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Bills Committee on Employment (Amendment) Bill 2016

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper sets out background information and summarises the past discussions of the Panel on Manpower on the Administration's proposal to empower the Labour Tribunal ("LT") to make a compulsory order for reinstatement or re-engagement of an employee who has been dismissed unreasonably and unlawfully, and to require the employer to pay a further sum to the employee for failing to comply with such an order.

Background

2. Under Part VIA of the Employment Ordinance (Cap. 57) ("EO"), employees are afforded employment protection under different circumstances, including the right to claim remedies against their employers if they have been unreasonably and unlawfully dismissed¹. Where an employee has been unreasonably and unlawfully dismissed, LT may, subject to the mutual consent of the employer and the employee, make an order for reinstatement²/re-engagement³. If no order for reinstatement/re-engagement is

¹ Unreasonable and unlawful dismissal refers to the situation where an employee is dismissed in as mentioned in section 32A(1)(c) of EO, viz., the employee is dismissed other than for a valid reason as specified under EO (including the conduct of the employee, his/her capability/qualification for performing the job, redundancy or other genuine operational requirements of the business, compliance with legal requirements, or other reason of substance), and the dismissal is in contravention of labour legislation, including dismissal during pregnancy and maternity leave, during paid sick leave, after work-related injury, by reason of the employee exercising trade union rights or giving evidence for the enforcement of relevant labour legislation.

² Under section 32N(4) of EO, an order for reinstatement is an order that the employer shall treat the employee in all respects as if he had not been dismissed or as if there had been no such variation of the terms of the contract of employment.

³ Under section 32N(6) of EO, an order for re-engagement is an order that the employer must re-engage the employee in an employment on terms comparable to his original terms of the employment or in other suitable employment.

made, LT may make an award of terminal payments and an additional award of compensation not exceeding \$150,000 to the employee. LT, however, has no power to make an order for reinstatement/re-engagement without the employer's consent, even if it considers such an order appropriate.

3. According to the Administration, to enhance employees' protection against unreasonable and unlawful dismissal, it has, in consultation with the Labour Advisory Board ("LAB") and relevant stakeholders, proposed to amend EO to empower LT to make a compulsory order without securing the consent of the employer for reinstatement/re-engagement of an employee who has been dismissed unreasonably and unlawfully, if LT considers making such an order appropriate and compliance with it by the employer reasonably practicable. It also proposes to order the employer to pay a further sum subject to a maximum of \$50,000 to the employee in the event of non-compliance with the order by the employer.

The Employment (Amendment) Bill 2016 ("the Bill")

4. The Administration introduced the Bill into the Legislative Council ("LegCo") on 2 March 2016. The Bill seeks to amend EO so that -

- (a) the employer's agreement is not a pre-requisite for ordering reinstatement or re-engagement of the employee, if an employee is dismissed unreasonably and unfairly;
- (b) the employer must pay a further sum to the employee if the employer fails to reinstate or re-engage the employee; and
- (c) the employer is liable to commit an offence if the employer wilfully and without reasonable excuse fails to pay the further sum.

Deliberations of the Panel

Adequacy of protection

5. Some members considered that the proposed amount of the further sum, which was three times the employee's monthly wages and subject to a maximum of \$50,000, was too low and insufficient to ensure protection for employees, especially the professional and high-salaried employees, against unreasonable and unlawful dismissal. Noting that the maximum amount of \$50,000 was calculated based on the findings from past cases in which the average monthly salary of employees concerned was around \$10,000, some members considered that the ceiling should be reviewed and adjusted in view of the accumulated wage increase over the years.

6. According to the Administration, the consensus of LAB on specific elements of the legislative proposal, including the proposed amount of the further sum and the penalty on employers concerned, had been reached after thorough discussion. Members' attention was drawn to the current median monthly wage which was around \$15,000. The Administration took the view that the legislative proposal would be able to provide further protection to employees, and assured members that it would keep in view the protection for employees' rights in this respect.

7. Some members were of the view that the legislative proposal should safeguard employment of employees exercising trade union rights, and cast doubt about the deterrent effect of the reinstatement/re-engagement provisions to be enacted in protecting employees against anti-union discrimination. Some members considered that employers' non-compliance with the order for reinstatement or re-engagement should be made a criminal offence in order to increase the deterrence effect.

8. Members were advised that an employee who was dismissed owing to his exercising trade union rights under relevant provisions of EO within 12 months immediately before the dismissal was entitled to make a claim for remedies against the employer for unreasonable and unlawful dismissal. The Administration believed that the stringent enforcement effort would strengthen the deterrent effect and send a strong message to employers that violating EO was a serious offence. According to the legislative proposal, in considering an employee's claim for reinstatement or re-engagement, if LT found that an order for reinstatement or re-engagement was appropriate and compliance with the order by the employer reasonably practicable, it might make such an order even if the employer disagreed. As such, the right to opt for reinstatement or re-engagement or receiving terminal payments and/or compensation would be vested in the employees concerned.

