

立法會
Legislative Council

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Bills Committee on Public Officers Pay Adjustment Bill

Background Brief

Purpose

This paper sets out the background of the Public Officers Pay Adjustment Bill, and summarizes the views of Members, major civil service unions, the Administration and the Legal Adviser of the Legislative Council (LegCo) Secretariat when the subject of 2002 civil service pay adjustment was discussed at the meetings of the Panel on Public Service (PS Panel) on 23 May and 29 May 2002.

Background

2001 civil service pay adjustment

2. The 2001 civil service pay adjustment exercise sparked a public debate on civil service pay. Some critics argued that the net Pay Trend Indicators (PTIs) obtained from the 2000-01 Pay Trend Survey (PTS) (i.e. 4.99% for the upper salary band, 2.38% for the middle salary band and 1.97% for the lower salary band) did not accurately reflect the pay movements in the private sector. The business sector considered that the existing pay levels for civil servants, especially those for the lower band, had outstripped those of their private sector counterparts. There were also calls for a review on the methodology of PTS and the civil service pay adjustment mechanism.

Review of civil service pay policy and system

3. In response to various public concerns raised about civil service pay, the Administration rejected the call for an arbitrary and out-of-cycle civil service pay reduction, reiterating that there was a long-established mechanism for deciding civil service pay adjustment. But the Administration noted that it had been over a decade since it last conducted an overall review of the civil service pay policy and system and that there was a need to address public concerns about possible erosion of broad comparability of civil service pay with private sector over time. The Administration

therefore considered it necessary to examine whether the current arrangements continued to meet present day circumstances. In December 2001, the Administration invited the Standing Commission on Civil Service Salaries and Conditions of Service, the Standing Committee on Disciplined Services Salaries and Conditions of Service and the Standing Committee on Directorate Salaries and Conditions of Service to conduct a comprehensive review of the civil service pay policy and system. The three advisory bodies set up a Task Force to take forward the review. On 25 April 2002, the Task Force published its interim report on the first phase of the review for public consultation until 30 June 2002.

2002-03 Budget Speech

4. In the 2002-03 Budget Speech delivered on 6 March 2002, the Financial Secretary (FS) stated that for financial planning purposes, he had assumed in the Medium Range Forecast that civil service pay would be cut by 4.75% and the salary-related portions of subventions to the various organizations would also be reduced by the same rate with effect from 1 October 2002. FS also stated that any decision on a civil service pay cut needed to go through the legislative process before it could be implemented.

5. The FS's announcement of the assumption on civil service pay cut before the findings of 2001-02 PTS were available had caused concern. There were worries that the Government might not follow the existing pay adjustment mechanism in deciding the 2002 civil service pay adjustment. In this respect, FS and the Secretary for the Civil Service (SCS) clarified that the Government would continue to adopt the existing mechanism in deciding the 2002 civil service pay adjustment. The 4.75% pay cut was only an assumption made for financial planning purposes.

Public Service Panel meeting on 18 March 2002

6. At the PS Panel meeting on 18 March 2002, some members expressed concern on the legal grounds for the Administration to alter civil servants' pay unilaterally and the justifications for implementing civil service pay reduction by legislation. SCS advised that it was provided in the Memorandum on Conditions of Service (MOCS) for civil servants that notwithstanding anything contained in the MOCS or in the covering letter of offer of appointment, the Government reserved the right to alter any of the officer's terms of appointment, and/or conditions of service set out in the MOCS or the said covering letter should the Government at any time consider this to be necessary. This was confirmed by the legal advice sought by the Administration. As civil service pay reduction had only been implemented once in 1936 and had not so far been implemented since the existing pay adjustment mechanism was in place in 1974, the Administration had accepted the legal advice that in the event of a decision on a civil service pay reduction for 2002-03, the pay reduction would be implemented by legislation in the interest of certainty and to avoid legal disputes. The members were not convinced and requested the Administration to provide the following information in writing:

- (a) Legal grounds for the Administration to alter civil servants' terms of employment unilaterally;
- (b) Full justifications for the Administration's proposal to implement civil service pay reduction by legislation, having regard to the fact that civil service pay increase in previous years had not been implemented by legislation;
- (c) Full justifications for the Administration's proposal to implement civil service pay reduction from a prospective date, having regard to the fact that civil service pay increase in previous years had retrospective effect and was effective from 1 April but not 1 October of the years concerned;
- (d) The legal advice obtained by the Administration on the issue; and
- (e) The Administration's response to the queries raised by a member of the Panel on whether the "executive orders" issued by the Chief Executive under Article 48(4) of the Basic Law has legal effect and if the answer is in the affirmative, whether it is necessary to implement civil service pay reduction by legislation.

7. Members may wish to refer to the following papers circulated to members of the Bills Committee on 11 June 2002:

- (a) An extract from the minutes of the PS Panel meeting on 18 March 2002 (LC Paper No. CB(1)1445/01-02);
- (b) The Administration's written response (LC Paper No. CB(1)1473/01-02); and
- (c) "Fact sheet — Information on the Hong Kong Government Service (Levy on Salaries) Ordinances, 1936 and 1937" prepared by the Research and Library Services Division of the LegCo Secretariat (LC Paper No. CB(1)1823/01-02(03)).

