



立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

來函檔號 YOUR REF LD CR 38/706 Pt.27
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By Fax (2544 3271)

7 April 2016

Ms Melody LUK
Assistant Commissioner for Labour (Labour Relations)
Headquarters
Labour Department
16/F, Harbour Building
38 Pier Road
Central
Hong Kong

Dear Ms LUK,

Employment (Amendment) Bill 2016

Thank you for your letter dated 31 March 2016. Concerning the Administration's responses to our enquiries, I should be grateful if you would further clarify the following matters.

Clause 4 – sections 32N(3C) to 32N(3E)

As stated in paragraphs 3 and 4 of your letter, the proposed legal framework in sections 32N(3C) to 32N(3E) is intended to uphold and ensure the confidential and non-prejudicial nature of conciliation. However, the court or the Labour Tribunal ("LT") may need to call for a report under the proposed section 32N(3D) when it finds that the information that will be obtained from the report is relevant in making its finding. In the absence of the report when an employer or an employee fails to agree to its contents, please clarify:

- (a) whether the court or LT may seek further clarification from the employer and the employee under the proposed section 32N(3C);
- (b) if the answer to (a) is affirmative, whether the court or LT can ask the employer and the employee any information in connection with the conciliation;

- (c) if the answer to (b) is affirmative, whether the purpose of introducing section 32N(3D) and (3E) would be defeated; and
- (d) even if the answer to (b) is negative, as the court or LT, or the parties themselves, may have difficulty to know what should be kept confidential, would it be likely that the confidential and non-prejudicial information would be revealed under the process of section 32N(3C)? Should the court or LT be specifically asked to exclude such information in connection with the conciliation?

Clause 7 – section 32PA

As stated in paragraph 6 of your letter, the proposed section 32PA arrangement is intended to ensure that an application for variation is indeed the "conscious wish" of the employee.

It is noted that, under the proposed section 32PA, an order of variation may only be made by the court or LT if there is a written agreement among all relevant parties and the court or LT is satisfied with the terms on which the alternative employer is to engage the employee. The terms of the order also seems to be sufficient in ensuring the "conscious wish" of the employee is secured. Please clarify:

- (a) with such a sophisticated application process, the justification for granting the power to make an application for variation to one party to the proceedings only, i.e. the employee; and
- (b) what action the employer could take if the employee fails, refuses or neglects to make an application for variation even though an re-engagement agreement has already been entered into by all relevant parties.

Consequential amendments

Concerning the power of granting a stay of execution of the judgment or order by the District Court and the High Court, the Administration is of the view that Order 45 rule 11 of the District Court Rules ("RDC") and the High Court Rules ("RCH") 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.

We wish to point out that the Court of Appeal in *Credit Lyonnais v SK Global Hong Kong Ltd*¹ held that a stay of execution under Order 45 rule 11 may be granted where "*new evidence emerges after the relevant judgment, showing that it was not valid.*". The proposed alternative compliance application and relief application are not based on the validity of the original order. It seems that Order 45 rule 11 does not cover a possible application for stay pending such applications. However, the Court of Appeal has confirmed in *Credit Lyonnais v SK Global Hong Kong Ltd* that the court has inherent jurisdiction to stay a judgment which have been regularly obtained and there is no challenge as to its validity or appeal pending.

Please clarify whether the Administration is of the view that the employer or the employee can rely on the inherent jurisdiction of the courts instead of Order 45 rule 11 to apply for a stay pending an alternative compliance application and a relief application under the proposed sections 32PA and 32PC.

I look forward for receiving your reply in both languages by 15 April 2016.

Yours sincerely,



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¹ [2003] 4 HKC 104.