid reason for the dismissal or variation as specified under the EO, the Labour Tribunal (LT) may award the employee remedies which include reinstatement/re-engagement, subject to the consent of the employer and the employee, or terminal payments. In case of unreasonable and unlawful dismissal, the LT may also make an award of compensation of up to $150,000 if no order of reinstatement/re-engagement is made.

Review of the provisions on reinstatement under the EO

4. The Labour Department conducted a review on the provisions on reinstatement in 1999, two years after the enactment of Part VIA of the EO.

Result of the review

5. The review recommended that the reinstatement and re-engagement provisions be amended to the effect that where an employee who has been found to be *unreasonably and unlawfully dismissed* makes a claim for reinstatement/re-engagement, the LT may make an order of reinstatement/re-engagement if the LT considers it *appropriate and reasonably practicable.* This would remove the need to secure the consent of the employer.

6. The proposal is confined to cases of unreasonable and unlawful dismissal. Similar provisions for the court to make compulsory order of reinstatement already exist in the Sex Discrimination Ordinance, the Disability Discrimination Ordinance and the Family Status Discrimination Ordinance. The District Court is empowered, under the respective legislation, to order, among other things, the respondent to employ, re-employ or promote the claimant.

7. The review also proposed that the LT, in determining whether an order of reinstatement/re-engagement should be made in cases of unreasonable and

unlawful dismissal, may request the LD to submit a report on the circumstances of the case.

Consultation

8. The Labour Advisory Board (LAB) was consulted on 28 March 2000 and endorsed the proposal. The LegCo Panel on Manpower also accepted the proposal at its meeting on 27 April 2000.

Problems identified when drafting the proposed amendments

9. In the course of drafting the proposed provisions, legal problems concerning the making of re-engagement order under the existing provisions were identified. While the existing section 32N(3) of the EO empowers the LT to make an order of re-engagement against an employer, section 32N(6) specifies that a re-engagement order is one that requires the employee to be engaged by the employer, or by a successor of the employer or an associated company. As section 32N(3) only specifies the employer and makes no reference to a successor or associated company as in section 32N(6), there may be ambiguity as to whether the term "employer" in this subsection should include a successor or associated company in cases of re-engagement. Moreover, concerns have been raised about the enforceability of a re-engagement order under the existing section 32N(6) as the LT would not issue an order of re-engagement against a successor of the employer or an associated company, being non-parties to a claim, notwithstanding that this subsection has included them.

10. We note that the policy intent of the existing section 32N(6) is to give an additional avenue for the employer to discharge his obligation by arranging his successor or associated company to re-engage the employee. To ensure that this policy intent can be accurately reflected, there is a need to clarify the relevant provisions and remove the ambiguities and enforcement problems in the existing provisions. It will also allow the drafting of the new provisions for compulsory re-engagement, which have to be built on the existing law, to proceed. To this end, we have come up with a proposal to make the following clarifying amendments to the relevant re-engagement provisions:

(a) To state clearly that a re-engagement order made under section 32N(3) shall be directed at the employer *alone*, not his successor or an associated company, but if the employee consents, the employer will be relieved of his obligation to comply with such order if his successor or an associated company re-engages the employee concerned on the terms specified in the order. Such arrangement will also apply to the proposed compulsory re-engagement to be considered by the LT in cases of unreasonable and unlawful dismissal.

(b) To specify that where an employee is re-engaged by a successor or an associated company as arranged by the employer in circumstances as described in paragraph 10(a) above, the change of employer shall not break the continuity of employment of the employee and his previous length of service with the original employer will be brought forward to the successor or the associated company for the purpose of reckoning his entitlements under the EO and the employment contract.

11. The LAB was consulted on the clarifying amendments on 5 November 2002 and endorsed the proposal.

Way forward

12. The drafting of the Employment (Amendment) Bill to give effect to the proposed amendments in paragraphs 5, 7 and 10 is well underway. We intend to introduce the Bill into the Legislative Council within the current legislative session.

Labour Department
Economic Development and Labour Bureau
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