

## INFORMATION NOTE

### Remedies for unfair dismissal in selected places

#### 1. Background

1.1 The Panel on Manpower, during the deliberation of the research report entitled "Minimum wages in selected places" at its meeting on 20 March 2008, requested the Research and Library Services Division to provide information on the penalty on employers for unfair dismissal. This information note provides information on the following areas in the same set of places studied in the research report:

- (a) relevant legislation governing unfair dismissal;
- (b) definition of unfair or unlawful dismissal;
- (c) grounds constituting an unfair or unlawful dismissal;
- (d) remedies for unfair or unlawful dismissal;
- (e) amount of compensation; and
- (f) penalty on employers for unfair dismissal.

The places selected are the United Kingdom, France, the United States, Australia, Japan, South Korea, Singapore, Guangdong, Shenzhen and Taiwan.

Table – Remedies for unfair dismissal in selected places

	United Kingdom	France	United States	Australia
Relevant legislation	<i>Employment Act 2002.</i>	<i>Program for Social Cohesion Act of 2005.</i>	The employment relationship is governed by the Employment At-Will doctrine, under which any employment is presumed to be "at will"; meaning that an employer is free to discharge an employee "for good cause, bad cause, or no cause", while the employee is equally free to quit, strike, or otherwise cease work. In any event, the following conditions may over-ride the Employment At-Will doctrine: (a) statutory provisions <sup>1</sup> ; (b) public policies <sup>2</sup> ; and (c) contractual obligations.	(a) <i>Workplace Relations Act 1996</i> ; and (b) <i>Workplace Relations Regulations 2006.</i>
Definition of unfair or unlawful dismissal	An employee who has been in continuous employment for two years being dismissed on grounds not in accordance with the codes of disciplinary practice and procedures issued by the Advisory, Conciliation and Arbitration Service <sup>3</sup> .	A dismissal that is not grounded upon a real and serious cause.	No specific definition on unfair or unlawful dismissal.	(a) Unfair dismissal refers to harsh, unjust or unreasonable termination of employment; and (b) unlawful dismissal refers to breaches of the <i>Workplace Relations Act 1996</i> in relation to discrimination and notice periods.
Grounds constituting an unfair or unlawful dismissal	(a) All reasons relating to maternity; (b) family reasons including parental leave, paternity leave (birth and adoption), adoption leave or time off for dependants; (c) representation including acting as the employee representative, or having a trade union membership; (d) being a part-time or a fixed-term employee; (e) discrimination on the grounds of age, sex, race, disability, sexual orientation, religion or belief; and (f) breaching the <i>Working Time Regulations</i> and/or the National Minimum Wage system in relation to wage and working hours.	Discrimination on the grounds of age, sex, race, origin, morals, sexual orientation, domestic situation, genetic characteristics, belonging or non-belonging to an ethnic group, nation, political opinions, trade-union or mutualistic activities <sup>4</sup> , religion or beliefs, physical appearance, name, health condition or handicap of the employee.	(a) Family reasons; (b) medical leave; (c) discrimination on the grounds of age, sex, race, colour, physical or mental disability, marital status, sexual orientation, national origin or ancestry; (d) refusing to commit illegal acts; and (e) not according to the termination procedures prescribed in the employment contract.	(a) Maternity leave or other parental leave; (b) medical leave; (c) family reasons; (d) having a trade union membership, participation in trade union activities outside working hours or, with the employer's consent, during working hours; (e) not being a member of a trade union; (f) seeking office as, or acting or having acted in the capacity of, a representative of employees; (g) filing a complaint, or participation in proceedings, against the employer involving alleged breaches of laws or regulations; (h) discrimination on the grounds of age, sex, race, colour, physical or mental disability, marital status, sexual preference, national extraction or social origin, religion, or political opinion; (i) refusing to negotiate, sign, vary or terminate an individual transitional employment agreement; and (j) temporary absence from work for voluntary emergency management activities.

<sup>1</sup> Examples of federal statutes include: (a) *Equal Pay Act of 1963* (relating to discrimination on the grounds of sex in payment of wages); (b) *Title VII of the Civil Rights Act of 1964* (relating to discrimination on the grounds of race, colour, religion, sex, or national origin); (c) *Employment Act of 1967* (relating to discrimination on the grounds of age with respect to persons of at least 40 years of age); (d) *Rehabilitation Act of 1973*; and (e) *Americans with Disabilities Act of 1990* (both relating to discrimination on the grounds of the handicap status).

<sup>2</sup> An employer may not fire an employee if such an act violates public policies or statutes of the state.

<sup>3</sup> Largely funded by the Department for Business, Enterprise and Regulatory Reform, the Advisory, Conciliation and Arbitration Service is a non-departmental public body providing information, advice and training to both employers and employees and working with employers and employees to solve problems and improve performance.

<sup>4</sup> Mutualistic activities refer to activities on behalf of a mutual benefit society.

