

II. REPORT

The date of First Reading of the Bill is 17 May 2017. Members may refer to the LegCo Brief (File Ref.: LD LAB/CR/38 706(C)) issued by the Labour and Welfare Bureau on 2 May 2017 for further details.

Object of the Bill

2. The Bill seeks to amend the Employment Ordinance (Cap. 57) to remove the employer's agreement as the pre-requisite for making a reinstatement¹ or re-engagement² order in the event of an employee being dismissed by the employer under section 32A(1)(c) of Part VIA of Cap. 57³ ("unreasonable and unlawful dismissal"), and to provide for related matters.

Background

3. At present, in cases of unreasonable and unlawful dismissal, the court⁴ or Labour Tribunal ("LT") may make an order for reinstatement or re-engagement under section 32N of Cap. 57. Such order can only be made with the agreement of both the employee and his employer. If no order is made under section 32N of Cap. 57, the court or LT may make an award of terminal payments (including payment in lieu of notice, severance payment, sickness allowance etc.) under section 32O and an award of compensation not exceeding \$150,000 under section 32P of Cap. 57.

4. To remove the employer's agreement as a pre-requisite for making a reinstatement or re-engagement order in the event of unreasonable and unlawful dismissal, in March 2016, the Administration introduced the Employment (Amendment) Bill 2016 ("the 2016 Bill") into the Fifth Legislative Council ("the Fifth LegCo"). A Bills Committee was formed to scrutinize the 2016 Bill ("the 2016 Bills Committee"). Members of the 2016 Bills Committee raised various concerns and had indicated their respective intention to propose Committee stage amendments ("CSAs"), most of which sought to increase the ceiling for the further sum to be paid by an employer for non-compliance with a reinstatement or

¹ Under section 32N(4), an order for reinstatement is an order that the employer shall treat the employee in all respects as if he had not been dismissed or as if there had been no such variation of the terms of the contract of employment.

² Under section 32N(6), an order for re-engagement is an order that the employer must re-engage the employee in an employment on terms comparable to his original terms of the employment or in other suitable employment.

³ Section 32A(1)(c) provides that an employee may be granted remedies against his employer where he is dismissed by the employer other than for a valid reason within the meaning of section 32K and in contravention of the law, such as dismissal during pregnancy and paid sick leave.

⁴ Under section 32J(3), "court" refers to the Court of First Instance or the District Court.

re-engagement order. The Administration informed the 2016 Bills Committee that it needed to further consult the Labour Advisory Board ("LAB") on the proposed CSAs. The 2016 Bills Committee reported its deliberations to the House Committee on 17 June 2016. Members may refer to the Report of the 2016 Bills Committee on the 2016 Bill (LC Paper No. CB(2)1748/15-16) for further details. Before prorogation of the Fifth LegCo, no notice of resumption of Second Reading debate on the 2016 Bill had been given by the Administration. The 2016 Bill had therefore lapsed at the end of the Fifth LegCo.

5. According to paragraph 4 of the LegCo Brief, the Administration has consulted LAB on the views of members of the 2016 Bills Committee and their proposed CSAs. The consultation was concluded in September 2016. LAB agreed that the original proposals in the 2016 Bill should remain unchanged but the ceiling for the further sum be raised from \$50,000 to \$72,500.

Provisions of the Bill

6. The Bill seeks to amend Cap. 57 following the consultation with LAB in September 2016. The Legal Service Division has compared the 2016 Bill with the Bill and found that the provisions proposed in the Bill are essentially the same as those in the 2016 Bill, except that the ceiling for the further sum would be increased. The main provisions of the Bill are summarized in the following paragraphs.

Making an order for reinstatement or re-engagement without the employer's consent

7. Clause 4 proposes to amend section 32N of Cap. 57 by, among others, empowering the court or LT to make an order for reinstatement or re-engagement in the absence of the employer's consent in the event of unreasonable and unlawful dismissal if it finds that the making of the order is reasonably practicable.

Consequences for non-compliance

8. New sections 32NA and 32NB are proposed to be added to Cap. 57 to impose an additional liability on employers for non-compliance with an order for reinstatement or re-engagement. On top of the terminal payments and compensation under the existing sections 32O and 32P respectively, the employer has to pay to his employee the further sum which is set at three times the employee's average monthly wages but subject to a maximum of \$72,500 for non-compliance with the relevant order (clause 5).

Variation and relief

9. Clauses 7 and 8 seek to add new sections 32PA, 32PB and 32PC to Cap. 57 to:

- (a) provide for an alternative way for an employer to discharge his obligation under a re-engagement order by empowering the court or LT to make an order for variation of the original order to the effect that engagement of the employee by the original employer's successor or associated company would be treated as compliance with the original order (new sections 32PA and 32PB); and
- (b) allow an employer to apply to the court or LT for relief from the liability to pay the further sum on the ground that the reinstatement or re-engagement of the employee becomes no longer reasonably practicable because of reasons attributed to the employee or because of a change of circumstances beyond the employer's control since the making of the order (new section 32PC).

Offence

10. Clauses 9 and 10 seek to amend sections 43N and 43P of Cap. 57 to the effect that an employer commits an offence and is liable on conviction to a fine of \$350,000 and to imprisonment for three years if:

- (a) the employer fails to reinstate or re-engage the employee so ordered by the court or LT; and
- (b) where there is non-compliance with an order for reinstatement or re-engagement, the employer wilfully and without reasonable excuse fails to pay the terminal payments, compensation or the further sum to the employee.

Transitional provisions

11. If the Bill is passed, the new statutory scheme would apply to dismissal or notification of dismissal which takes effect on or after the commencement date of the relevant provisions of the Bill. For dismissal or notification of dismissal which takes effect before the commencement date, the former provisions would continue to apply (clause 12).

Consequential amendments

12. Parts 3 to 5 of the Bill propose consequential amendments to a number of legislation including the Labour Tribunal Ordinance (Cap. 25), the Labour Tribunal (General) Rules (Cap. 25A) and the Labour Tribunal (Forms) Rules (Cap. 25C).

Commencement

13. The Bill, if passed, would come into operation on a day to be appointed by the Secretary for Labour and Welfare by notice published in the Gazette.

Public Consultation

14. According to paragraph 18 of the LegCo Brief, LAB had several rounds of discussion on the legislative proposals in 2000, 2002, 2004, 2007, 2011 and 2016 and broad consensus on the legislative proposals was reached.

Consultation with LegCo Panel

15. According to the Clerk to the Panel on Manpower, the Panel was consulted at its meeting on 20 December 2016 on the legislative proposals. While members were generally supportive of the proposals, some members expressed concerns on various issues including the proposed ceiling for the further sum to be paid by an employer to an employee for non-compliance with a reinstatement or re-engagement order for unreasonable and unlawful dismissal cases, and the mechanism for reviewing the amount of the further sum.

Conclusion

16. In view of the concerns expressed by members of the Panel on Manpower, Members may wish to consider whether a Bills Committee should be set up to study the Bill in detail.

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