

立法會
Legislative Council

LC Paper No. CB(2)1939/15-16
(These minutes have been seen
by the Administration)

Ref : CB2/BC/3/15

Bills Committee on Employment (Amendment) Bill 2016

Minutes of meeting
held on Monday, 11 April 2016, at 2:30 pm
in Conference Room 1 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
Dr Hon CHIANG Lai-wan, JP
Hon CHUNG Kwok-pan
Hon Alvin YEUNG Ngok-kiu

Members absent : Hon WONG Yuk-man
Hon Frankie YICK Chi-ming, JP

**Public Officers : Item I
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

**Attendance : Item I
by invitation**

Liberal Party

Mr SHIU Ka-fai
Vice Party Chair

Manpower Concern Group

Mr WONG Kwai-sang

The Federation of Hong Kong & Kowloon Labour Unions

Mr YAU Yik-shing
Secretary

Hong Kong Professional Teachers' Union

Mr CHAN Hung
Director of Rights & Complaints Dept

Individual

Mr WONG Kai-yeung

Labour Party

Miss Suzanne WU
Chairperson

Hong Kong Confederation of Trade Unions

Mr FAN Cheung-fung
Organizer

Individual

Mr LAI Chi-po

民生議政

Ms YAU Mei-po

合味道杯麵之友

Miss WONG Hiu-kwan

Hong Kong Chef Union

Mr YEUNG Yue-chung

Individual

Mr LEUNG Kam-wai
Kwai Tsing District Council member

Great Tsing Yi

Mr NGAN Lit-chau

Individual

Mr CHONG Ka-wai

Neighbourhood and Worker's Service Centre

Mr WONG Yun-tat

Hong Kong Buildings Management and Security Workers
General Union

Mr TAM Lok-kei
Chief Executive

Individual

Ms Christine FONG Kwok-shan
Sai Kung District Council member

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

Staff in attendance : Mr Alvin CHUI
Assistant Legal Adviser 3

Ms Mina CHAN
Council Secretary (2) 1

Ms Kiwi NG
Legislative Assistant (2) 1

Miss Lulu YEUNG
Clerical Assistant (2) 1

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I. Meeting with deputations and the Administration

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

2. Members received oral representations from 17 deputations/individuals on the Employment (Amendment) Bill 2016 ("the Bill") at the meeting. The major views and concerns expressed by deputations and individuals attending the meeting are summarized as follows:

- (a) the majority of deputations and individuals giving views at the meeting supported the proposal of making an order for reinstatement and re-engagement without the requirement of an employer's agreement;

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- (b) to enhance greater protection for employees, some deputations considered that remedies under the Bill should also be granted to employees who were not employed under a continuous contract or for a period of less than 24 months. Some deputations were of the view that non-compliance with an order for reinstatement or re-engagement by an employer should be made a criminal offence. Some deputations considered that the Administration should increase the amount of the further sum, in order to provide sufficient protection for employees, especially higher-paid employees; and
- (c) there was, however, an opposing view that it was impracticable for an employer to reinstate or re-engage a dismissed employee on a mandatory basis due to deterioration of working relations or loss of mutual trust and confidence between both parties. Given that the employer who did not agree to an order for reinstatement or re-engagement was liable to pay the dismissed employee terminal payments and compensation up to \$150,000, the proposed further sum would in effect impose double penalty on an employer who considered it inappropriate to reinstate or re-engage the employee concerned.

3. In response to the views and concerns raised by deputations and individuals attending the meeting, the Administration made the following points:

- (a) the Bill sought to remove the employer's agreement as the prerequisite for making a reinstatement or re-engagement order in the event of unreasonable and unlawful dismissal;
- (b) unlawful dismissal covered situation where the employee was dismissed in contravention of labour legislation under the following circumstances : (i) dismissal during pregnancy and maternity leave; (ii) dismissal during paid sick leave; (iii) dismissal after work-related injury and before determination/settlement and/or payment of compensation under the Employees' Compensation Ordinance (Cap. 282); (iv) dismissal by reason of the employee exercising trade union rights; or (v) dismissal for giving evidence or