2002 civil service pay adjustment and Public Officers Pay Adjustment Bill

2001-02 Pay Trend Survey

8. The 2001-02 PTS covered a total of 130 854 employees in 91 companies. Data was collected over the period from 2 April 2001 to 1 April 2002. The resulting net PTIs for the three non-directorate salary bands are as follows -

2001-02 net PTIs

Upper salary band (\$47,591 - \$97,325 a month)	-4.42%
Middle salary band (\$15,520 - \$47,590 a month)	-1.64%
Lower salary band (Below \$15,520 a month)	-1.58%

Executive Council (ExCo)'s decision on 22 May 2002

9. The Chief Executive in Council decided on 22 May 2002 that –
- (a) an offer of a pay reduction of 4.42% for the directorate and the upper salary band, 1.64% for the middle salary band, and 1.58% for the lower salary band, with effect from 1 October 2002, should be put to the staff sides of the four central consultative councils; and
 - (b) agreement in principle should be given to the draft Public Officers Pay Adjustment Bill. A copy of the draft Bill should be provided to the staff sides of the four central consultative councils for comments.

ExCo's decision on 28 May 2002

10. Having considered all relevant factors, the Administration considered that the proposed pay adjustment, which was in line with the net PTIs of the 2001-02 PTS, was reasonable and had struck a balance between the concerns of civil servants and the wider interests of the community. The Chief Executive in Council decided on 28 May 2002 that civil service pay should be adjusted as originally proposed, and that the Public Officers Pay Adjustment Bill should be introduced into LegCo.

Staff sides' views

11. At the PS Panel meetings on 23 May and 29 May 2002, Members noted the strong objection raised by the four central consultative councils and seven major civil service unions to the Administration's proposal to implement civil service pay reduction by legislation. The staff sides were concerned that the proposed legislation would set a precedent for the Government to further cut back the conditions of service of civil servants in future. They suggested that an independent Committee of Inquiry should be set up under the 1968 Agreement between the Hong Kong Government and the Main Staff Associations (the 1968 Agreement) to deal with the issue of 2002 civil service pay adjustment. A summary of the staff sides' views is in **Appendix I**.

12. For the background information on the Committee of Inquiry, members may wish to refer to the information paper on "Committee of Inquiry under the 1968 Agreement" provided by the Administration to the PS Panel (LC Paper No. CB(1)1883/01-02(01) circulated to members of the Bills Committee on 11 June 2002).

Members' views

13. At the PS Panel meetings on 23 May and 29 May 2002, while Members had no objection to a civil service pay reduction in accordance with the findings of PTS, they expressed concerns over -

- (a) the need to implement civil service pay reduction by legislation;
- (b) whether there are other feasible options to implement the pay reduction, e.g. by using the existing mechanism provided under the 1968 Agreement or the variation clause in the MCOS applicable to civil servants;
- (c) whether the variation clause in MCOS applicable to civil servants is not sufficient for enabling the Government to reduce the pay of civil servants, as claimed by the Administration; if not, whether this means that there is no legal basis for the Government to reduce the pay of civil servants, and whether such reduction in pay would contravene Article 100 of the Basic Law;
- (d) whether the implementation of civil service pay reduction by legislation would deprive civil servants of the right to claim for compensation, damages or other remedies; and
- (e) whether it is more appropriate for the court than the legislature to deal with the contractual disputes between the Government and civil servants on the issue of pay adjustment.

Administration's responses and Legal Adviser's views

14. A summary of the Administration's responses (LC Paper Nos. CB(1)1832/01-02(02) and (04)) and the Legal Adviser's views (LC Paper No. LS108/01-02) is in **Appendix II**. A majority of the Members present at the Panel meetings still queried the need to implement civil service pay reduction by legislation.

**LegCo Panel on Public Service
Meetings on 23 May and 29 May 2002**

**Summary of views
of four central consultative councils and seven major civil service unions**

Name of Organization	Objection to implement pay reduction by legislation	Pay Freeze for 2002/03	To set up a Committee of Inquiry under the 1968 Agreement*	Other views
1. Senior Civil Service Council (Staff Side)	√	√	√	<ul style="list-style-type: none"> ● Net pay trend indicators (PTIs) are important but not the sole determining factor for civil service pay adjustment. ● The Staff Side acknowledges the policy to share in the ups and downs of the economy. It should however be noted that the civil service had undergone drastic reforms and cuts in expenditure in recent years. ● Civil service pay reduction would have detrimental consequences to the economy. ● Government's claim that even if the recommendations of a Committee of Inquiry were accepted by both the Government and the staff associations who are parties to the 1968 Agreement, they would not bind associations who are not parties to the 1968 Agreement nor would they bind individual civil servants, even if they are members of the relevant associations. This is misleading. In fact, the recommendations of the Committee of Inquiry appointed in 1988, which were accepted by the then Governor in Council, applied to all civil servants.
2. Model Scale I Staff Consultative Council (Staff Side)	√	√	√	<ul style="list-style-type: none"> ● Impact of pay reduction on staff morale and the standard of living of staff at the lower ranks should be considered. ● The structural fiscal deficit problem cannot be solved by pay reduction alone. ● The proposed legislation would set a precedent for the Government to further cut back the conditions of service of civil servants in future.
3. Disciplined Services Consultative Council (Staff Side)	√	√	√	<ul style="list-style-type: none"> ● Civil service pay reduction would have adverse impact on the spending power of civil servants, the economy and staff morale. ● The proposed legislation would set a precedent for the Government to further cut back the conditions of service of civil servants in future. ● May resort to more radical actions if the Government insists to implement pay reduction by legislation. ● It is unfair and illegal for the Government to alter terms of appointment unilaterally. ● Civil service pay adjustment exercise this year should be held in abeyance pending the completion of the comprehensive review of civil service pay policy and system.

