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Panel on Manpower

Background brief prepared by the Legislative Council Secretariat for the meeting on 19 March 2013

Protection for participation in trade unions

Purpose

This paper gives an account of the past discussions by the Panel on Manpower ("the Panel") and its Subcommittee on Employer and Employee Relations ("the Subcommittee") formed in the First Legislative Council ("LegCo") on issues relating to the protection for participation in trade unions.

Background

The Basic Law

2. Article 27 of the Basic Law provides, among other things, that Hong Kong residents shall have freedom of association, the right and freedom to form and join trade unions, and to strike.

3. Article 39 of the Basic Law further provides, among others, that the provisions of the international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law.

Application of international labour conventions

4. Hong Kong has applied International Labour Convention ("ILC") No. 98 on the right to organize and collective bargaining in full since 1975. Hong Kong has also applied since 1963 ILC No. 87 on freedom of association and protection of the right to organize with modification (i.e. implementation of the provisions of a Convention subject to modification of certain provisions to suit local conditions), which is allowed under the Constitution of the International Labour Organization.

5. According to the Administration, the two Conventions are applied in Hong Kong by virtue of a number of ordinances and administrative measures. The two major relevant ordinances are the Trade Unions Ordinance (Cap. 332) ("TUO") and the Employment Ordinance (Cap. 57) ("EO").

6. TUO makes provisions on matters relating to the registration of trade unions and the regulation of their internal administration. Under the Ordinance, any combination of employees or employers which has the principal objects of regulating relations between employees and employers, between employees, or between employers is required to be registered with the Registry of Trade Unions.

7. EO provides protection against union discrimination. The Ordinance stipulates the rights of an employee to be or become an union officer, participate in union activities and associate with others to form or apply for the registration of a trade union in accordance with TUO. EO also protects the employee against unlawful and unreasonable dismissal arising from trade union membership and activities.

8. To further protect employees against dismissals for involvement in trade union activities, the Administration amended EO in 2000 to clarify that the taking part by an employee in a strike is not a lawful ground for an employer to terminate the employee's contract of employment without notice or payment in lieu.

Deliberations by members

9. The Panel had not discussed the subject of protection for participation in trade unions per se, but had considered the relevant issues in a wider context of employer and employee relations. Specifically, a subcommittee was formed under the Panel in the First LegCo to study in detail issues of employer and employee relations. The Subcommittee had examined issues, among others, on the right to organize and protection against anti-union discrimination. In the course of the Subcommittee's study, members considered that the protection of trade unions against acts of interference[1] by employers was not sufficient, although this protection was required under ILC No. 87 and No. 98 and was guaranteed under the Basic Law. When enquired by members whether consideration would be given to implementing the requirements under ILC through the enactment of local legislation, the Administration advised that there was no need to enact legislation for such a purpose, as there was neither

[1] Under Article 2 of the International Labour Convention No. 98, "interference" is defined as "acts which are designed to promote the establishment of workers' organizations under the domination of employers or employees' organizations, or to support workers' organizations by financial or other means, with the object of placing such organizations under the control of employers or employers' organizations shall be deemed to constitute acts of interference within the meaning of this Article.

evidence nor complaint that employers had interfered in the activities of trade unions. The Subcommittee was assured by the Administration that it would closely monitor the situation and review the need for the introduction of legislative measures.

10. There was a view that some employers were only willing to negotiate with employee representatives sitting on joint consultation committees and refused to have any dialogue with representatives of trade unions. The Subcommittee noted that joint consultative committees were established channels of communication between employers and employees in many organizations. The Administration thus considered that joint consultative committees were effective channels of communications between employers and employees and that the use of such a channel for negotiations should be encouraged.

11. Concern was also raised about the lack of civil remedy in respect of trade union discrimination of a non-dismissal nature. Given the difficulty in proving beyond doubt that an employer discriminated against an employee, there was a suggestion that the requirement of proving an employer's discrimination against trade unions should be amended along the lines of "has reasonable cause to believe that those conducts are likely to prevent or deter the employee from exercising the right to participate in trade union activities". The Administration took the view that legislative measures might not be a solution to all problems related to employer-employee relations. The employee's right to participate in trade union activities had been protected under EO. The employer would commit an offence under EO if there was sufficient proof that he had prevented or deterred the employee from, or dismissed the employee for, exercising such right.

12. Responding to some members' concern about the Administration's lack of action in the promotion of collective bargaining through legislative means, the Administration advised that it was not an appropriate time to introduce compulsory collective bargaining by legislation in Hong Kong as the community had no consensus on the issue. The Administration also advised that it was promoting the establishment of tripartite committees comprising representatives of employers, employees' organizations and LD.

13. Following the submission of the Subcommittee's report to the Panel in May 2000, the Panel was briefed at its meeting on 20 June 2000 on the measures taken by the Administration to promote employer and employee relations. Members noted, among others, the Administration's proposal to amend the reinstatement provisions under EO, where an employee who had been found to be unreasonably and unlawfully dismissed made a claim for reinstatement or re-engagement, the Labour Tribunal might make an order of reinstatement or re-engagement without the need of securing the consent of the

employer concerned, if the Labour Tribunal considered it appropriate and reasonably practicable.

14. At the Panel meeting on 20 January 2012, the Administration updated members on the progress of the above proposal. In the course of deliberation, there was a view that in situations where an employee was dismissed or discriminated against by reason of the employee exercising trade union rights, the order for reinstatement or re-engagement should be made compulsory to the effect that the employer concerned would not be allowed to opt for making a proposed further sum subject to a maximum of $50,000 in the event of non-compliance with the order. It was suggested that a provision be added for the Labour Tribunal to exercise discretion to make a compulsory order strictly for reinstatement/re-engagement.

15. Members were advised that dismissal by reason of the employee exercising trade union rights fell within the scope of unlawful dismissal, in which case the employer concerned was liable to prosecution. According to the Administration, as the proposal to empower the Labour Tribunal to make a compulsory order for reinstatement or re-engagement of an employee who had 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 was targeted at all types of dismissal prohibited by EO and without valid reasons, singling out those cases of dismissal on grounds of union membership or participation in union activities and according them differential treatment might not be tenable as a matter of principle.

16. Members may wish to note that the Employment (Amendment) Bill 2013, which seeks to remove the requirement for an employer's agreement to the making of an 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, has been included in the Legislative Programme 2012-2013. The Administration has indicated its intention to introduce the bill in the second half of the 2012-2013 legislative session.

Relevant papers

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

Council Business Division 2
Legislative Council Secretariat
13 March 2013

Appendix

Relevant papers on the protection for participation in trade unions

Committee	Date of meeting	Paper
Panel on Manpower	28 October 1999 (Item III)	Agenda Minutes
	20.6.2000 (Item II)	Agenda Minutes
	20.1.2012 (Item V)	Agenda Minutes
Subcommittee on Employer and Employee Relations	---	Report

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