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information in any proceedings or inquiry in connection with the enforcement of relevant labour legislation. Under the Employment Ordinance (Cap. 57), only the making of claim for unreasonable and unlawful dismissal under (i) and (ii) above required the claimant to be an employee who had been employed under a continuous contract; and

- (c) the Administration proposed a further sum payable to the employee concerned by the employer who failed to comply with an order for reinstatement or re-engagement made in an unreasonable and unlawful dismissal case. In drawing up the legislative proposal, the Government had made reference to overseas practices in this respect and considered the proposed payment of a further sum a pragmatic arrangement in balancing the interests of both employers and employees.

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- 4. The Administration was requested to provide information on overseas practices in respect of non-compliance of an order for reinstatement or re-engagement.

II. Any other business

- 5. Members noted that the next meeting of the Bills Committee would be scheduled for 25 April 2016 at 2:30 pm to continue discussion with the Administration on the Bill.

- 6. There being no other business, the meeting ended at 4:25 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 Monday, 11 April 2016, at 2:30 pm
in Conference Room 1 of the Legislative Council Complex**

Time marker	Speaker	Subject(s) / Discussion	Action Required
000000 - 000954	Chairman	Opening remarks	
000955 - 001303	Chairman Mr SHIU Ka-fai, Liberal Party	Presentation of views	
001304 - 001635	Chairman Mr WONG Kwai-sang, Manpower Concern Group	Presentation of views	
001636 - 001950	Chairman Mr YAU Yik-shing, The Federation of Hong Kong & Kowloon Labour Unions	Presentation of views [LC Paper No. CB(2)1306/15-16(01)]	
001951 - 002320	Chairman Mr CHAN Hung, Hong Kong Professional Teachers' Union	Presentation of views [LC Paper No. CB(2)1246/15-16(02)]	
002321 - 002647	Chairman Mr WONG Kai-yeung	Presentation of views	
002648 - 002953	Chairman Miss Suzanne WU, Labour Party	Presentation of views	
002954 - 003309	Chairman Mr FAN Cheung-fung, Hong Kong Confederation of Trade Unions	Presentation of views [LC Paper No. CB(2)1306/15-16(02)]	
003310 - 003604	Chairman Mr LAI Chi-po	Presentation of views	

Time marker	Speaker	Subject(s) / Discussion	Action Required
003605 - 003912	Chairman Ms YAU Mei-po, 民生議政	Presentation of views	
003913 - 004222	Chairman Miss WONG Hiu-kwan, 合味道杯麵之友	Presentation of views	
004223 - 004505	Chairman Mr YEUNG Yue-chung, Hong Kong Chef Union	Presentation of views	
004506 - 004836	Chairman Mr LEUNG Kam-wai, Kwai Tsing District Council member	Presentation of views	
004837 - 005159	Chairman Mr NGAN Lit-chau, Great Tsing Yi	Presentation of views	
005200 - 005519	Chairman Mr CHONG Ka-wai	Presentation of views	
005520 - 005824	Chairman Mr WONG Yun-tat, Neighbourhood and Worker's Service Centre	Presentation of views [LC Paper No. CB(2)1306/15-16(03)]	
005825 - 010136	Chairman Mr TAM Lok-kei, Hong Kong Buildings Management and Security Workers General Union	Presentation of views	
010137 - 010415	Chairman Ms Christine FONG Kwok-shan, Sai Kung District Council member	Presentation of views	
010416 - 010821	Chairman Admin	The Administration's response to the views and concerns raised by deputations and individuals attending the meeting.	

