

立法會
Legislative Council

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Bills Committee on Employment (Amendment) Bill 2016

Minutes of meeting
held on Friday, 1 April 2016, at 10:45 am
in Conference Room 3 of the Legislative Council Complex

- Members present** : Hon WONG Ting-kwong, SBS, JP (Chairman)
Hon LEE Cheuk-yan
Hon LEUNG Yiu-chung
Hon Andrew LEUNG Kwan-yuen, GBS, JP
Hon Cyd HO Sau-lan, JP
Hon IP Kwok-him, GBS, JP
Hon Alan LEONG Kah-kit, SC
Hon YIU Si-wing, BBS
Hon Gary FAN Kwok-wai
Hon CHAN Yuen-han, SBS, JP
Hon KWOK Wai-keung
Hon SIN Chung-kai, SBS, JP
Hon IP Kin-yuen
Hon POON Siu-ping, BBS, MH
Hon TANG Ka-piu, JP
Hon CHUNG Kwok-pan
Hon Alvin YEUNG Ngok-kiu
- Members absent** : Hon WONG Yuk-man
Hon Frankie YICK Chi-ming, JP
Dr Hon CHIANG Lai-wan, JP

**Public Officers : Item II
attending**

Ms Melody LUK
Assistant Commissioner for Labour
(Labour Relations)

Mr Simon LI
Chief Labour Officer (Labour Relations)
Labour Department

Ms Cecilia CHAN
Senior Labour Officer (Labour Relations)
Labour Department

Ms Betty CHEUNG
Senior Assistant Law Draftsman
Department of Justice

Ms Selina LAU
Senior Assistant Law Draftsman
Department of Justice

**Clerk in : Miss Betty MA
attendance Chief Council Secretary (2) 1**

**Staff in : Mr Alvin CHUI
attendance Assistant Legal Adviser 3**

Ms Rita LAI
Senior Council Secretary (2) 1

Ms Mina CHAN
Council Secretary (2) 1

Ms Kiwi NG
Legislative Assistant (2) 1

Miss Lulu YEUNG
Clerical Assistant (2) 1

Action

I. Election of Chairman

Mr LEUNG Yiu-chung, member who had the highest precedence in Council among members of the Bills Committee present, presided over the election of the Chairman. He invited nominations for the chairmanship of the Bills Committee.

2. Mr WONG Ting-kwong was nominated by Mr Andrew LEUNG and the nomination was seconded by Mr IP Kwok-him. Mr WONG Ting-kwong accepted the nomination.

3. As there was no other nomination, Mr LEUNG Yiu-chung declared that Mr WONG Ting-kwong was elected Chairman of the Bills Committee.

4. Members agreed that the election of Deputy Chairman was not necessary.

Late membership

5. Members agreed to accept the application from Mr LEE Cheuk-yan for late membership of the Bills Committee.

II. Meeting with the Administration

6. The Bills Committee deliberated (index of proceedings attached at **Annex**).

Admin

7. Members requested the Administration to:

- (a) clarify whether the employer of an unreasonable and unlawful dismissal case might, by paying the further sum, evade the liability to pay compensation under section 32P of the Employment Ordinance (Cap. 57);
- (b) provide information on the time when the Labour Advisory Board reached a consensus on the amount of the further sum of \$50,000; and
- (c) consider members' request for increasing the maximum amount of the further sum.

Action

- ALA3 8. Members requested Assistant Legal Adviser 3 to advise:
- (a) how a reinstatement or re-engagement order operated in the four discrimination related ordinances, viz. the Sex Discrimination Ordinance (Cap. 480), Disability Discrimination Ordinance (Cap. 487), Family Status Discrimination Ordinance (Cap. 527) and Race Discrimination Ordinance (Cap. 602); and
 - (b) whether the term "re-engagement" had been specifically defined under the law.

III. Any other business

Date of subsequent meetings

9. Members agreed to receive public views on the Bill at the next meeting to be held on 11 April 2016. A notice to invite public views would be posted on the Legislative Council website.
10. The Chairman added that another meeting with the Administration to discuss the Bill would be tentatively scheduled for 25 April 2016 from 2:30 pm to 4:30 pm.
11. There being no other business, the meeting ended at 12:34 pm.

