

For information on
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Legislative Council Panel on Manpower

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

Introduction

This paper updates Members on the progress of the proposal to amend the reinstatement / re-engagement provisions of the Employment Ordinance (“EO”) (Cap. 57) and sets out the details of the proposed provisions.

Background

2. Under the relevant provisions of Part VIA of EO, an employee may claim remedies against his employer in cases of unreasonable and unlawful dismissal¹, and request an award of remedies made by the Labour Tribunal (LT) which includes an order for reinstatement or re-engagement subject to mutual consent of the employer and the employee², or terminal payments³. If no order

¹ Unreasonable and unlawful dismissal refers to the situation where the employee is dismissed other than for a valid reason as specified under EO (including (a) the conduct of the employee; (b) his capability/qualification for performing the job; (c) redundancy or other genuine operational requirements of the business; (d) compliance with legal requirements; or (e) other reason of substance), and the dismissal is in contravention of labour legislation, including dismissal during pregnancy and maternity leave, during paid sick leave, after work-related injury, by reason of the employee exercising trade union rights or giving evidence for the enforcement of relevant labour legislation.

² (a) An order for reinstatement is an order requiring the employer to treat the employee in all respects as if he had not been dismissed or as if there had been no variation of the terms of the contract of employment. (b) An order for re-engagement is an order to the effect that the employee shall be engaged by the employer, his successor or an associated company in an employment on terms comparable to his original terms of the employment or in other suitable employment.

³ 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.

for reinstatement or re-engagement is made, LT may also make, apart from an award of terminal payments, an award of compensation⁴ of up to \$150,000.

3. According to the said Ordinance, in making an order for reinstatement or re-engagement subject to mutual consent, LT shall specify the terms on which reinstatement/re-engagement is to take place, including the date by which the employer must comply with the order and, in the event that the employer fails to comply with the order, the amount of terminal payments and compensation to be payable to the employee. However, under the existing provisions, even if LT finds that an order for reinstatement/re-engagement is appropriate, it has no power to make such an order without the employer's agreement.

Major features of the legislative proposal

4. In respect of cases of unreasonable and unlawful dismissal, the employee is not only dismissed without a valid reason but the dismissal is prohibited by law. As such, upon review, it is proposed that where an employee who has been found to be unreasonably and unlawfully dismissed makes a claim for reinstatement/re-engagement, LT may make an order for reinstatement/re-engagement without the need to secure the consent of the employer if LT considers it appropriate and the employer's compliance with the order reasonably practicable. In determining whether to make such a compulsory order, LT must take into account the circumstances of the claim such as the relationship between the employee and the employer, the circumstances surrounding the dismissal, whether the employer may face any genuine difficulties in complying with the order etc.

5. In the course of consultation, there was a body of opinion that, owing to the practical difficulties in compelling an employer to arrange for reinstating a dismissed employee and based on the past experience of LT, whether the employer shows a positive attitude towards an order for reinstatement or re-engagement would invariably be one of the relevant considerations in assessing whether it is appropriate and reasonably practical to grant such an order. Hence notwithstanding the enabling provision for non-consensual order to be introduced by the bill in respect of unreasonable and unlawful dismissal, whether the employer and the employee are willing to accept such an order would continue to be an important consideration before LT would make any reinstatement or re-engagement order.

⁴ In determining an award of compensation and the amount of the award of compensation, LT shall take into account the circumstances of the claim which include the circumstances of the employer and the employee, the employee's length of service, the manner in which the dismissal took place, any loss sustained by the employee which is attributable to the dismissal, possibility of the employee obtaining new employment, any contributory fault borne by the employee, and any payments that the employee is entitled to receive in respect of the dismissal.

Problems encountered in drafting the proposed amendments

6. In the course of drafting the proposed amendments, the Administration encountered different problems, some of which were related to legal issues or matters of practical implementation. To ensure that the proposed provisions could fulfil the requirements of the law and could in practice be implemented, we have sought the views of the Labour Advisory Board (LAB) and the Panel on Manpower (Manpower Panel) of Legislative Council (LegCo) and obtained their general support on these issues. The details are reported below.