Safeguard against non-compliance with a reinstatement/re-engagement order

9. Some members expressed concern whether the proposed amendments could plug the loophole for an irresponsible employer to evade his responsibility to comply with a reinstatement/re-engagement order. These members were worried that the further sum would have conversely given employers an alternative to evade from carrying out the compulsory reinstatement order, as the employer concerned might opt to pay a further sum rather than complying with the compulsory order. There was a suggestion that a provision should be made for LT to exercise discretion to make a compulsory order strictly for reinstatement or re-engagement.

10. The Administration advised that under the legislative proposal, a re-engagement order would be directed at the employer and hence, he could not shift the responsibility to his successor or associated company. The employer could only relieve his obligation to comply with such order if his successor or associated company re-engaged the employee concerned and if the employee consented. If the employer failed to comply with the proposed compulsory order to reinstate or re-engage the employee, the latter should be entitled to a further sum of three times of his monthly wages, subject to a maximum of \$50,000. This sum would be over and above the terminal payments and award of compensation.

Monitoring mechanism

11. Some members were concerned whether there were measures in place to ensure that employees could receive payments awarded by LT. The Administration advised that it was also concerned about the failure of some employees in obtaining the judgment sum awarded by LT, particularly because of employers' wilful intention of defaulting. As an employer who wilfully and without reasonable excuse failed to pay a sum for wages or other specified entitlements awarded by LT within 14 days after it became due would commit an offence and would be liable on conviction to a maximum fine of \$350,000 and three years of imprisonment. The Administration considered penalty level was effective in deterring the offenders.

12. According to the Administration, cases of default payment of LT awards were broadly divided into two categories. The first category recorded most of the cases which involved mainly insolvent employers. Under such circumstances, LD would provide the employees concerned with assistance in executing the award or instituting winding-up or bankruptcy proceedings against the insolvent employers, and refer the cases to the Protection of Wages on Insolvency Fund for application of ex gratia payments, if applicable. For the second category of cases where the employers were solvent and still in operation, upon receipt of the employee's complaint on default of LT awards, LD would conduct follow-up investigation and, with sufficient evidence of breach of EO requirements, take out criminal prosecution against the employer. The Administration added that in the past, LD had successfully secured conviction of employers who defaulted LT awards, with one of them being fined \$300,000 and some other employers being sentenced to imprisonment for a few weeks to a few months. Past cases indicated that it was mostly employees of medium and small-sized companies who failed to obtain the judgment sum. The Administration would continue to work closely with the Judiciary to explore feasible improvement measures on execution of awards made by LT.

Wage payment during the intervening period

13. Some members were concerned whether a reinstated employee would be entitled to payment of wages for the period he was out of work. According to the Administration, the existing legislation did not provide for wage payment in the intervening period. This was because wages were payable in respect of work done. The law should not provide for wage payment when no work was performed. This position would remain unchanged after the proposed amendments. In considering whether to award to the employee payment of an amount equivalent to his lost wages, LT would take into account the individual circumstances of the case, including the taking of other employment by the employee concerned during the intervening period. An employee, upon a reinstatement order of LT, should be treated in all aspects as if he had not been dismissed or as if there had been no variation of the terms of the employment contract. In the case where an employee was re-engaged by his employer's successor or associated company, his previous length of service with the original employer would be reckoned as service with the new employer.

Relevant papers

14. A list of the relevant papers on the LegCo website is in the **Appendix**.

Appendix

Relevant papers on proposed amendments to the reinstatement and re-engagement provisions under the Employment Ordinance

Committee	Date of meeting	Paper
Panel on Manpower	20.11.2003 (Item IV)	Agenda Minutes
Panel on Manpower	17.1.2008 (Item III)	Agenda Minutes
Panel on Manpower	21.1.2010 (Item V)	Agenda Minutes
Panel on Manpower	23.2.2010 (Item II)	Agenda Minutes
Panel on Manpower	17.6.2010 (Item II)	Agenda Minutes
Panel on Manpower	21.10.2010 (Item II)	Agenda Minutes
Panel on Manpower	20.10.2011 (Item II)	Agenda Minutes
Panel on Manpower	20.1.2012 (Item V)	Agenda Minutes
Panel on Manpower	19 November 2013 (Item III)	LC Paper Nos. CB(2)555/13-14(01) and (02)
Panel on Manpower	9 October 2014 (Item III)	LC Paper No CB(2)383/14-15(01)
Panel on Manpower	15 December 2015 (Item V)	Agenda Minute