Name of Organization	Objection to implement pay reduction by legislation	Pay Freeze for 2002/03	To set up a Committee of Inquiry under the 1968 Agreement*	Other views
4. Police Force Council (Staff Side)	√		√	<ul style="list-style-type: none"> ● The implementation of pay reduction without the employees' consent is an illegal act. ● If the Government implements pay reduction by legislation, it would deprive civil servants of their rights under the employment contract and contravene Article 160 of the Basic Law. ● Pay reduction would have adverse impact on staff morale and stability in the Police Force. ● Disputes over pay adjustment between employer and employees should be resolved by negotiation, but not by legislation. ● May resort to legal actions on request of majority of members.
5. Hong Kong Chinese Civil Servants' Association	√	√	√	<ul style="list-style-type: none"> ● In deciding the 2002-03 civil service pay adjustment, the following factors should be taken into consideration: the prevailing economic climate in Hong Kong, the Government's stringent financial situation, the impact of the comprehensive review of civil service pay policy and system as well as the accountability system for principal officials on the morale and stability of the civil service, etc.
6. Senior Non-expatriate Officers Association	√	√	√	<ul style="list-style-type: none"> ● Shares the views of the Senior Civil Service Council. ● The implementation of pay reduction by legislation set a bad precedent for settling disputes between employers and employees.
7. Hong Kong Federation of Civil Service Unions	√	√		<ul style="list-style-type: none"> ● Disputes over pay adjustment between employer and employees should be resolved by negotiation, but not by legislation. ● Adverse impact of pay reduction on private sector pay, the economy, staff morale and the standard of living of staff at the lower ranks should be considered.
8. Hong Kong Civil Servants General Union	√			<ul style="list-style-type: none"> ● It would be illegal for the Government to implement pay reduction unilaterally and this destroys the rule of law in Hong Kong. ● If the Government implements pay reduction by legislation, it would deprive civil servants of their rights under the employment contract and set a bad example to employers in the private sector. ● Consider taking legal actions against the Government if it insists to implement pay reduction by legislation. ● It is inopportune to implement pay reduction at this stage when the review of civil service policy and system is still in progress.

Name of Organization	Objection to implement pay reduction by legislation	Pay Freeze for 2002/03	To set up a Committee of Inquiry under the 1968 Agreement*	Other views
9. Government Disciplined Services General Union	√			<ul style="list-style-type: none"> ● If the Government implements pay reduction by legislation, it would deprive civil servants of their legal rights under the employment contract and contravene Articles 39, 100 and 160 of the Basic Law. ● Civil service pay adjustment exercise this year should be held in abeyance pending the completion of the comprehensive review of civil service pay policy and system. ● Will accept pay reduction if it is implemented through the existing mechanism. ● May resort to radical actions against the Government if it insists to implement pay reduction by legislation.
10. Government Employees Association	√			<ul style="list-style-type: none"> ● Pay reduction would have adverse impact on staff morale and the livelihood of staff at lower ranks.
11. Government Model Scale I Staff General Union	√	√	√	<ul style="list-style-type: none"> ● Pay reduction would have adverse impact on the standard of living of staff at lower ranks. ● Suggest the Government to consider other measures to address the fiscal deficit problem, such as increasing the profit tax.

* The 1968 Agreement was signed between the Hong Kong Government and Hong Kong Chinese Civil Servants' Association, the Association of Expatriate Civil Servants and the Senior Non-expatriate Officers Association.

**LegCo Panel on Public Service
Meetings on 23 May and 29 May 2002**

2002 Civil service pay adjustment

Summary of Administration's responses and Legal Adviser's views

Members' concerns	Administration's responses (LC Paper No. CB(1)1832/01-02(02))	Legal Adviser's views (LC Paper No. LS108/01-02)
<p>1. Justifications to implement civil service pay reduction by legislation</p>	<ul style="list-style-type: none"> ● At common law the terms of a contract cannot be unilaterally varied by one party so that, without the agreement of an employee, or the reservation of an express power in the contract, an employer cannot reduce an employee's pay. ● In civil service contracts, the Government reserves the right to alter any of the terms of appointment or conditions of service should the Government at any time consider this to be necessary. On the basis of decided cases, the courts are unlikely to accept that this general power of variation applies to such a fundamental term as a civil servant's salary. The contracts of officers engaged since June 2000 have included the following clause – <p style="margin-left: 40px;">“Subject to Civil Service Regulations 451 and 452 [which refer to satisfactory service] the officer will move to the appropriate pay scale on completion of one year's service. The pay scale will be subject to review in accordance with the annual pay adjustment exercise. Such adjustment may take the form of pay increase, pay freeze or pay reduction.”</p> <p>There is, however, no such clause in the contracts of officers appointed before June 2000.</p> ● While at common law an employer could terminate employees' contracts by notice and offer them re-employment on a lower salary, the majority of civil servants have permanent contracts that cannot be terminated by notice and under which, subject to good conduct, they are entitled to remain in office until they reach the retirement age prescribed by the Pensions Ordinances. ● While it might be possible for the Administration to reach such agreement with Civil Service Central Consultative Councils on a civil service pay reduction, such an agreement would not prevent individual civil servants from challenging any agreed pay reduction. In the circumstances, the only safe way to achieve a lawful reduction in civil service pay is through legislation. ● For details on the need for legislation to implement a civil service reduction, please refer to the article prepared by Law Officer (Civil Law) at Annex A. The article, which also addresses the question of consistency of the proposed legislative approach with the Basic Law, was published in a number of newspapers on 24 May 2002. 	<ul style="list-style-type: none"> ● The issue here is not on the merits of the legislative proposal to reduce civil service pay. The question is why the reduction should be done through legislation. Remarks such as "the only viable means to achieve such certainty", "the only safe way to achieve a lawful cut", "the chance of a successful challenge reduced" and "to ensure that a justified decision can be implemented fairly and with certainty" have been used by officials to describe the reasons justifying the use of legislation to implement the policy decision to reduce civil service pay.