Time marker	Speaker	Subject(s) / Discussion	Action Required
010822 - 011650	Chairman Miss CHAN Yuen-han Admin	<p>Miss CHAN Yuen-han expressed grave dissatisfaction that the Administration had dragged its feet in taking forward the legislative proposal, and that the proposed amount of the further sum was too low to provide adequate protection for employees, especially higher-paid employees. She considered that the proposed cap on the further sum, which was set at \$50,000, should be adjusted upwards in line with wage adjustments over the years.</p> <p>The Administration reiterated that the amount of the further sum was a consensus reached by the Labour Advisory Board ("LAB") following rounds of discussion. The Administration took note of members' concerns in this regard.</p> <p>Miss CHAN's enquiries and the Administration's response regarding:</p> <p>(a) whether failure to pay the further sum by the employer would constitute a criminal offence; and</p> <p>(b) whether the employee concerned needed to revert to the court or the Labour Tribunal ("LT") for payments in case the employer failed to reinstate or re-engage the employee.</p>	
011651 - 012235	Chairman Mr LEE Cheuk-yan Admin	<p>Mr LEE Cheuk-yan noted that the Employment (Amendment) Bill 2016 ("the Bill") did not cover cases of unreasonable dismissal, in which mutual consent of the employer and employee was still required for the court or LT to make an order for reinstatement or re-engagement. He queried about such inconsistency in the handling of cases of unreasonable and unlawful dismissal as proposed under the Bill and other cases of unreasonable dismissal.</p> <p>The Administration reiterated that the Bill sought to remove the employer's agreement as the prerequisite for making an order for reinstatement or re-engagement in cases of unreasonable and unfair dismissal. The Administration had no intention to extend the scope of the Bill.</p>	

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		<p>Mr LEE considered that employers' non-compliance with the order for reinstatement or re-engagement should be made a criminal offence in order to enhance the deterrence effect.</p> <p>The Administration advised that in drawing up the legislative proposal, reference had been made to overseas practices in respect of the making of compulsory reinstatement or re-engagement order. Having regard to the circumstances of Hong Kong and the views of employers and employees, the current legislative proposal was considered a pragmatic arrangement in balancing the interests of parties concerned.</p> <p>Mr LEE requested the Administration to provide information on overseas practices in respect of non-compliance with an order for reinstatement or re-engagement.</p>	<p>Admin</p>
<p>012236 - 012749</p>	<p>Chairman Mr KWOK Wai-keung Admin</p>	<p>Mr KWOK Wai-keung reiterated his dissatisfaction with the proposed maximum amount of the further sum, which was considered too low to have adequate deterrence effect. He asked whether the Administration had worked out any proposals regarding the ceiling of the further sum for consultation of LAB. The Administration advised that while it had taken note of members' views, it was unable to provide a concrete response at the moment.</p> <p>Mr KWOK was concerned about those employees who were unable to obtain the compensation awarded by LT specified in the order for reinstatement or re-engagement due to the winding-up of their employers' companies. He pointed out that the Protection of Wages on Insolvency Fund ("the Fund") did not cover sums payable by employers for non-compliance with a reinstatement or re-engagement order. He asked whether the Administration would amend the Protection of Wages on Insolvency Ordinance (Cap. 380) ("PWIO") to address such problem.</p> <p>The Administration responded that depending on the kinds of payments owed, the affected employees could make application to the Fund for ex gratia payments in respect of payments</p>	

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		awarded by LT. The Administration had no plan to amend PWIO in the context of the Bill.	
012750 - 013409	Chairman Ms Cyd HO Mr WONG Kai-yeung	<p>Ms Cyd HO said that the Labour Party expressed support for increasing the maximum amount of the further sum, and considered that due regard should be given to imposing criminal liability on the employer who failed to comply with the reinstatement or re-engagement order.</p> <p>At the invitation of Ms HO, Mr WONG Kai-yeung supplemented his views on the meaning of "reasonably practicable" in the proposed section 32N(3B) of the Bill.</p>	
013410 - 013941	Chairman Mr LEUNG Yiu-chung Admin	<p>Mr LEUNG Yiu-chung considered that the employer's agreement for making an order for reinstatement or re-engagement was an absurd requirement. He requested the Administration to provide information on the respective numbers of cases in which the employers agreed and disagreed to the making of the order for reinstatement or re-engagement by the court or LT.</p> <p>The Administration advised that since the enactment of the relevant labour legislation, there were not many cases where the court or LT had ordered to reinstate or re-engage the dismissed employees. On the other hand, around 20% of dismissed employees seeking reinstatement or re-engagement were reinstated or re-engaged by their employers upon the reconciliation of the Labour Department.</p> <p>Mr LEUNG took the view that the proposed amount of the further sum was too low to safeguard the reinstatement or re-engagement right of an employee. The Administration reiterated that the proposed amount of the further sum was a consensus reached by LAB.</p>	
013942 - 014451	Chairman Mr CHUNG Kwok-pan Admin Mr WONG Kai-yeung	Responding to Mr CHUNG Kwok-pan's enquiry, the Administration advised that the legislative proposal was applicable to foreign domestic helpers, as labour legislation covered all employees, including foreign domestic helpers, working in Hong Kong.	