Table – Remedies for unfair dismissal in selected places (cont'd)

	United Kingdom	France	United States	Australia
Remedies for unfair or unlawful dismissal	(a) Reinstatement; or (b) re-engagement; or (c) compensation.	(a) Reinstatement; or (b) compensation.	(a) Reinstatement; or (b) compensation; and/or (c) punitive measures on employers.	(a) Reinstatement; and/or (b) compensation; and/or (c) punitive measures on employers.
Amount of compensation	The compensation awarded is usually consisted of a "basic award" and a "compensatory award": <u>Basic award</u> (a) The amount is calculated according to a formula based on age, length of service and weekly pay; <sup>5</sup> (b) maximum number of weeks entitling compensation being 30; (c) maximum amount of payment for one week being £330 (HK\$5,059) <sup>6</sup> ; and (d) maximum total payment being £9,900 (HK\$151,767). <sup>7, 8</sup> <u>Compensatory award</u> (a) Compensation for loss of pension and other rights and expenses incurred as a result of the dismissal; and (b) maximum total payment being £63,000 (HK\$965,790). <sup>9</sup>  An additional award might be granted if the employer fails to comply with the court's order for reinstatement or re-engagement. The amount is calculated as follows: (a) minimum total payment being 26 weeks' pay or £8,580 (HK\$131,531) whichever is lower; and (b) maximum total payment being 52 week's pay, which is equivalent to £17,160 (HK\$263,063). <sup>10</sup>	(a) The amount being awarded at the discretion of the Court on the grounds of age, length of service, salary and reasons of the dismissal, and the loss of benefits incurred as a result of the dismissal; and (b) minimum compensation for an employee who has been in continuous employment for two years being six months' remuneration, which may be increased in the event of collective dismissals if the employer fails to comply with the <i>Program for Social Cohesion Act of 2005</i> . <sup>11</sup>	(a) In general, compensation being made in accordance with the rate of pay or salary, or federal or state statutes; (b) compensation for an at-will employee including unpaid wages, interest on these wages, costs for finding new jobs and accrued vacation leave; (c) compensation for the employee terminated under federal or state statutes or public policies being awarded in accordance with the relevant statutes; and (d) compensation for an employee terminated pursuant to an employment contract including compensation as stipulated in the employment contract, penalty on the employer to deter such conduct in the future, interest incurred on the outstanding compensation and the attorneys' fees and costs.	(a) Maximum six months' wages or salaries for any employee; <sup>12</sup> and (b) the maximum amount for a non-award employee <sup>13</sup> in the 2007-2008 financial year is AUS\$50,700 (HK\$375,687) <sup>14, 15</sup>
Penalty on employers	Not applicable.	Not applicable.	In accordance with the relevant statutes or contracts.	An amount up to AUS\$10,000 (HK\$74,100). <sup>16</sup>

<sup>5</sup> Only the most recent 20 years of continuous services being taken into account. The total payment being the addition of the following: (a) for services rendered before the 22<sup>nd</sup> birthday, the amount being half a week's pay for each year worked; (b) for services rendered between the 22<sup>nd</sup> and the 40<sup>th</sup> birthday, the amount being one week's pay for each year worked; and (c) for services rendered between the 41<sup>st</sup> and the 65<sup>th</sup> birthday, the amount being one and a half week's pay for each year worked.

<sup>6</sup> The exchange rate of Hong Kong Dollar per Pound Sterling in May 2008 was 15.33.

<sup>7</sup> Department for Business, Enterprise and Regulatory Reform (2008).

<sup>8</sup> There is a minimum amount of basic award for (a) members of a trade union; (b) actions on health and safety; (c) occupational pension scheme trustee; (d) employee representative; and (e) working time regulations.

<sup>9</sup> There is no limit for an employee being dismissed unfairly or selected for redundancy for reasons relating to health and safety or public interest disclosure.

<sup>10</sup> Department for Business, Enterprise and Regulatory Reform (2008).

<sup>11</sup> Cabinet Paller Lemaitre Vigneron Bardoul (2006).

<sup>12</sup> Ingmar Taylor (2006).

<sup>13</sup> Non-award employees are employees (such as professionals and senior management) not covered by any award or agreement.

<sup>14</sup> The exchange rate of Hong Kong Dollar per Australian Dollar in May 2008 was 7.41.

<sup>15</sup> Department of Employment and Workplace Relations (2007).

<sup>16</sup> Ingmar Taylor (2006).