Members' concerns	Administration's responses (LC Paper No. CB(1)1832/01-02(02))	Legal Adviser's views (LC Paper No. LS108/01-02)
<p>2. Whether there is a need, from the legal point of view, to implement civil service pay reduction by legislation.</p>	<p>—</p>	<ul style="list-style-type: none"> ● Generally speaking, government policies can be implemented through legislative or non-legislative means or a combination of both. In the case of the Chief Executive in Council's decision to reduce civil service pay, it has been decided that it should be implemented by way of legislation. This method of implementing that decision is not legally imperative.
<p>3. Whether the following clauses are included in each of the versions of MOCS:</p> <ul style="list-style-type: none"> — General clause (Clause 1.1 in MOCS (June 2000 version)) "The officer is subject to Executive Orders issued from time to time by the Chief Executive for the administration of the public service and to regulations and directions made under these Orders." — Clause relating to salary and increments (Clause 4.7 in MOCS (June 2000 version)) "Subject to Civil Service Regulations 451 and 452, the officer will move to the appropriate pay scale on completion of one year's service. The pay scale will be subject to review in accordance with the annual pay adjustment exercise. Such adjustment may take the form of pay increase, pay freeze or pay reduction." — Variation clause (Clause 23 in MOCS (June 2000 version)) "Notwithstanding anything contained in this Memorandum or in the covering letter of offer of appointment, the Government reserves the right to alter any of the officer's terms of appointment, and/or conditions of service set out in this Memorandum or the said covering letter should the Government at any time consider this to be necessary." 	<ul style="list-style-type: none"> ● The employment arrangements for a civil servant are governed by the provisions set out in a letter of appointment and the Memorandum on Conditions of Service (MOCS) attached to the letter. At present, there are a total of 11 sets of sample letter of appointment and 25 sets of standard MOCS (including those for retired and re-employed but excluding those tailored made by individual departments for their own staff, e.g. the Hong Kong Police Force) in the civil service to cater for the different types of terms of appointment for new recruits and serving officers on transfer or further appointment. By and large, these MOCSs contain very similar provisions. Those clauses with a greater degree of variation concern the fringe benefits to which officers are entitled under different terms of appointment. ● The various sets of MOCS are updated from time to time to reflect the changes to the Civil Service Regulations and other Government rules and regulations relating to the management of the civil service. For serving officers in the civil service, therefore, the MOCSs applicable to them differ from individual to individual depending on the date of their offer of appointment and the particular terms of their appointment. There are altogether over 200 sets of MOCSs introduced over the years which are currently still in force. Broadly speaking, the general clause (similar to clause 1.1 of the June 2000 version of the MOCS) and the variation clause (similar to clause 23 of GF 608 of the June 2000 version of the MOCS) (with very minor differences in drafting) have been included in most MOCSs for decades. In other words, these two provisions apply to most civil servants now serving in the Government. For the salary and increments clause, however, in all the MOCSs preceding the June 2000 version, it does not expressly stipulate that "the pay scale will be subject to review in accordance with the annual pay adjustment exercises and such adjustment may take the form of pay increase, pay freeze or pay reduction" as in clause 4.7 of the June 2000 version of GF 608. ● We estimate that about 2 700 officers have joined the Government since the June 2000 version of the MOCS came into force and another 2 700 officers on agreement or retired and re-employment on agreement terms may have been issued with the June 2000 version of MOCS. But the employment contracts of the great majority of serving civil servants totally over 160 000 do not contain an express power to reduce pay. 	<ul style="list-style-type: none"> ● The Administration highlights the fact that there may be differences in terms and conditions of service among civil servants for various reasons. This was acknowledged by the Court of Appeal in the case of <i>Lam Yuk Ming v. Attorney General</i> as a situation which justifies the need for a variation clause in order to allow Government to achieve uniformity in terms and conditions of service in the civil service when it is considered necessary.

Members' concerns	Administration's responses (LC Paper No. CB(1)1832/01-02(02))	Legal Adviser's views (LC Paper No. LS108/01-02)
<p>4. Reasons why the variation clause in MOCS is not sufficient for enabling the Government to reduce the pay of civil servants and details of the relevant court decisions mentioned by the Law Officer (Civil Law) of the Department of Justice at the Panel meeting.</p>	<ul style="list-style-type: none"> ● The MOCS applicable to officers appointed before June 2000 does not reserve an express power for the Government to reduce the appointee's pay. Despite the decision of the Hong Kong Court of Appeal in <i>Lam Yuk-ming v Attorney General</i> [1980] HKLR 815 in which the Court upheld the enforceability of the unilateral variation clause, a subsequent decision of the Hong Kong High Court in <i>Fynn v Attorney General</i> [1991] 1 HKLR 315 at 318 stated that – <ul style="list-style-type: none"> “There seems to be little doubt that there is nothing to prevent the Government from effecting changes and modifications to the various regulations relating to the employment. However, it is doubtful whether a basic alteration could be made by the Government unilaterally such as changing the basis upon which the employee is to be remunerated.” ● That approach is supported by decisions in the U.K. such as <i>United Associations for Protection of Trade Ltd. v Kilburn</i> (17 September 1985, unreported) and the Court of Appeal's decision in <i>Wandsworth London Borough Council v D'Silva</i> [1998] IRLR 193. 	<ul style="list-style-type: none"> ● Synopsis of and comments on the four cases referred to by the Administration are at Annexes B to E. ● It might appear that the case of <i>Fynn v Attorney General</i> shows signs of a possible departure from the principles of law declared by the Court of Appeal in the case of <i>Lam Yuk Ming v Attorney General</i>. But, it should be noted that <i>Fynn v Attorney General</i> was decided by a single High Court Judge when determining an appeal against a Master's decision made at interlocutory proceedings. ● The two U.K. cases were decided in the context of U.K. employment law which is quite different from that in Hong Kong although principles relating to the law of contract are quite similar. ● According to the Administration, the variation clause has been the contractual basis for the Government to adjust civil service pay annually for some decades. The actual adjustment made each year depends on the outcome of applying the pay adjustment mechanism. Application of this mechanism may lead to an upward or downward adjustment of pay. If there had not been the variation clause, agreement of all parties to the contract would be required for any variation in the terms and conditions of service including for adjusting upwards the level of pay. ● According to the Administration, the standard MOCS applicable to civil servants provides that the Government reserves the right to alter any of the officer's terms of appointment, and/or conditions of service set out in the MOCS or letter of appointment, should the Government at any time consider this to be necessary. ● The terms of this standard variation clause are clear. The Hong Kong Court of Appeal has given effect to it in the case of <i>Lam Yuk Ming and Others v. Attorney General</i> in 1980. However, in view of the Administration's claim that it has obtained Leading Counsel's advice which led to its conclusion that decided cases indicate the courts are unlikely to accept this general power of variation applies to such a fundamental term as the salary and that it would not be safe to regard that provision as authorising a unilateral pay reduction,

