



Labour Department (Headquarters)

勞工處（總處）

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Our reference 本處檔案編號 : LD CR 38/706 Pt.27
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31 March 2016

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Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
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Dear Mr. CHIU,

Employment (Amendment) Bill 2016

I set out below our response on the matters raised in your letter of 21 March 2016 concerning the Employment (Amendment) Bill 2016 ("Bill").

Clause 4 – section 32N(3D)

2. The conciliation undertaken by the Labour Department (LD) is held under the Labour Tribunal Ordinance (Cap 25). The conciliation is conducted on the basis of confidentiality and non-prejudicial to the legal rights of the employer and the employee. While the proposed section 32N(3D) of the Bill provides that with the agreement of the employer and the employee, the court or Labour Tribunal (LT) may request the Commissioner for Labour (Commissioner) to provide a report containing information of the claim obtained in connection with the conciliation, the proposed section 32N(3E) stipulates that such a report may only be provided if the employer and the employee agree to the content of the report. Hence, a report can

only be submitted to and considered by the court or LT if the report and the information therein have received prior agreement from both the employer and the employee for disclosure to the court or LT.

3. The proposed section 32N(3D) aims to provide the court or LT a statutory channel, where it is desirable to do so, to obtain the information revealed by the employer and employee in connection with the conciliation. The information may only be provided with the agreement of the employer and the employee. This helps ensure that the confidential and non-prejudicial basis of the conciliation would not be affected.

Clause 4 – section 32N(3E)

4. To uphold the confidential and non-prejudicial nature of conciliation, which underpins its effectiveness at all times, the agreement of the employer and the employee is made the prerequisite for not only the making of request for the report by the court or LT, but also the information to be included in the report to be prepared by the Commissioner. We do not consider it appropriate for the Commissioner or the court or LT to be given discretionary powers to allow the report to be submitted in the event of disagreement on the contents by the parties.

5. Under the proposed section 32N(3C), before making a finding for the purpose of section 32N(3B) of whether the making of an order for reinstatement or re-engagement is reasonably practicable, the court or LT must give an opportunity to the employer and the employee to present each of their cases in respect of the making of an order for reinstatement or re-engagement and take into account a number of specified circumstances. The request for a report from the Commissioner is optional for the court or LT in making such a finding.

Clause 7 – section 32PA

6. Under the proposed section 32PA(4), an application for variation of a re-engagement order may only be made by an employee. This is to ensure that in the event that the court or LT has made an order for the original

employer to re-engage the employee, alternative compliance with the order by the employer's successor or associated company engaging the employee is indeed the conscious wish of the employee.

Clause 8 – section 32PC

7. The proposed section 32PC allows the employer to apply for relief from paying the further sum mentioned in the proposed section 32NA(1)(b) if it is no longer reasonably practicable for the employer to reinstate or re-engage the employee because of reasons attributable to the employee or because a change of circumstances has occurred beyond the employer's control since the court or LT last found that reinstatement or re-engagement of the employee is reasonably practicable.

8. Under the proposed sections 32N(4)(d) and 32N(6)(e), the employer becomes liable to pay the further sum mentioned in section 32NA(1)(b) if the employee is not reinstated or re-engaged by the date specified in the order. Given the liability of the employer to pay the further sum arises if the employee is not reinstated or re-engaged by the specified date for reinstatement or re-engagement, it appears that under normal circumstances, events occurred after that date may not be relevant to the employer's failure to reinstate or re-engage the employee as ordered. Nevertheless, the court or LT may take into account any events which it considers relevant in determining whether relief from paying the further sum should be granted

Consequential amendments

Question (a)

9. There is no requirement that a stay of execution can only be made by the employee in the event that an alternative compliance application is made.

Question (b)

10. Pursuant to the proposed section 32J(4) of the Employment Ordinance, Cap. 57, the Court of First Instance or the District Court may, for

a claim transferred to it from the Labour Tribunal under section 10(2) of the Labour Tribunal Ordinance, Cap. 25, make all or any of the orders and awards provided for under, inter alia, section 32PA (alternative compliance with order for re-engagement) and 32PC (relief from payment).

11. Upon the aforesaid transfer of the proceedings to the District Court or the Court of First Instance, the respective rules and practice of the District Court or the Court of First Instance, as the case may be, apply to the proceedings in the like manner as they would apply to proceedings commenced in the District Court or the Court of First Instance, to the extent they are applicable and subject to such modification as are necessary (see respective Order 79 of the Rules of the District Court, Cap. 336H and the Rules of the High Court, Cap. 4A and Hong Kong Civil Procedure 2016, Volume 1, paragraph 79/1/1).

12. The District Court and the High Court under their respective rules have specific powers to order a stay of execution of the judgment or order or grant relief and on such terms, as it thinks just. For example, the respective Order 45 rule 11 of the Rules of the High Court, and the Rules of the District Court provides:

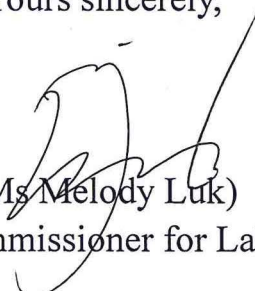
“Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just.”

Order 45 rule 11 should be wide enough to cover a possible application for stay pending an alternative compliance application and a relief application under the proposed sections 32PA and 32PC.

13. In this regard, we do not consider it necessary to introduce amendments to the District Court Rules and the High Court Rules to provide the District Court or Court of First Instance with any additional statutory power to order a stay of execution of the original reinstatement or

re-engagement order pending an alternative compliance application or relief application.

Yours sincerely,



(Ms Melody Luk)
for Commissioner for Labour