Table – Remedies for unfair dismissal in selected places (cont'd)

	Japan	South Korea	Singapore	Guangdong/Shenzhen	Taiwan
Relevant legislation	<i>Labor Standards Act.</i>	<i>Labor Standards Act.</i>	<i>Employment Act (Cap 91).</i>	<i>Law of the People's Republic of China on Employment Contracts.</i>	<i>Labor Standards Law.</i>
Definition of unfair or unlawful dismissal	A dismissal lacking objectively reasonable grounds. Such an act being considered as inappropriate in general societal terms.	An employee being dismissed, laid off, suspended, transferred, whose wages are being reduced, or under other punitive measures without justifiable reason.	An employee being dismissed without just cause or excuse. No reason given to the employee for the termination of contract also being considered as an unfair dismissal.	No specific definition on unfair or unlawful dismissal.	No specific definition on unfair or unlawful dismissal.
Grounds constituting an unfair or unlawful dismissal	(a) Medical leave relating to occupational injuries or illnesses suffering in the course of duties and within 30 days thereafter; and  (b) maternity leave for six weeks (10 weeks in case of twins) before and eight weeks after childbirth and within 30 days thereafter.	(a) Medical leave for occupational injuries or diseases and within 30 days thereafter; and  (b) maternity leave before and after childbirth and within 30 days thereafter.	Any reasons relating to maternity <sup>17</sup> .	(a) Engaging in operations with occupational disease hazard exposure and not undergone a pre-departure occupational health check-up;  (b) being suspected of having an occupational disease and being diagnosed or under medical observation;  (c) losing or partially losing capacity to work due to an occupational disease or a work-related injury;  (d) medical leave for non-work-related injuries;  (e) pregnancy, confinement or nursing period;  (f) continuously working for the employer for not less than 15 years and being less than five years away from the legal retirement age; and  (g) being under other circumstances stipulated in laws or administrative statutes.	(a) Maternity leave before and after childbirth for a combined period of eight weeks;  (b) absence for four weeks due to a miscarriage after being pregnant for more than three months; and  (c) medical treatment due to an occupational accident.
Remedies for unfair or unlawful dismissal	If the dismissal is done for "socially acceptable reasons" (upon the decision of the judge), it may not be considered as an unfair or unlawful dismissal. <sup>18</sup>	(a) Reinstatement; or  (b) compensation; and  (c) punitive measures on employers.	(a) Reinstatement; and  (b) compensation.	(a) Reinstatement; or  (b) compensation.	Punitive measures on employers.

<sup>17</sup> There are no reasons other than those relating to maternity have been stipulated in the *Employment Act (Cap 91)* as grounds constituting an unfair dismissal.

<sup>18</sup> *Berlitz Union* (2008).

**Table – Remedies for unfair dismissal in selected places (cont'd)**

	Japan	South Korea	Singapore	Guangdong/Shenzhen	Taiwan
Amount of compensation	Information not available.	<p>(a) An amount not less than the amount of wages the employee would have received if he/she had worked during the dismissal period, in lieu of ordering his/her reinstatement;</p> <p>(b) an enforcement levy in the amount not exceeding 20 million won (HK\$150,000)<sup>19</sup> in the event that the employer fails to comply with the remedy order by the compliance deadline; and</p> <p>(c) in the event that the employer continues to fail to comply with the enforcement levy, the collection will follow the process for recovery of the national taxes in arrears.</p>	<p>(a) An amount equivalent to the wages the employee would have earned had he not been dismissed; or</p> <p>(b) an amount determined by the Minister of Manpower.</p>	<p>(a) Twice the monthly wage<sup>20</sup> for each full year of employment;<sup>21</sup></p> <p>(b) in the event that the monthly wage is greater than three times the average monthly wage of the employees in the area where the employer is located (as published by the government of either (i) the municipality directly under the central government or (ii) a district within the municipality where the employer is located), the rate of the compensation being three times the average monthly wage of the employee, and the maximum amount being 12 years;<sup>22</sup> and</p> <p>(c) in the event that the employer fails to pay the compensation within the specified period, the employer being ordered by the labour administration authority to additionally pay damages to the employee at a rate of not less than 50% and not more than 100% of the amount payable.</p>	Not applicable.
Penalty on employers	Information not available.	<p>(a) Imprisonment of up to five years; or</p> <p>(b) a fine not exceeding 30 million won (HK\$225,000).<sup>23</sup></p>	In the event that the employer fails to comply with the direction of the Minister of Manpower, a fine not exceeding S\$5,000 (HK\$28,550) <sup>24</sup> or imprisonment for a term not exceeding 12 months or both being imposed. <sup>25</sup>	Not applicable.	<p>(a) A fine not exceeding 30,000 yuan (HK\$7,830)<sup>26</sup>; and</p> <p>(b) in the event that the employer fails to pay the fine, the case being referred to the Court for compulsory execution.</p>

<sup>19</sup> The exchange rate of Hong Kong Dollar per Korean Won in May 2008 was 0.0075.

<sup>20</sup> Monthly wage refers to the average monthly wage for the past 12 months prior to the termination of the employment contract.

<sup>21</sup> Any period of not less than six months but less than one year is counted as one year, while that of less than six months is counted as one-half of his/her monthly wage.

<sup>22</sup> www.ldht.org (2008).

<sup>23</sup> *Labor Standards Act*.

<sup>24</sup> The exchange rate of Hong Kong Dollar per Singapore Dollar in May 2008 was 5.71.

<sup>25</sup> *Employment Act*.

<sup>26</sup> The exchange rate of Hong Kong Dollar per New Taiwan Dollar in May 2008 was 0.261.

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