Members' concerns	Administration's responses (LC Paper No. CB(1)1832/01-02(02))	Legal Adviser's views (LC Paper No. LS108/01-02)
		Legal Adviser would not attempt to offer any conclusive view without studying all the relevant materials relied on by the Administration.
<p>5. If the variation clause in MOCS is not sufficient for enabling the Government to reduce the pay of civil servants, whether this means that there is no legal basis for the Government to reduce the pay of civil servants, and whether such reduction in pay would contravene Article 100 of the Basic Law.</p>	<ul style="list-style-type: none"> ● In view of the absence of an express power for the Government to reduce the pay of civil servants in most MOCSs currently in force, based on decided court cases there is a serious risk that a decision to reduce civil service pay without legislation would be subject to a successful legal challenge. ● The current proposal to reduce civil service pay is based on careful consideration of all relevant factors under the established civil service pay adjustment mechanism including: the net pay trend indicators derived from the independent Pay Trend Survey, the state of the economy, budgetary considerations, changes in the cost of living, the staff sides' pay claims and civil service morale. This mechanism is flexible enough to allow for reductions as well as increases since some of these factors are capable of upward and downward movements. The Government is committed, and the staff sides of the central consultative councils have also hitherto urged the Government, to follow the established mechanism in deciding the size of this year's pay adjustment. The proposed legislation is a means to ensure that a justified decision made under the established mechanism can be implemented fairly and with certainty. ● Article 100 of the Basic Law provides that public servants serving in all Hong Kong Government departments before the establishment of the Hong Kong SAR "may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before." Assuming that any pay reduction does not reduce the salaries of civil servants who were serving immediately before 1 July 1997 to a level below that which they were receiving on that date, there would be no breach of that article. 	<ul style="list-style-type: none"> ● A unilateral reduction of pay without a sufficiently effective variation clause may mean that the Government would be exposing itself to claims for breach of contract. If a reduction of pay were made without lawful basis, whether or not the reduction would contravene Article 100 of the Basic Law would not seem relevant.
<p>6. The interpretation of "<i>no less favourable than before</i>" under Article 100 of the Basic Law.</p>	<ul style="list-style-type: none"> ● While it is arguable that "<i>no less favourable than before</i>" in Article 100 of the Basic Law could be construed to take account of changes in the cost of living, that issue does not arise in the context of the present proposed reduction since even after the reduction, the pay of civil servants would still be at or above the level in cash terms that they were receiving on 30 June 1997. 	<ul style="list-style-type: none"> ● There has not been any established authoritative interpretation of "<i>no less favourable than before</i>" in the context of Article 100 of the Basic Law. In view of the extent of the proposed reduction in civil service pay announced on 28 May 2002, it may not be necessary to examine this issue for the time being.
<p>7. Other alternatives to implement the pay reduction, e.g. by using the existing mechanism provided under the 1968 Agreement between the Hong Kong Government and the Main Staff Associations (the 1968 Agreement) to appoint an independent Committee of Inquiry to deal with the issue.</p>	<ul style="list-style-type: none"> ● There is no other alternative to legislation which will enable the Government to implement the pay reduction, which is a reasonable decision made under the established pay adjustment mechanism, with certainty. The 1968 Agreement between the Hong Kong Government and certain staff associations does not form part of the existing civil service pay adjustment mechanism. Any request for the appointment of a Committee of Inquiry under the 1968 Agreement will have to be justified on merit and is subject to the decision of the Chief Executive. 	<p>(No comments)</p>