Time marker	Speaker	Subject(s) / Discussion	Action Required
		<p>Mr CHUNG cast doubt about the practicability of making a compulsory order for reinstatement or re-engagement given that the relationship between the employer and employee might further deteriorate following the legal proceedings.</p> <p>The Administration explained that before determining whether to make an order for reinstatement or re-engagement, the court or LT had to consider a number of factors, including the relationship between the employer and the employee, and both the employer and employee would be given an opportunity to present their cases in respect of the making of such an order.</p> <p>At the invitation of Mr CHUNG, Mr WONG Kai-yeung pointed out that while court orders for reinstatement or re-engagement were rarely made in overseas jurisdictions, the right to reinstatement had symbolic significance in the human rights context.</p>	
014452 - 015041	Chairman Mr LEE Cheuk-yan Admin	<p>Mr LEE Cheuk-yan enquired about the meaning of "reasonably practicable" for considering whether the employer could comply with an order for reinstatement or re-engagement.</p> <p>The Administration explained that in determining whether to make an order for reinstatement or re-engagement, the court or LT would take into account the circumstances of the case and would only make such an order when it considered that the order was appropriate and the compliance with the order by the employer was reasonably practicable.</p> <p>Mr LEE asked about the reasons why the provisions relating to making an order for reinstatement or re-engagement under the Bill were different from those in the four discrimination-related ordinances, namely the Sex Discrimination Ordinance (Cap. 480), the Disability Discrimination Ordinance (Cap. 487), the Family Status Discrimination Ordinance (Cap. 527) and the Race Discrimination Ordinance (Cap. 602).</p>	

Time marker	Speaker	Subject(s) / Discussion	Action Required
		<p>The Administration advised that the four discrimination-related ordinances had no provision on non-compliance of an order for re-employment. The Administration considered it appropriate to spell out in the Bill the employer's liability for failure to comply with an order for reinstatement or re-engagement.</p>	
<p>015042 - 015531</p>	<p>Chairman ALA3</p>	<p>In response to the enquiries raised by members at the previous meeting, ALA3 made the following points:</p> <p><u>Operation of the reinstatement or re-engagement order in the discrimination-related ordinances</u></p> <p>(a) in the four discrimination-related ordinances, the term "re-engagement" was not used. Instead, the District Court could order an employer to "re-employ" an employee ("the Order") without the need to first secure the employer's agreement; and</p> <p>(b) it was not stipulated in the four discrimination-related ordinances the legal consequences for an employer who failed to comply with the Order. The employee concerned could only be able to enforce the order under Order 45 rule 5 of the District Court Rules. Such remedies included committal of the employer for non-compliance with the Order.</p> <p><u>Definition of the term "re-engagement"</u></p> <p>(a) "re-engagement" was not a term that had been specifically defined under any judicial decisions in Hong Kong, but it was a term specifically defined and used in the context of EO under section 32N; and</p> <p>(b) the term "re-engagement" was also used in section 115 of the Employment Rights Act 1996 in UK. The existing section 32N of EO was modelled on section 115 of the Employment Rights Act 1996 in UK.</p>	

Time marker	Speaker	Subject(s) / Discussion	Action Required
015532 - 015609	Chairman	The Chairman requested Mr WONG Kai-yeung to provide his written submission to the Secretariat, as far as practicable, after the meeting. Date of next meeting.	

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27 July 2016