Council Business Division 2
Legislative Council Secretariat
27 July 2016

**Proceedings of meeting of the
Bills Committee on Employment (Amendment) Bill 2016
held on Friday, 1 April 2016, at 10:45 am
in Conference Room 3 of the Legislative Council Complex**

Time marker	Speaker	Subject(s) / Discussion	Action Required
000000 - 000243	Mr LEUNG Yiu-chung Mr Andrew LEUNG Mr WONG Ting-kwong Mr IP Kwok-him	Election of Chairman	
000244 - 000402	Chairman Mr IP Kwok-him Mr LEE Cheuk-yan	Mr LEE Cheuk-yan's application for late membership.	
000403 - 000512	Chairman	Opening remarks	
000513 - 001157	Chairman Admin	Briefing by the Administration on the background and contents of the Employment (Amendment) Bill 2016 ("the Bill").	
001158 - 002014	Chairman Mr LEE Cheuk-yan Admin	<p>Mr LEE Cheuk-yan considered that the scrutiny of the Bill should be completed as early as possible, so that the resumption of Second Reading debate on the Bill could take place shortly.</p> <p>Mr LEE pointed out that the proposed further sum, which was three times the employee's monthly wages and subject to a maximum of \$50,000, was too low to provide sufficient deterrence for the employers to comply with the order for reinstatement or re-engagement made by the court or Labour Tribunal ("LT"). In his view, the amount of the further sum should be set at least six times the employee's average monthly wages up to a maximum of \$100,000. Mr LEE sought clarification as to whether:</p> <p>(a) the court or LT would, in making an order for reinstatement or re-engagement, specify at the same time the amount of terminal payments and compensation as well as the further sum to be paid to the employee concerned by the employer in the event that the employer failed to reinstate or re-engage the employee as required by the order; and</p>	

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		<p>(b) the reinstated employee would be awarded any remedies during the period when the employee was out of work.</p> <p>The Administration explained that:</p> <p>(a) under the existing provisions of the Employment Ordinance (Cap. 57) ("EO"), the court or LT must specify in its order for reinstatement or re-engagement the amount of terminal payments and compensation as it considered just and appropriate in the circumstances, to be paid to the employee by the employer if the employer failed to reinstate or re-engage the employee as ordered;</p> <p>(b) to enable an employee who was dismissed unreasonably and unlawfully to obtain the further sum the soonest possible without having to file another claim to the court or LT in the event that the employer failed to reinstate or re-engage him/her as required by the order, it was proposed that a further sum should be ordered by the court or LT at the same time when an order for reinstatement or re-engagement was made; and</p> <p>(c) on making an order for reinstatement or re-engagement, if the court or LT considered just and appropriate in the circumstances, it might specify as part of the remedies any amount payable by the employer to the employee in respect of any arrears of wages and statutory entitlements under EO which the employee might reasonably be expected to have had but for the dismissal, for the period between the dismissal and the date of reinstatement or re-engagement. In considering whether or not to award to the employee remedies, the court or LT would take into account the individual circumstances of the case, e.g. the employee might have taken up other employment during the period.</p>	

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002015 - 002544	Chairman Mr Andrew LEUNG Admin ALA3	<p>Mr Andrew LEUNG expressed grave concern about the obligation of an associated company under an order for reinstatement or re-engagement for the purpose of the Bill.</p> <p>The Administration advised that:</p> <p>(a) there was ambiguity in the existing EO provision on re-engagement by the employer's successor or associated company. Besides, given that the employer's successor or associated company was not a party to the proceedings relating to the employee's claim, there was doubt on how an order made by the court or LT might involve a successor or associated company. There was hence a need to remove the doubt and make necessary supplementary provisions on the arrangement for re-engagement of the employee by the employer's successor or associated company and the respective obligations of the employer and the successor or the associated company under a re-engagement order; and</p> <p>(b) the proposed section 32PA sought to provide an additional avenue for the employer to discharge his/her obligation under a re-engagement order where the employee was re-engaged by the employer's successor or associated company. Such arrangement had to be agreed by the three parties concerned, viz. the employee, employer and successor or associated company. The re-engagement terms must be specified in a written agreement made among the three parties concerned and endorsed by the court or LT. The associated company would not be compelled to re-engage the employee unless the associated company itself, together with the original employer and the employee concerned, reached an agreement to do so.</p> <p>Mr LEUNG considered that it was not appropriate for the associated company to reinstate or re-engage the employee concerned. As the arrangement had to be agreed by the three parties concerned, it would be more appropriate for the disputes to be settled out of the court.</p>	