Members' concerns	Administration's responses (LC Paper No. CB(1)1832/01-02(02))	Legal Adviser's views (LC Paper No. LS108/01-02)
8. If the Chief Executive so decides or the main staff associations so request to appoint an independent Committee of Inquiry to deal with the issue, whether the Government would defer the introduction of the proposed Public Officers Pay Adjustment Bill into LegCo.	<ul style="list-style-type: none"> ● Since the 1968 Agreement is not part of the pay adjustment mechanism, there would be no necessary connection between a decision to appoint an independent Committee of Inquiry and the decision to introduce the proposed Bill into LegCo. 	(No comments)
9. Whether the recommendations of a Committee of Inquiry are binding on the Government and all civil servants.	<ul style="list-style-type: none"> ● The recommendations of a Committee of Inquiry are not binding on either the Government or the staff associations who are parties to the agreement unless they are accepted by both the Government and the associations. Even if they were accepted by both the Government and the associations, they would not bind associations who are not parties to the 1968 Agreement nor would they bind individual civil servants, even if they are members of the relevant associations. 	(No comments)
10. Whether the implementation of civil service pay reduction by legislation would deprive civil servants of the right to claim for compensation, damages or other remedies.	—	<ul style="list-style-type: none"> ● If it is accepted that there is a contractual right under the variation clause for the Government to reduce pay, there would be no question of deprivation of rights to claim compensation, damages and other remedies. ● If the civil service pay reduction could not be done lawfully without the proposed legislation, implementation of the legislation would appear to have the effect of depriving civil servants rights that they would otherwise be able to exercise under the contract.
11. Please explain the intent and effect of clause 9 (Compensation, remedies etc.) of the draft Bill.	<ul style="list-style-type: none"> ● Clause 9 of the Bill as presently drafted is intended to expressly authorize the adjustments to pay and allowances made by the ordinance when enacted and to clarify that following enactment a public officer will not directly or indirectly be able to recover the amount of the reduction by way of compensation or damages. 	(No comments)
12. Please provide the justifications for not allowing amendments to the Bill.	<ul style="list-style-type: none"> ● Amendments to a Bill under consideration by the Legislative Council may be moved subject to compliance with the procedural rules on the form and contents of such amendments as set out in Rule 54 of the Rules of Procedures of the Legislative Council. 	(No comments)
Written questions raised by Hon LEE Cheuk-yan	Administration's responses (LC Paper No. CB(1)1832/01-02(04))	
13. It was reported on 24 May 2002 in Ming Pao that the Government had sought legal advice from the legal profession in the United Kingdom on whether civil service pay reduction should be implemented by legislation. Will the	<ul style="list-style-type: none"> ● In line with the usual practice and legal professional privilege, we are unable to provide a copy of the legal advice from Leading Counsel. The advice is based on the authorities referred to in the reply to item 4 above. 	—

<p>Written questions raised by Hon LEE Cheuk-yan</p>	<p>Administration's responses (LC Paper No. CB(1)1832/01-02(04))</p>	
<p>Administration provide this Panel with the details of the legal advice, if any?</p>		
<p>14. The legal advice of the Administration was that according to the contracts signed between the Government and civil servants, the Government had no right to reduce civil service pay unilaterally, and therefore the civil service pay reduction had to be effected by legislation. In this connection, will the Administration inform this Panel whether the Government has ever altered unilaterally the terms of the contracts signed with the civil servants, other individuals or organizations, and prescribed in law that the other parties to the contracts are not entitled to compensation or damages and are not entitled to exercising any rights or remedies stated in the contracts?</p>	<ul style="list-style-type: none"> ● There has been a previous occasion when legislation was enacted which had the effect of reducing civil service pay – the Hong Kong Government Service (Levy on Salaries) Ordinance 1936. That Ordinance did not include an express provision specifying that affected public officers would not be entitled to compensation or remedy. There have been recent examples of such legislation in other common law jurisdictions such as the Canadian Province of Prince Edward Island’s Public Sector Pay Reduction Act 1994 and the US State of Illinois’ State Government Leaders’ Salary Reduction Act 2002. The former contained express provisions that no compensation should be payable and that the reduction would not entitle a person to any other remedy. 	<p>—</p>
<p>15. Given that the Administration has decided to alter the contracts of civil servants unilaterally by way of legislation, is this approach to handle contracts also applicable to other contracts signed by the Government? For instances, can the Government alter the terms of the Scheme of Control Agreement signed with the two power companies with a view to lowering the level of permitted return, and prescribing in law that the two power companies are not entitled to compensation or damages, and are not entitled to exercising any rights or remedies stated in the Agreement?</p>	<ul style="list-style-type: none"> ● We have explained in LC Paper No. CB(1)1832/01-02(02) the reasons why it is necessary to seek the enactment of legislation to implement a civil service pay reduction. There is no direct read-across of our proposal in this regard to how other contracts signed by the Government should be handled. ● The relationship between the Government and civil servants is a matter of both private and public law. The funds necessary to pay civil servants including additional provisions to pay increases in civil service salaries under the salary adjustment mechanism and to provide them with pensions have to be voted by the Legislative Council. Legislation provides for civil service pensions and imposes more stringent requirements on civil servants than on other citizens under the Prevention of Bribery Ordinance. It is therefore not inappropriate for the legislature to consider proposals to implement an adjustment of civil service pay, since ultimately the level of civil service pay affects the amount of the appropriation from the General Revenue. ● While the Government’s relationship with its employees is a matter of both private and public law, the Government also enters into contractual relations with companies and individuals entirely on a private law basis, for example, by granting leases of Government land. Those property rights may be affected by subsequent legislation which applies to the world at large, relating to such matters as town planning, environmental pollution and public hygiene; and in those circumstances, no compensation will be payable. 	<p>—</p>

Written questions raised by Hon LEE Cheuk-yan	Administration's responses (LC Paper No. CB(1)1832/01-02(04))	
<p>16. The Administration has stated in its interpretation of the 1968 Agreement between the Hong Kong Government and the Main Staff Associations (“the Agreement”) that “... the civil service associations pledge to observe any recommendations made by the independent Committee of Inquiry and accepted by the Government. Under such circumstances, members and non-members of the civil service associations concerned will adhere to the decisions made and no individual civil servant will be permitted to make any personal choice unless it is so stipulated in the Agreement ...”. In this connection, will the Administration inform this Panel:</p> <p>(a) whether the Agreement constitutes part of the contract with civil servants and is binding on both the Government and civil servants; and</p> <p>(b) whether, in deciding to implement civil service pay reduction by legislation, it has taken the above Agreement and its interpretation of the Agreement into consideration?</p>	<p>● The 1968 Agreement only applies to certain staff associations. It is not part of the contract between the Government and civil servants so that if an agreement was reached between the Government and the associations which are parties to the agreement, that agreement would not bind individual civil servants. In view of this, the 1968 Agreement is not a relevant consideration in deciding on the implementation of the proposed pay reduction.</p>	<p>—</p>

