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Panel on Manpower

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 20 January 2012**

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

Purpose

This paper summarizes past discussions of the Panel on Manpower ("the Panel") on the Administration's proposal to empower the Labour Tribunal ("LT") to make a compulsory order for reinstatement or re-engagement of an employee who has been dismissed unreasonably and unlawfully, and to require the employer to pay a further sum to the employee for failing to comply with such an order.

Existing protection in respect of unreasonable and unlawful dismissal

2. Under the existing provisions of the Employment Ordinance ("EO"), if an employee is unlawfully dismissed¹ and the employer fails to provide a valid reason as specified in EO for the dismissal², LT may, subject to the mutual consent of the employer and the employee, make an order for reinstatement/re-engagement. If no order for reinstatement/re-engagement is made, LT may make an award of terminal payments and/or an award of compensation not exceeding \$150,000 to the employee. LT, however, has no power to make an order for reinstatement/re-engagement without the employer's consent, even if it considers such an order appropriate.

¹ Unlawful dismissal refers to the situation where the employee is dismissed 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 or information in any proceedings or inquiry in connection with the enforcement of EO, work accidents or work safety legislation.

² The valid reasons for dismissal stipulated in EO refer to an employee's conduct, his capability/qualification for performing the job, redundancy or other genuine operational requirements of the business, compliance with legal requirements, and any other reason of substance.

Administration's proposal to amend the reinstatement and re-engagement provisions under EO

3. To enhance employees' protection against unreasonable and unlawful dismissal, the Administration has, in consultation with the Labour Advisory Board ("LAB") and relevant stakeholders, proposed to amend EO to empower LT to make a compulsory order without securing the consent of the employer for reinstatement/re-engagement of an employee who has been dismissed unreasonably and unlawfully, if LT considers making such an order appropriate and compliance with it by the employer reasonably practicable; and to order the employer to pay a further sum subject to a maximum of \$50,000 to the employee in the event of non-compliance with the order by the employer.

Deliberations of the Panel

4. At the Panel meetings on 20 November 2003 and 17 January 2008, members were briefed on the Administration's proposal to amend the reinstatement and re-engagement provisions under EO as set out in paragraph 3 above. The major views and concerns raised by members are summarized below.

Wage payment during the intervening period

5. While expressing support for the proposed amendments, some members were concerned whether a reinstated employee would be entitled to payment of wages for the period he was out of work.

6. According to the Administration, the existing legislation did not provide for wage payment in the intervening period. This was because wages were payable in respect of work done. The law should not provide for wage payment when no work was performed. This position would remain unchanged after the proposed amendments. In considering whether to award to the employee payment of an amount equivalent to his lost wages, LT would take into account the individual circumstances of the case, including the taking of other employment by the employee concerned during the intervening period. An employee, upon a reinstatement order of LT, should be treated in all aspects as if he had not been dismissed or as if there had been no variation of the terms of the employment contract. In the case where an employee was re-engaged by his employer's successor or associated company, his previous length of service with the original employer would be reckoned as service with the new employer.

Safeguard against evasion of responsibility to comply with a reinstatement/re-engagement order

7. Clarification was sought on whether the proposed amendments could plug the loophole for an irresponsible employer to evade his responsibility to comply with a reinstatement/re-engagement order. Some members expressed doubt as to whether the further sum would have conversely given employers an alternative to evade from carrying out the compulsory reinstatement order. There was a suggestion that to plug the possible loophole that the employer might opt to pay a further sum rather than complying with the compulsory order, a provision should be made for LT to exercise discretion to make a compulsory order straightly for reinstatement or re-engagement.

8. The Administration advised that under the proposal, a re-engagement order would be directed at the employer and hence, he could not shift the responsibility to his successor or associated company. The employer could only relieve his obligation to comply with such order if his successor or associated company re-engaged the employee concerned and if the employee consented. If the employer failed to comply with the proposed compulsory order to reinstate or re-engage the employee, the latter should be entitled to a further sum of three times of his monthly wages, subject to a maximum of \$50,000. This sum would be over and above the terminal payments and award of compensation.

Calculation basis for the proposed further sum

9. Some members were of the view that the proposed amount of the further sum was too small. Queries were raised about the basis of calculation of the sum and whether the Administration would consider increasing the sum to a maximum of \$100,000 or six times of the monthly wages of the employee concerned. There were suggestions that the cap should be removed so as to stay on par with other discrimination ordinances in Hong Kong, and employees unlawfully dismissed and awaiting the making of reinstatement order by LT should be compensated for their wages unpaid.