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		<p>Assistant Legal Adviser 3 ("ALA3") drew members' attention to the fact that the above arrangement was only applicable to the employer's successor and an associated company under an order for re-engagement.</p>	
002545 - 002757	<p>Chairman Mr SIN Chung-kai Admin</p>	<p>Mr SIN Chung-kai considered that the proposed amount of the further sum was insufficient to ensure protection for employees, in particular high-salaried employees, against unreasonable and unlawful dismissal. He took the view that no cap should be imposed on the amount of the further sum. As least, it should be set at three months' wages of the employee or \$50,000, whichever was the higher. He might consider proposing Committee stage amendments to the Bill to this effect.</p> <p>The Administration explained that the legislative proposal, including the proposed amount of the further sum, was a broad consensus reached by the Labour Advisory Board ("LAB") after thorough discussion.</p>	
002758 - 003502	<p>Chairman Mr CHUNG Kwok-pan Admin</p>	<p>Invitation for public views on the Bill.</p> <p>Mr CHUNG Kwok-pan asked about the circumstances and considerations under which LT would make an order for reinstatement or re-engagement in a case of unreasonable and unlawful dismissal.</p> <p>The Administration advised that:</p> <ul style="list-style-type: none"> (a) under the existing provisions, the court or LT should first consider the making of an order for reinstatement before considering the making of an order for re-engagement. The court or LT would explain to both the employer and the employee what order might be made, and asked the two parties whether they agreed to the making of such an order. Subject to the mutual agreement between them, LT might make the order in accordance with that agreement; and (b) the Bill sought to remove the employer's agreement as a prerequisite to the making of an order for reinstatement or re-engagement by the court or LT in a case of unreasonable 	

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		<p>and unlawful dismissal in considering an employee's claim for reinstatement or re-engagement, if the court or LT found that an order for reinstatement or re-engagement was appropriate and compliance with the order by the employer reasonably practicable. In determining whether to make such an order, the court or LT had to take into account the circumstances of the case having regard to a number of factors, such as the relationship between the employee and the employer, the relationship between the employee and other persons in relation to the employment, the circumstances of the dismissal, any genuine difficulties that the employer might face when complying with the order. Before the court or LT determined whether to make an order for reinstatement or re-engagement, both the employer and the employee would be given an opportunity to present his/her case in respect of the making of the order.</p> <p>Regarding Mr CHUNG's concern about the arrangement of enlisting the successor or associated company of the employer into an order for re-engagement, the Administration advised that:</p> <p>(a) the employee might be re-engaged by the employer's successor or associated company if it was agreed by the employee, employer and successor or associated company. In the written agreement made among them, there had to be terms concerning the associated rights and obligation of the parties. Among others, the terms had to spell out that the employee's period of employment with the original employer was to be counted as a period of employment of the employee with the successor or associated company for reckoning the employee's existing and future entitlements under EO and his/her employment contract; and</p> <p>(b) if the successor or associated company eventually did not re-engage the employee, the original employer's obligation under the</p>	

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		<p>order for re-engagement was not relieved. The original employer had to pay to the employee terminal payments, compensation and further sum if he/she himself/herself had not re-engaged the employee either.</p> <p>The Chairman and Mr CHUNG remained concerned whether it was appropriate to transfer the re-engagement obligation to the alternative employer.</p>	
003503 - 004135	Chairman Mr LEUNG Yiu-chung Admin	<p>Mr LEUNG Yiu-chung sought clarification about the terms of employment of the employee who was re-engaged by the employer's successor or associated company.</p> <p>The Administration explained that as it might not be possible for the employer to reinstate the employee on exactly the same terms of his/her previous employment, in a re-engagement the employment terms might differ, e.g. change of post title or work place, etc. On making an order for re-engagement, the court or LT would consider the terms on which the employee was to be re-engaged and had to be satisfied that the terms were comparable to the original terms of employment of the employee.</p> <p>Mr LEUNG asked whether the Administration would consider increasing the amount of further sum to enhance protection for employees against unreasonable and unlawful dismissal.</p> <p>The Administration advised that the amount of the further sum, which had been fully deliberated and agreed by LAB, was remedies in addition to the terminal payments and compensation payable to the employee as ordered by the court or LT.</p>	
004136 - 004716	Chairman Mr TANG Ka-piu Admin	<p>Mr TANG Ka-piu considered that the Administration should take into account wage adjustments in these years and consider proposing corresponding adjustment to the ceiling of the further sum. He was concerned when LAB had reached a consensus on the amount of the further sum, i.e. \$50,000.</p> <p>While considering that the legislative proposal was a step forward, Mr TANG cast doubt as to</p>	