Civil Service Pay : the legal issues

1. The current debate concerning a possible reduction in civil service pay has thrown up important legal issues. Would a pay reduction be lawful and consistent with the Basic Law?
2. The Department of Justice is confident that a limited pay reduction, achieved through legislation, would be both lawful and consistent with the Basic Law.

Pay adjustment mechanism

3. The current pay adjustment mechanism takes into account the net pay trend indicators derived from the pay trend survey, the state of the economy, budgetary considerations, movements in the cost of living, the Staff Sides' pay claims and civil service morale. It is flexible enough to take account of reductions as well as increases, since some of these factors are capable of upward and downward movements. But if the result of applying these factors suggests that there should be a reduction of pay, the question now is how best we could achieve it.

The need for legislation

4. As a general rule, the terms of a contract cannot be unilaterally varied by one party. And so, without the agreement of the employee, an employer cannot generally reduce an employee's pay.
5. In civil servants' contracts, the Government reserves the right (normally in clause 20) to alter any of the terms of appointment or conditions of service should the Government at any time consider this to be necessary. This might appear to give the Government the right to reduce salaries unilaterally. But decided cases indicate that the courts are unlikely to accept that this general power of variation applies to such a fundamental term as the salary. It would therefore not be safe to regard that provision as authorising a unilateral pay reduction.
6. There is another route that is open to some employers. They may be able to terminate employees' contracts by notice and offer them re-employment on a lower salary. However, a large proportion of civil servants have permanent contracts that cannot be terminated by notice. For those

without permanent contracts, the termination route is theoretically possible. But the prospect of dismissing civil servants en masse, with no guarantee that they would accept re-employment on lower salaries, would raise serious concerns about the smooth operation of the Government, and of deliveries of services to the public.

7. It has been suggested that there is a further route open to the government, namely to reach an agreement with the civil service. However, even if such an agreement were reached with civil service central consultative councils, it would not prevent individual civil servants from challenging any agreed pay reduction.]

8. Faced with these difficulties, the only safe way to achieve a lawful reduction in civil service pay is through legislation. If legislation to reduce pay is enacted the risk of a successful legal challenge would be significantly reduced.

Basic Law issues

9. But if there is to be a civil service pay reduction, would it be lawful and consistent with the Basic Law? And if so, would any legislation to give effect to such pay reduction be consistent with the Basic Law?

10. [Article 100 provides that public servants serving in all Hong Kong government departments before the establishment of the Hong Kong SAR “may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before.” Assuming that the pay reduction does not make the salaries of civil servants lower than they were on 30 June 1997, there would be no breach of that Article.

11. Moreover, in a case decided in 1998, the court held that Article 100 was intended to ensure continuity of employment so that no public servant suffers as a consequence of the transition itself, but was not intended to inhibit the introduction of new measures for the good governance of Hong Kong. The Association of Expatriate Civil Servants had challenged the introduction, after Reunification, of a Chinese language proficiency requirement for those civil servants who wished to transfer to permanent terms of service. After explaining the purpose of Article 100, the court held that it had not been breached by the introduction of this new requirement.

12. Article 103 of the Basic Law provides that Hong Kong’s previous system of management for the public service, including special bodies for advising on their pay and conditions, shall be maintained. The emphasis here is on the system, rather than on the pay and conditions themselves.

13. The system for pay adjustments, which has been in place since 1974, has been described earlier. The application of that system this year reflects the downward trend of relevant factors and, in particular, the downturn in the economy and our deficit budget. If the revised pay levels give full effect to the established system, there would therefore be no breach of Article 103.

14. Article 160 of the Basic Law provides that contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the Hong Kong SAR, provided that they do not contravene the Basic Law. The contractual rights of civil servants who were employed on 30 June 1997 are within this provision. But the pay of those who remain in Government employment has been increased since that date by between 4.99% (for directorate officers at D3 and above) and 11.32%.

15. Assuming that the proposed pay reductions would not bring salaries to a level below that on 30 June 1997, the right to the salary as at that date would be fully recognized and protected.

16. Can it be argued that the rights protected by Article 160 include a right not to have any legislative interference with a subsisting contract? Given that laws previously in force can be amended by legislation, provided that the amendments are consistent with the Basic Law, it would be extraordinary if contractual rights could not be modified by legislation. Article 160 cannot have been intended to have that effect. It is primarily a savings provision, to ensure that contractual rights did not fall away as a result of Reunification.

17. The proposed pay reduction has taken full account of all relevant factors under the established civil service pay adjustment mechanism, which is itself consistent with Article 103 of the Basic Law. The legislative approach now proposed would simply be a new measure to give effect to a justified decision made under the established mechanism. Applying the reasoning that governs Article 100, it would also be a measure for the good governance of Hong Kong. Thus, the proposed legislative pay reduction is consistent with the Basic Law. The argument that Article 160 prohibits such a reduction cannot therefore be accepted.]

Conclusion

18. The proposed pay reduction is controversial. But the legal issues should be put on one side. It is clear that, if there is to be a reduction, legislation is needed. And it is clear that a limited pay reduction would be consistent with the Basic Law.