Making clarifying amendments to the existing provisions

7. While the existing section 32N(3) of EO empowers LT to make an order for reinstatement or re-engagement against an employer, section 32N(6), in spelling out what an order for re-engagement is, specifies that it is an order 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 mentions about 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 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.

8. 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, we would make clarifying amendments to the re-engagement provisions under Part VIA of EO to state clearly that a re-engagement order made by LT shall be directed at the employer alone, not his successor or an associated company. However, with the consent of the employee, an order for re-engagement can be taken to have been complied with by the employer if the successor or associated company of the employer re-engages the employee on the terms specified in the order. Under such circumstances, the employee’s period of employment and continuity of employment with the original employer will then be brought forward to the successor or associated company for the purpose of reckoning his existing and future entitlements under EO and his employment contract.

Employers' obligation to pay a "further sum" for non-compliance with compulsory order

9. The proposed compulsory reinstatement/re-engagement order to be made without the need to secure the employer's consent is targeted at dismissals prohibited by law without valid reasons. To enhance the protection brought by this compulsory order to employees, we have, in drafting the proposed amendments, found it necessary to add a provision of a further sum to be payable to the employee in case the employer fails to comply with the compulsory order for reinstatement/re-engagement. Without such a provision, the terms of the compulsory order will be no different from those of an order made by LT with the consent of the employer under the existing provisions, namely, the employee will only be entitled to terminal payments and/or compensation as specified in the order in the event of non-compliance by the employer.

10. To this end, we have proposed that if the employer fails to comply with the compulsory reinstatement/re-engagement order, the employee would be entitled to an additional compensation of up to \$50,000. This further sum, which is over and above the terminal payments and award of compensation stipulated under the existing provisions of EO, is an additional monetary compensation to recompense the aggrieved employee in consequence of the employer's non-compliance with the compulsory reinstatement/re-engagement order. However, there were views that, according to common law principles, the aforesaid further sum should, as an additional compensation, be quantified in accordance with the loss sustained by the employee to reflect its compensatory nature. We have therefore consulted Judiciary and the Department of Justice in detail regarding the relevant provision on further sum. After careful deliberation, the Administration is of the view that the said further sum should be a form of tangible financial relief to be provided to the aggrieved employee such that it can be afforded to the employee in an expedient manner. It is hence proposed that the further sum should be in the form of a fixed amount. The Administration also proposes that when LT makes a compulsory reinstatement / re-engagement order, the terms of the order shall specify the amount of this further sum to be paid by the employer if he fails to comply with the order. This would dispose the employee of the need to approach LT again for seeking the award in the event of non-compliance by the employer. According to the consensus reached by LAB, the further sum is fixed at three times of the monthly wages of the employee, subject to a maximum of \$50,000.

Handling of non-payment of “further sum”

11. In the process of drafting the bill to incorporate the above proposed amendments, the Administration introduced another bill, which was subsequently enacted to become the Employment (Amendment) Ordinance 2010 (“E(A)O 2010”), into LegCo in July 2009 to create a new offence against wilful default of payment of any sum comprising wages and employees’ statutory entitlements as awarded by LT or the Minor Employment Claims Adjudication Board, and the default of such sum is already a criminal offence under EO. While the said bill was being scrutinized by LegCo, the Administration adopted Members’ views and extended the scope of the new offence to cover non-payment of the award of terminal payments and compensation made by LT in circumstances of unreasonable and unlawful dismissal. The rationale behind this decision was that notwithstanding their civil nature, the said terminal payments and compensation are awarded on the ground of unreasonable and unlawful dismissal which in itself is a criminal offence.

12. This legislative decision has an impact on the proposal on compulsory reinstatement/re-engagement in cases of unreasonable and unlawful dismissal. In the proposal on compulsory reinstatement/ re-engagement arising from the aforesaid circumstances of dismissal, the awards of terminal payments, compensation and the proposed further sum form an essential part of the claim for remedies. Yet, in the previous discussions of LAB and Manpower Panel on this subject, the question of how employers’ non-payment of the further sum should be dealt with, such as whether default of payment should be treated as a criminal offence, was not touched on. Therefore, LAB Members agreed in early 2010 to put the preparatory work for the bill on compulsory reinstatement/re-engagement temporarily on hold and re-visit the proposal when the provisions of the other bill which was subsequently enacted to become the E(A)O 2010 have been finalized.

