

For information on
17 January 2008

Legislative Council Panel on Manpower

Provision of a further sum for non-compliance with compulsory order of reinstatement or re-engagement

Purpose

This paper briefs Members on a proposal regarding a further sum to be payable to the employee in the event of the employer failing to comply with the proposed compulsory order of reinstatement or re-engagement to be made by the Labour Tribunal (LT) under the Employment Ordinance (EO).

Background

2. Part VIA of the EO on employment protection has come into operation since 27 June 1997. Under the existing provisions of Part VIA, an employee may claim remedies against his employer in cases of unreasonable dismissal¹, unreasonable variation of the terms of the employment contract², and unreasonable and unlawful dismissal³. If the employer fails to show a valid reason as specified under the EO for the dismissal or variation, the LT may award to the employee remedies which include reinstatement or re-engagement subject to mutual consent of the employer and the employee, or terminal

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- 1 Where the employee has been employed under a continuous contract for not less than 24 months and is dismissed other than for a valid reason as specified under the EO (namely, employee's conduct, employee's capability/qualifications for performing the job, redundancy or other genuine operational requirements of the business, compliance with legal requirements or any other reason of substance).
 - 2 Where the employee has been employed under a continuous contract, the terms of his employment contract are varied by the employer 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 as specified under the EO.
 - 3 Where the employee is dismissed other than for a valid reason as specified under the EO and the dismissal is in contravention of labour legislation, including dismissal during pregnancy and maternity leave, during paid sick leave, after work-related injury, or by reason of the employee exercising trade union rights or giving evidence for the enforcement of labour legislation.

payments⁴. In cases of unreasonable and unlawful dismissal, the LT may also make an award of compensation of up to \$150,000 if no order of reinstatement or re-engagement is made. In making an order of reinstatement or re-engagement subject to mutual consent, the LT shall specify the terms on which reinstatement/re-engagement is to take place, including the amount of terminal payments and compensation (for unreasonable and unlawful dismissal) payable by the employer if he fails to comply with the order.

3. The Labour Department (LD) conducted a review of the reinstatement/re-engagement provisions in 1999 and came up with a proposal to amend the provisions to the effect that where an employee has been found to have been unreasonably and unlawfully dismissed and he makes a claim for reinstatement or re-engagement, the LT may, without securing the agreement of the employer, make an order of reinstatement or re-engagement if the LT considers such an order appropriate and reasonably practicable. In determining whether to make the order, the LT may request the LD to submit a report on the circumstances of the case as agreed by the employer and the employee.

Provision of a further sum for non-compliance with compulsory order

4. In drafting the amendment bill on the proposal, we have found it necessary to include a provision of a further sum to be payable to the employee in case the employer fails to comply with the proposed compulsory order of reinstatement or re-engagement. Without such a provision, the terms of the compulsory order will be no different from those of an order made by the LT with the consent of the employer under the existing provisions, namely, the employee will only be entitled to terminal payments and compensation as specified in the order in the event of non-compliance by the employer.

4 Terminal payments refer to:

- (a) the statutory entitlements under the EO which the employee is entitled to but has not yet been paid upon termination of employment and other payments due to the employee under his contract of employment; and
- (b) those statutory entitlements for which the employee has not yet attained the minimum qualifying length of service but which the employee might reasonably be expected to be entitled to upon termination of employment had he been allowed to continue with his original employment or original terms of the contract of employment. In such cases, terminal payments shall be calculated according to the employee's actual length of service.

5. To ensure protection for employees against unreasonable and unlawful dismissal, we propose that if the employer fails to comply with the proposed compulsory order to reinstate or re-engage the employee, the latter should be entitled to a further sum which should be over and above the terminal payments and award of compensation stipulated under the existing provisions of the EO. This further sum should be three times of the monthly wages of the employee concerned and subject to a maximum of \$50,000. We also consider it necessary for the provision to set out that, when the LT makes the proposed compulsory order of reinstatement or re-engagement, the terms of the order shall specify the amount of the further sum to be paid by the employer if he fails to comply with the order. This would avoid the employee having to approach the LT again for seeking the award in the event of non-compliance by the employer.

6. We favour this approach because an additional monetary award can provide employees who have been unreasonably and unlawfully dismissed with tangible assistance as the further sum will go directly to the employee. Conversely, a fine or imprisonment imposed on the employer will not provide financial relief for the aggrieved employee.

7. At its meeting held on 10 December 2007, the Labour Advisory Board endorsed the proposal that the further sum should be set at three months' wages of the employee concerned, subject to a maximum of \$50,000.

Way forward

8. The drafting of the Employment (Amendment) Bill to include the provision of a further sum is underway. It will be introduced as soon as possible.

Labour Department
January 2008