Harold William Newnham Fynn

v.

Attorney General

[1991] 1 HKLR 315

Facts

This was an interlocutory appeal by the Attorney General, who was the defendant. The Plaintiff was a Police Research Officer remunerated contractually at a level equivalent to a Superintendent of Police. In April 1988, the pay scale of the Police was revised resulting in an increase in remuneration for police officers. The Plaintiff and his colleagues were deemed to be holding civil jobs and were excluded from the new pay scale. The Plaintiff sued the government for breach of contract. The AG applied to strike out the action for disclosing no cause of action. The application was successful before a Master. The plaintiff appealed.

High Court Decision

Mayo J allowed the appeal because the defendant applicant was not able to show that the plaintiff had no prospect whatever of success in the litigation and it was by no means certain that the plaintiff would not succeed in his claim.

Comments

The judge followed the case of Lam Yuk-ming and others v. Attorney General [1980] HKLR 815, and opined that to alter the basis upon which an employee was remunerated was such a basic alteration that it was doubtful that the Government could do so unilaterally.

Lam Yuk-ming & Ors v. Attorney General
[1980] HKLR 815

Facts

The appellants were 26 dispensers, who were at the relevant time, in the employment of the Hong Kong Government. They sought to appeal against the judgement of Cons J. whereby he dismissed their action for a declaration and held that the Governor of Hong Kong had under Article XVI of the Hong Kong Letters Patent the authority to suspend their officers without pay. The authority under which the Secretary for the Civil Service purported to suspend the appellants from office without pay lay in regulation 611 of the Civil Service Regulation ("CSR 611").

Issues

Two issues (amongst other things) were addressed:

- (a) (i) Is there a contract of service between the Crown and the public officers?
- (ii) If there is, do Colonial Regulations and CSR 611 form part of that contract?
- (b) If there is a contract of service between the Crown and public officers, can the conditions of that contract be varied unilaterally by the Crown, with the variations becoming part of the contract?

Court of Appeal Decision

Appeal dismissed.

- (a) There is a contract between the Crown and its servants and its terms are mutually enforceable, even though this contract contains one anomalous provision (the power of dismissal at pleasure) which overrides the contract, and, if used, effectively negates the usual relationship of employer and employee. The Crown, by the form of the contract which it offers to its employees, has chosen to incorporate all Government Regulations into the contract of service.

- (b) There is a contract between the Crown and public officers, which is variable at the will of the Crown if the public officer's initial terms of service indicate to him that such a power is reserved to the Crown.

- (c) It follows that CSR 611 became a condition of service of every such public officer on its promulgation in October 1977.

Comments

The following observation of Roberts, C.J. in this judgement was cited by Mayo J. in *Fynn v. A-G* [1991] 1 HKLR 315:

"... With hesitation, we conclude that that principle is applicable also when any term is capable of unilateral variation, and that such a clause does not destroy the contractual relationship between the Crown and public officers, however vulnerable the latter may be as a result...."

Mayo J. said that "[t]here seems to be little doubt that there is nothing to prevent the Government from effecting changes and modifications to the various regulations relating to employment. However, it is doubtful whether a basic alteration could be made by the Government unilaterally such as changing the basis upon which the employee is remunerated." (at p.318)

**United Association for the Protection of Trade Ltd.
and
Killairn
(17 September 1985, unreported)**

Facts

This was an appeal to the Employment Appeal Tribunal against the decision made by the Industrial Tribunal in the United Kingdom. At the hearing of the case by the Industrial Tribunal, the Tribunal considered a clause in the employment contract concerned which reserved to the employer the right to make alterations to the contract of employment. The Industrial Tribunal decided that the employer had been unreasonably timid not to exercise the reserved power of variation under the employment contract which would have entitled them to re-organize their undertaking. The employer appealed against the decision on the ground that the Tribunal's construction of the employment contract was erroneous.

Issues

One of the issues was the proper construction of the clause reserving to the employer the right to make alterations to the contract of employment.

Decision of the Employment Appeal Tribunal

The reserved power of variation should be construed narrowly. A clause reserving to an employer the right to alter a contract of employment did not give the employer a free hand to re-write the employment bargain throughout the workforce. The Industrial Tribunal had, therefore, misdirected themselves in law and it was a material and significant misdirection.

Comments

The Appeal Tribunal's decision would suggest that even though there is an express power for an employer to make alterations to a contract of employment unilaterally, the power would not extend to giving the employer a right to introduce new terms of a significant substantial or fundamental character without the consent of the employee.

Wandsworth London Borough Council

v.

D'Silva and another

[1998] IRLR 193

Facts

Wandsworth London Borough Council has a code of practice on staff sickness which includes procedures for monitoring and reviewing different categories of absence. In 1995, the employers notified the employees of certain changes to the code.

Issues

Whether the relevant provisions of the code could be amended by the employer unilaterally.

UK Court of Appeal Decision

The Court examined the language of the relevant provisions and held that they did not provide an appropriate foundation on which to base contractual rights. They did not more than provide guidance for both supervisors and employees as to what was expected to happen in certain circumstances. Therefore, the employers were entitled to amend the provisions unilaterally.

Comments

- (1) The approach mentioned in paragraph 11 of LC Paper CB(1)1832/01-02(02) is an obiter dictum.
- (2) Being a test case, the Court found it might be useful to give some general guidelines on the situation in which an employer could amend the employment contract unilaterally:
 - (a) The general position is that contracts of employment can only be varied by agreement.
 - (b) However, if one party intends to reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party, clear language is required.
 - (c) The court is unlikely to favour an interpretation which does more than enable a party to vary contractual provisions with which the party is required to comply.