13. The E(A)O 2010 commenced operation in October 2010. In formulating that Ordinance, the Administration has taken on board Members’ views and made non-payment of terminal payments and compensation awarded in circumstances of unreasonable and unlawful dismissal a prosecutable offence. According to that Ordinance, an employer who wilfully and without reasonable excuse fails to pay the specified sum as awarded by LT within 14 days after it becomes due is liable to prosecution and, upon conviction, to a fine of \$350,000 and imprisonment for three years.

14. Notwithstanding that non-payment of terminal payments and compensation as awarded by LT in cases of unreasonable and unlawful dismissal has been made a criminal offence, when LAB supported the proposal in the past to hold an employer liable to pay a further sum to the employee in the event that

the employer fails to comply with the compulsory reinstatement/re-engagement order made by LT, non-payment of LT awards by employers was not yet made a criminal offence. As such, the question of whether criminal liability should be imposed on an employer who fails to pay the further sum was not brought up for consideration then.

15. By their nature, an award of compensation (maximum at \$150,000) and the proposed further sum to be introduced under the legislative proposal on compulsory reinstatement/re-engagement share certain common features. For instance, both are remedies under Part VIA of EO on employment protection awarded by LT; both are triggered in the event of unreasonable and unlawful dismissal which in itself is an offence; both are to be borne by the employer in relation to his non-compliance with the reinstatement or re-engagement order made by LT; and both are payable by the employer to compensate for the financial loss sustained by the aggrieved employee. On the other hand, there are dissimilarities between the two. For example, though an award of compensation is capped at \$150,000, the actual amount awarded to the employee is to be determined by LT in consideration of the circumstances of individual claim cases. The further sum is nevertheless a fixed amount that is not subject to the circumstances of individual cases. In addition, LT may not always award compensation having regard to individual circumstances, but in tandem with making a compulsory reinstatement/re-engagement order, LT has to order the employer to pay the further sum to the employee in the event of the employer's non-compliance with the order.

16. In view of the enactment of the E(A)O 2010, we sought LAB's views on the following in July 2011: whether non-payment of the proposed further sum should be criminalized just as criminal sanction is imposed for non-payment of wages and awards of compensation made by LT in cases of unreasonable and unlawful dismissal under EO; the relevant penalty level; and the liability of corporate directors and partners of firms. In November 2011, LAB agreed to make the default of the further sum a criminal offence, and impose a maximum fine of \$350,000 and 3 years of imprisonment on conviction of wilful non-payment of the further sum without reasonable excuse. LAB also agreed that where the wilful default of the further sum committed by a body corporate or by a partner of a firm is proved to have been committed with the consent, connivance or neglect of a director or responsible person of the body corporate or by any other partner or person concerned in the management of the firm, the director or responsible person, or that other partner or person commits the like offence.

Relevant statistics on cases of unlawful and unreasonable dismissal

17. Part VIA of EO on employment protection has come into operation since June 1997. During the period of more than 14 years between July 1997 and December 2011, the Labour Department has handled 6 653 claim cases of unreasonable and unlawful dismissal, representing 1.73% of the total number of claim cases (385 569 cases) handled in the same period. Of the aforesaid 6 653 claim cases, only 46 cases (0.69%) involved employees' requests for reinstatement or re-engagement, which amount to an average of 3.17 cases per year, while the remaining cases involved request for monetary remedy only. Among the said 46 cases involving employees' request for reinstatement or re-engagement, 14 cases (30%) were concluded with the employees being reinstated or re-engaged with mutual consent of both parties, 4 cases (9%) were settled by other means (including monetary remedy), and only 28 cases (61%) were not settled and referral to LT were thus made (an average of 2 cases per year).

Way forward

18. We are now drafting a bill to amend EO to incorporate the aforesaid proposed amendments. Concurrently, we are also seeking Judiciary's views. We will introduce the bill into LegCo as soon as possible once it is finalised.

Labour and Welfare Bureau
Labour Department
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