

For discussion on  
19 June 2006

LC Paper No. CB(1)1746/05-06(06)

## **LEGISLATIVE COUNCIL PANEL ON PUBLIC SERVICE**

### **Civil servants' freedom and right to join trade unions and take part in trade union activities**

#### **Supplementary Information**

#### **Introduction**

In April 2006, we circulated, for Members' information, a Panel paper on "Civil servants' freedom and right to join trade unions and take part in trade union activities" (LC Paper No. CB(1)1288/05-06(02)). On 18 May 2006, a Member wrote to the Clerk to the Panel, raising a number of questions on issues covered in that Panel paper.

2. This paper sets out the Administration's response to the questions raised.

#### **International Labour Convention No.98**

3. The first question raised by the Member is reproduced below:-

"Is Article 1 of the International Labour Convention No. 98 - Right to Organize and Collective Bargaining Convention 1949 - applicable to civil servants and non-civil service contract (NCSC) staff? If yes, regarding the rights to join trade unions and to take part in their activities, should civil servants and NCSC staff be entitled to the same protection enjoyed by employees in general (i.e. protection under Parts IVA and VIA of the Employment Ordinance)?"

4. We have consulted the Department of Justice ("DoJ").

5. The International Labour Convention No. 98 - Right to Organise and Collective Bargaining Convention 1949 - applies in the Hong Kong Special Administrative Region. The freedom and right of Hong Kong residents (including civil servants and NCSC staff) to join trade union and to

take part in trade union activities are protected under Articles 27 and 39 of the Basic Law and Article 18 of the Hong Kong Bill of Rights Ordinance (Cap. 383). While the Employment Ordinance (Cap. 57) is not applicable to the Government as an employer, we have put in place administrative arrangements that help ensure the spirit of the Ordinance is upheld with regard to civil servants and NCSC staff.

**Mechanism for handling complaints raised by civil servants and NCSC staff against alleged discrimination relating to trade union membership or participation in trade union activities**

6. The second question raised by the Member is reproduced hereunder:-

“Is there any established mechanism or procedures to handle cases in which a civil servant is discriminated against because of his participation in a trade union and its activities? If yes, please give details of such mechanism or procedures, including:

- (a) Whether the case-handling authorities or persons have the same statutory power to investigate, inquire and gather evidence as that of the Commissioner for Labour;
- (b) What punishment will be meted out to persons who commit an anti-union discriminatory act against the civil servants;
- (c) What remedy is available to civil servants discriminated against because of his participation in a trade union and its activities; and
- (d) Whether such mechanism or procedures may apply to NCSC staff?”

7. We have promulgated a set of general guidelines on staff complaints procedure, dealing with expressions of dissatisfaction by any member of staff, about the treatment he has received from other staff in his bureau/department or from the management. Any civil servant or NCSC staff who feels aggrieved that his right to join trade union and take part in

trade union activities has been violated may seek redress through this well established staff complaint procedure.

8. The officers responsible for handling complaints in the context of the above procedure, including complaints of alleged discrimination relating to trade union membership or participation in trade union activities, are expected to investigate the complaint in such a manner as may be justified by the circumstances of the case. The investigation may include consultation with DoJ and, where appropriate, the relevant authority in the Administration (such as the Commissioner for Labour on matters relating to labour and trade union legislation). Where the complaint is substantiated, the defaulting party may be subject to administrative/disciplinary action depending on the circumstances of the case including the gravity of the breach.

9. If after following the prescribed procedure which provide for appeals to higher authorities, the civil servant or NCSC staff making the complaint is not content with the response he has received from his Permanent Secretary or Head of Department, he may appeal to the Secretary for the Civil Service, the Chief Secretary for the Administration, and ultimately the Chief Executive.

10. A civil servant or NCSC staff who considers that the Government – as his employer – has violated, or threatened to violate, his right to join trade union and take part in union activities under Article 18 of the Hong Kong Bill of Rights Ordinance may seek civil remedy or relief under section 6(1) of the Ordinance.