10. Members were informed that the proposed further sum, capped at \$50,000, was calculated based on the findings from past cases that the average monthly salary of employees was around \$10,000. It would be payable to the employee in the event of non-compliance with the compulsory order of reinstatement or re-engagement by the employer. It would be over and above the terminal payments and award of compensation stipulated under the existing provisions of EO.

Possible increase in conflict between the employer and the reinstated employee

11. Concern was raised about the possible increase in conflict if the employer was "forced" to reinstate/re-engage an employee whom he did not like.

12. According to the Administration, in determining whether an order of reinstatement should be made in cases of unreasonable and unlawful dismissal, LT would consider all relevant factors of the case and might request the Labour Department to submit a report containing factual information on the case as previously agreed by both the employer and employee. If reinstatement was considered impracticable, e.g. due to the existence of sour employer-employee relationship, LT would only award monetary compensation.

Monitoring mechanism

13. Some members were concerned about the measures adopted by the Administration to ensure that employees could receive payments awarded by LT.

14. The Administration advised members that it was also concerned about the failure of some employees in obtaining the judgment sum awarded by LT. Past cases indicated that it was mostly employees of medium and small-sized companies who failed to obtain the judgment sum. The Administration would continue to work closely with the Judiciary to explore feasible improvement measures on execution of awards made by LT.

Statistics relating to claims on unreasonable and unlawful dismissal

15. Members had sought information on the number of reinstatement claims in the past few years relating to unreasonable and unlawful dismissal.

16. According to the Administration, there was an average of about two to three such cases each year.

Latest developments

17. At the Panel meetings on 21 January and 23 February 2010, the Administration informed members that given the fact that some Committee Stage amendments to the Employment (Amendment) Bill 2009, which sought to create an offence relating to an employer's failure to pay any sum payable under an award of LT, would, by extending the new offence to cover non-payment of remedies awarded on the ground of unreasonable and unlawful dismissal, have read-across implications on the legislative proposal on compulsory reinstatement and re-engagement, LAB had asked the Administration to re-visit the proposal which

had been endorsed at LAB's meeting on 10 December 2007, taking into account the full implications of the operation of the Employment (Amendment) Ordinance 2010 ("E(A)O").

18. According to the Administration, pursuant to the operation of E(A)O in October 2010, wilful defaults of the sums awarded by LT or the Minor Employment Claims Adjudication Board, including the award of compensation that arises from unreasonable and unlawful dismissal, has been made a criminal offence, with culpable employers liable to a maximum fine of \$350,000 and imprisonment for three years. Since non-payment of an award of compensation made in circumstances of unreasonable and unlawful dismissal has been made a criminal offence, the Administration has considered how non-payment of the proposed further sum, which is triggered in the event of unreasonable and unlawful dismissal, should be dealt with. After further consultation with and upon securing the consensus of LAB as well as relevant stakeholders on the legislative proposal on compulsory reinstatement and re-engagement, the Administration intends to report the matter to the Panel with a view to introducing an amendment bill into the Legislative Council ("LegCo") as early as possible.

Relevant papers

19. A list of the relevant papers on the LegCo website is in the **Appendix**.

Council Business Division 2
Legislative Council Secretariat
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**Relevant papers on
Proposed amendments to the reinstatement and re-engagement
provisions under the Employment Ordinance**

Committee	Date of meeting	Paper
Panel on Manpower	20.11.2003 (Item IV)	<u>Agenda</u> <u>Minutes</u>
Panel on Manpower	17.1.2008 (Item III)	<u>Agenda</u> <u>Minutes</u>
Panel on Manpower	21.1.2010 (Item V)	<u>Agenda</u> <u>Minutes</u>
Panel on Manpower	23.2.2010 (Item II)	<u>Agenda</u> <u>Minutes</u>
Panel on Manpower	17.6.2010 (Item II)	<u>Agenda</u> <u>Minutes</u>
Panel on Manpower	21.10.2010 (Item II)	<u>Agenda</u> <u>Minutes</u>
Panel on Manpower	20.10.2011 (Item II)	<u>Agenda</u> <u>Minutes</u>