

**LegCo Panel on Manpower
(For Meeting on 27 April 2000)**

**Result of the review on reinstatement under
employment protection provisions of the Employment Ordinance**

Introduction

This paper informs Members of the result of a review of the reinstatement provisions under Part VIA of the Employment Ordinance (EO) conducted by the Labour Department.

Provisions on reinstatement under the EO

2. Part VIA of the EO on employment protection came into force on 27 June 1997. Under this part, an employee may claim for remedies against his employer in the following situations:

(a) unreasonable dismissal

where the employee has been employed under a continuous contract for not less than 24 months and he is dismissed other than for a valid reason (i.e. employee's conduct, employee's capability/qualification for performing the job, redundancy or other genuine operational requirements of the business, compliance with legal requirements or any other reason of substance);

(b) unreasonable variation of the terms of the employment contract

where the employee is employed under a continuous contract, the terms of his employment contract are varied without his consent and the employment contract does not contain an express term to allow such a variation, and the terms are varied other than for a valid reason; and

(c) unreasonable and unlawful dismissal

where the employee is dismissed other than for a valid reason and the dismissal is prohibited by law (i.e. dismissal during pregnancy or paid sick leave, after work-related injury, or by reason of the

employee giving evidence for the enforcement of labour legislation or exercising trade union rights).

3. If the employer fails to show a valid reason for the dismissal or variation as specified under the EO, the Labour Tribunal (LT) may award the employee remedies which include *reinstatement/re-engagement, subject to the consent of the employer and the employee*, or terminal payments. In case of unreasonable and unlawful dismissal, the LT may also make an award of compensation of up to \$150,000 if no order of reinstatement/re-engagement is made.

Review of the provisions on reinstatement under the EO

4. At the end of two years after the enactment of Part VIA, the Labour Department conducted a review on the provisions on reinstatement.

Statistics on related claims (July 1997 – June 1999)

5. In the first two years of operation of the employment protection provisions up to the end of June 1999, the Labour Department handled 6,126 claims of this category, comprising 5,016 claims (81.9%) on unreasonable dismissal, 806 claims (13.2%) on unreasonable and unlawful dismissal and 304 claims (5%) on unreasonable variation of contract terms. Of the 806 claims on unreasonable and unlawful dismissal, 277 (34.4%) were against dismissal during pregnancy, 372 (46.2%) against dismissal after work-related injury, 145 (18%) against dismissal during paid sick leave, 6 (0.7%) against dismissal due to the employee giving evidence for the enforcement of labour legislation, and 6 (0.7%) against dismissal due to the employee exercising trade union rights.

6. Of the total 6,126 claims, only 32 (or 0.5%) requested reinstatement. Among these, only 6 (or 0.1%) were on unreasonable and unlawful dismissal.

7. Our experience in the first two years shows that upon dismissal or variation of contract terms, the vast majority of the employees concerned preferred monetary compensation to reinstatement because the employer-employee relationship was already soured.

Result of the review

8. After careful consideration, it is proposed that the reinstatement provisions be amended to the effect that where an employee who has been found to be *unreasonably and unlawfully dismissed* makes a claim for reinstatement/re-engagement, the LT may make an order of reinstatement/re-engagement if the LT considers it *appropriate and reasonably practicable* without the need to secure the consent of the employer. In determining whether to make an order of reinstatement/re-engagement, the LT may request the Labour Department to submit a report on the circumstances of the case.

9. The reasons for the proposal are:

- (a) In cases of unreasonable and unlawful dismissal, the employee is not only dismissed without a valid reason but the dismissal is prohibited by law. Since the act of dismissal is unlawful, where the employee makes a claim for reinstatement/re-engagement, it should be logical and justified for the LT to make such an order without having to seek the employer's consent if the LT considers it appropriate and reasonably practicable to do so.
- (b) Employees who are unlawfully dismissed generally may have more difficulties in seeking alternative employment. Compulsory reinstatement/re-engagement will enable them to return to their original position.
- (c) The unfair dismissal legislation in other countries such as Singapore, Malaysia, UK, Australia, New Zealand and Canada does not require mutual consent to be obtained for making an order of reinstatement/re-engagement.
- (d) Similar provisions for the court to make compulsory order of reinstatement already exist in other pieces of legislation in Hong Kong. The Sex Discrimination Ordinance, Disability Discrimination Ordinance and Family Status Discrimination Ordinance empower the District Court to order, among other things, the respondent to employ, re-employ or promote the claimant.

10. The LT, which has judicial power and a well-established system of review and appeal, is the appropriate and competent authority to determine whether or not an order of reinstatement/re-engagement should be made. Under the proposal, the LT will consider the circumstances of each case and will make an order of reinstatement/re-engagement only if it is found appropriate and reasonably practicable for the employer to do so. Where the LT wishes to have more information on the circumstances of a case for determining the merits of making such an order, the LT may request the Labour Department to submit a report in this respect. Such report may include information such as the circumstances of the employer, the circumstances of the employee, the relationship between the employer/ proprietor and the employee and the relationship between the employee and other concerned parties, and the circumstances of the dismissal. This will ensure that the LT would have all the information it needs in considering whether or not an order of reinstatement/re-engagement would be appropriate and reasonably practicable.

11. We propose no change to the provisions regarding claims against unreasonable dismissal. In such cases, the employer has not committed an offence in initiating the dismissal. The existing requirement for the LT to seek the mutual consent of the employer and the employee before making an order of reinstatement/re-engagement is considered appropriate and should be maintained.

Views of the Labour Advisory Board

12. We have submitted the result of the review to the LAB. At its meeting held on 28 March 2000, Members accepted the proposal made by the review.

Education and Manpower Bureau
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