### **The Hong Kong Bill of Rights Ordinance**

11. The third question raised by the Member is reproduced hereunder:-

“According to Part VIA of the Employment Ordinance, unless an employer can prove that a dismissal is one with valid reason as specified in that provision, otherwise the Labour Tribunal may, upon considering the relevant appeal, rule that the dismissal is unlawful. The pre-1997 government issued in October 1993 a LegCo brief

entitled Review of Industrial Relations System in Hong Kong (EMB CR 1/3051/93 II), which set out the following: *“breaches of (anti-union discrimination) these provisions are difficult to prove because a covert intent to discriminate can always be disguised under other manifested cause.... To enhance the protection against anti-union discrimination, and to overcome the technical difficulty of establishing in court the employer’s intention to discriminate, it is proposed that if an employee is dismissed on grounds of union membership or activities, he may make a claim for compensation to the Labour Tribunal, and the burden of proving that the dismissal is not discriminatory should rest with the employer”*. If a civil servant or NCSC staff is discriminated against because of his participation in a trade union or its activities, and seeks civil remedy under section 6(1) of the Hong Kong Bill of Rights Ordinance, does the onus of proof also lie with the employer of this civil servant or NCSC staff (which is the Government in this case)?”

12. We have consulted DoJ, the Education and Manpower Bureau and the Labour Department.

13. Part VIA of the Employment Ordinance (the Ordinance) gives employees the right to claim remedies if they are dismissed, among other things, for exercising their right in respect of trade union membership and/or taking part in trade union activities. In cases involving dismissal alleging anti-union discrimination, if the employer can prove that there is a valid reason for the dismissal within the meaning of section 32K of the Ordinance (**Annex A**), the employee dismissed is not entitled to employment protection under Part VIA of the Ordinance. If the employer is unable to show a valid reason for the dismissal, however, it is up to him to show that the dismissal is not due to discrimination of the employee because of his trade union membership and/or taking part in trade union activities.

14. In relation to the dismissal of an employee, if the Labour Tribunal finds that the employer has not shown a valid reason for the dismissal within the meaning of section 32K of the Ordinance and, upon finding that the employer, after having been given an opportunity to do so, refuses or fails to show that the dismissal is not discriminating against the employee for exercising his right in respect of trade union membership

and/or taking part in trade union activities, then the Labour Tribunal may award remedies to the employee.

15. While the Employment Ordinance is not applicable to the Government as an employer, we have laid down procedures and provisions that the appropriate authority in the Government must observe before terminating the service of a civil servant. In brief, a civil servant will be informed of the grounds on which termination of his service is contemplated and be allowed to submit representations. A decision will then be made by the appropriate authority after considering the circumstances of the case and representations, if any, made by the civil servant. Regarding NCSC staff, we have also promulgated rules that require Heads of Departments not to do anything that is in contravention of the provisions under the Employment Ordinance relating to unreasonable and unlawful dismissal.

16. In other words, although the Employment Ordinance is not applicable to the Government as an employer, we have put into place administrative arrangements that help ensure that the relevant spirit of the Ordinance (namely, that there is a valid reason within the meaning of section 32K of the Ordinance for the dismissal of a civil servant or NCSC staff) is upheld.

17. A civil servant or NCSC staff who considers that the Government - as his employer - has violated, or threatened to violate, his right to join trade union and to take part in trade union activities under Article 18 of the Hong Kong Bill of Rights Ordinance may seek civil remedy or relief under section 6(1) of the Ordinance. Under this Ordinance, the onus of proof is on the employee to show that the employer has violated or threatened to violate the employee's right under Article 18 of the said Ordinance.

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Heading Reasons for the dismissal or the variation of the terms of the contract of employment Back to Individual Section Format

For the purposes of this Part, it shall be a valid reason for the employer to show that the dismissal of the employee or the variation of the terms of the contract of employment with the employee was by the reason of-

- (a) the conduct of the employee;
- (b) the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;
- (c) the redundancy of the employee or other genuine operational requirements of the business of the employer;
- (d) the fact that the employee or the employer or both of them would, in relation to the employment, be in contravention of the law, if the employee were to continue in the employment of the employer or, were to so continue without that variation of the terms of his contract of employment; or
- (e) any other reason of substance, which, in the opinion of the court or the Labour Tribunal, was sufficient cause to warrant the dismissal of the employee or the variation of the terms of that contract of employment.

(Part VIA added 75 of 1997 s. 4)