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		<p>whether the further sum would create a loophole for an employer to evade the payment of compensation that the employee was entitled to receive in respect of the dismissal under the existing provisions of EO.</p> <p>The Administration advised that should an employer eventually fail to reinstate or re-engage an employee as ordered, he/she was liable to pay the employee the sums that would have been awarded if no order for reinstatement or re-engagement had been made (i.e. terminal payments and compensation, if awarded, up to a maximum of \$150,000) plus a further sum of \$50,000 or three times the employee's average monthly wages, whichever was less.</p> <p>Mr TANG requested the Administration to provide responses in writing to the above concerns raised by him.</p>	<p>Admin</p>
<p>004717 - 005238</p>	<p>Chairman Mr POON Siu-ping Admin</p>	<p>Mr POON Siu-ping considered it necessary for the Administration to raise the maximum amount of the further sum, which had in fact been put forward for LAB's consultation in the last decade.</p> <p>Mr POON was concerned about the application of re-engagement provisions and whether a date would be set by which the employee must be re-engaged. The Administration advised that the court or LT would in an award order specify a date on which the order should be complied with. Where the employee, the employer and the employer's successor or associated company made an agreement that the employee was to be engaged by the employer's successor or associated company and the court or LT made a variation order for this purpose, the court or LT would also specify in the order the date by which the employee must be re-engaged. At the same time, the court or LT would specify in the order the amount of terminal payments, compensation and further sum to be payable by the original employer to the employee if the alternative employer failed to re-engage the employee as agreed. The employee was not required to file another claim with the court or LT for such payments.</p>	

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		<p>Mr POON's enquiry and the Administration's response regarding whether the employee who was ordered to be re-engaged was entitled to the payment of wages during the intervening period between dismissal and re-engagement.</p>	
005239 - 005836	<p>Chairman Mr KWOK Wai-keung Admin</p>	<p>Mr KWOK Wai-keung considered that the proposed amount of the further sum should be increased to provide adequate protection for employees, especially higher-paid employees and professionals, against unreasonable and unlawful dismissal. He asked when LAB agreed on the amount of the further sum.</p> <p>The Administration advised that:</p> <p>(a) LAB reached a consensus on the proposed amount of the further sum in 2007. LAB was appraised of the proposals under the Bill in end 2015. The Administration needed to consult LAB if the amount was to be revised; and</p> <p>(b) the median monthly wage of Hong Kong employees in 2015 was around \$15,000. The maximum amount of the further sum of \$50,000 was thus considered appropriate.</p> <p>Mr KWOK did not subscribe to the Administration's view, and pointed out that in 2014, the 75th and 90th percentile monthly wages of Hong Kong employees were some \$20,000 and nearly \$40,000 respectively. He considered that it was inappropriate for the Administration to make reference to the median monthly wage to set the amount of the further sum.</p> <p>The Chairman requested the Administration to provide a written response to members' concern about the amount of the further sum.</p>	<p>Admin</p>
005837 - 010539	<p>Chairman Mr YIU Si-wing Admin</p>	<p>Mr YIU Si-wing asked how long the reinstatement order would remain in force and whether the employer could arrange another position for the reinstated employee or terminate the employment if there were reasonable grounds for doing so.</p> <p>The Administration advised that the court or LT would take into account the circumstances of the</p>	

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		<p>case and would only make such an order when it considered that the order was appropriate and that compliance with the order by the employer was reasonably practicable. It was noteworthy that employers could not unilaterally change the terms of employment contract. Any variation of individual employment terms should be subject to the mutual agreement between the employer and the employee and in accordance with the relevant provisions under EO.</p> <p>Mr YIU expressed concern about the remuneration of the reinstated employees whose original employment might comprise basic wages, tips and commissions.</p> <p>The Administration advised that under an order for reinstatement, the employer was required to treat the employee in all aspects as if he/she had not been dismissed or as if there had been no variation of the terms of the employment contract.</p>	
010540 - 011309	Chairman Mr IP Kin-yuen Admin	<p>Mr IP Kin-yuen sought clarification on the meaning of the term "re-engagement" and calculation of length of service of the re-engaged employee.</p> <p>The Administration advised that where an employee was re-engaged as required by an order for re-engagement, the continuity of the employee's period of employment was not to be treated as broken for reckoning his/her entitlements under EO and his/her employment contract.</p>	
011310 - 011912	Chairman Mr LEE Cheuk-yan Admin	<p>Noting that provisions for the court to make an order for reinstatement without the employer's agreement also existed in the discrimination related ordinances, Mr LEE Cheuk-yan enquired how a reinstatement or re-engagement order operated under these ordinances and the legal consequences for non-compliance with such order.</p> <p>The Administration responded that as far as it was aware of, there had not been any court case involving the making of an order for reinstatement or re-engagement pursuant to the discrimination related ordinances.</p>	

Time marker	Speaker	Subject(s) / Discussion	Action Required
		<p>The Chairman requested ALA3 to advise how a reinstatement or re-engagement order operated under the four discrimination related ordinances, namely the Sex Discrimination Ordinance (Cap. 480), Disability Discrimination Ordinance (Cap. 487), Family Status Discrimination Ordinance (Cap. 527) and Race Discrimination Ordinance (Cap. 602).</p> <p>Mr LEE reiterated his dissatisfaction with the amount of the further sum. He strongly called on the Administration to make an upward adjustment to it, instead of reverting to LAB for consultation, as this would inevitably delay the legislative process.</p>	<p>ALA3</p>
<p>011913 - 012140</p>	<p>Chairman Ms Cyd HO Admin</p>	<p>Ms Cyd HO expressed support for an increase in the amount of the further sum to enhance protection for employees against unreasonable and unlawful dismissal.</p>	
<p>012141 - 012849</p>	<p>Chairman Mr CHUNG Kwok-pan Admin</p>	<p>Mr CHUNG Kwok-pan expressed concern whether, in a case of unreasonable and unlawful dismissal, the employer was liable to pay the concerned employee compensation even if the court or LT found that making an order for reinstatement or re-engagement was not appropriate after taking into account of a number of factors, such as the poor relationship between the employer and the employee.</p> <p>The Administration advised that in the case of unreasonable and unlawful dismissal, if the court had not made an order for reinstatement or re-engagement, it might order the employer to pay to the employee terminal payments and compensation as specified under EO.</p> <p>Mr CHUNG enquired about the liability for an employer who dismissed the reinstated employee subsequently in accordance with other provisions of EO. The Administration advised that there were specific provisions governing termination of contract in EO. Specifically, an employee who was dismissed owing to his/her exercising trade union rights within 12 months immediately before the dismissal could claim for remedies against the employer for unreasonable and unlawful dismissal.</p>	

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		<p>Mr CHUNG reiterated his concern about the proposed arrangement of re-engagement by the employer's successor or associated company, and asked about the definition of "associated company" in EO. The Administration explained that as stated in section 32E(3) and (4) of EO, two companies should be taken to be associated companies if one was a subsidiary of the other, or both were subsidiaries of a third company. The meaning of "company" and "subsidiary" should be construed in accordance with the Companies Ordinance (Cap. 622).</p> <p>The Chairman's enquiry and the Administration's response regarding whether the written agreement made among the employee, employer and successor or associated company must be satisfied by LT prior to the making of the re-engagement order.</p>	
012850 - 013752	Chairman Mr Alan LEONG Admin	<p>Mr Alan LEONG's enquiry and the Administration's response regarding how the proposed amount of the further sum was determined.</p> <p>The Administration's advice that the Bill did not apply to dismissal within the meaning of section 32A(1)(a) and 32A(1)(b) of EO.</p>	
013753 - 014422	Chairman Mr IP Kin-yuen Admin	<p>Mr IP Kin-yuen requested ALA3 to advise the legal meaning of the term "re-engagement".</p> <p>Mr IP pointed out that the salary of a teacher would largely be commensurate with the length of service. He was concerned about the impact of an order for re-engagement on the calculation of length of service of teaching staff who was involved in a case of unreasonable and unlawful dismissal and was later re-engaged by another school belonging to the same sponsoring body.</p> <p>The Administration responded that under the Bill, in the case where an employee was re-engaged by his/her employer's successor or associated company, the employee's period of employment with the original employer would be counted as a period of employment of the employee with the employer's successor or associated company for the purpose of reckoning his/her existing and</p>	ALA3

Time marker	Speaker	Subject(s) / Discussion	Action Required
		future entitlements under EO and his/her employment contract, and the continuity of employment was not to be treated as broken by the change of employer.	
014423 - 014753	Chairman Mr LEE Cheuk-yan Admin	Mr LEE Cheuk-yan's reiteration of his view on the amount of further sum and the Administration's response.	
014754 - 015041	Chairman Mr LEE Cheuk-yan	Scheduling of a meeting to receive public views on the Bill and further meetings to continue discussion with the Administration.	

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