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

Employment (Amendment) Bill 2016

I set out below our response on the matters raised in your letter of 7 April 2016 concerning the Employment (Amendment) Bill 2016 (“Bill”).

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

2. The proposed section 32N(3C) provides that for unreasonable and unlawful dismissal cases, before making a finding on whether reinstatement or re-engagement of the employee by the employer is reasonably practicable, the court or Labour Tribunal (“LT”) must give an opportunity to the employer and the employee to present their cases in respect of the making of an order for reinstatement or re-engagement. Reflecting a consensus reached by the Labour Advisory Board (“LAB”), the Bill further proposes that the court or LT may request the Commissioner for Labour (“Commissioner”) to submit a report containing information that relates to the circumstances of the claim obtained in connection with the conciliation.

3. The proposed section 32N(3D) and (3E) provides the court or LT with a statutory channel to obtain the above-mentioned information without jeopardising the confidential and non-prejudicial nature of the conciliation. The Bill is not going to make changes to the current power of the court or LT to inquire into, hear and determine claims.

Clause 7 – section 32PA

4. The proposed section 32PA seeks to clarify the re-engagement provisions under Part VIA of the Employment Ordinance (EO) (Cap. 57). The policy is that the obligation to re-engage the employee under a re-engagement order all along rests on the employer. Nevertheless, with the consent of the employee, the employer's obligation under the order to re-engage the employee can be taken to have been fulfilled if the employer's successor or associated company engages the employee on comparable terms.

5. To safeguard the interests of the employee and clearly define the respective rights and obligations of the parties under the arrangement, the proposed section 32PA spells out that the re-engagement terms must be specified in a written agreement made among the employee, the employer and the employer's successor or associated company, and that application to vary the re-engagement order is to be made by the employee. In the written agreement, there are terms concerning the associated rights and obligation of the parties. If the successor or associated company has not re-engaged the employee, the original employer's obligation under the order for re-engagement will not be relieved.

6. As endorsed by LAB, under this arrangement, the employee's consent is the pre-requisite for an offer of re-engagement by the employer's successor and associated company. If the employee does not make an application for variation of the re-engagement order after the re-engagement agreement is made, the original re-engagement order as made by the court or LT remains in force.

Consequential amendments

7. Concerning the power of granting a stay of execution of the judgment or order by the District Court and the High Court, we are asked to comment on whether 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 of EO as introduced by the Bill. You have drawn our attention to the judgment of the Court of Appeal in *Credit Lyonnais v SK Global Hong Kong Ltd* [2003] 4 HKC 104, and stated that the proposed alternative compliance application and relief application are not based on the “validity of the original order” and that, it seems to you, Order 45 rule 11 does not cover a possible application for stay pending such an application under the proposed sections 32PA and 32PC.

8. As explained below, we take the view that the applicability of Order 45 rule 11 and the meaning of “validity of the original order” as discussed in *Credit Lyonnais* and other relevant authorities are not as restrictive as suggested by you and Order 45 rule 11 should be wide enough to cover an application for stay pending an alternative compliance application and a relief application under the proposed sections 32PA and 32PC respectively. In any event, the courts have inherent jurisdiction or otherwise to order such a stay.

Validity of the original order

9. In *Credit Lyonnais*, Ma CJHC (as the Chief Justice then was) said, *inter alia*, that:

“Thus, a stay of execution may be granted where:

- (1) New evidence emerges after the relevant judgment, showing that **it was not valid**: see *Tam Ho Man v Wong Kwok Tai* (HCA 4736/1985), Hunter J, 20 October 1986) digested at [1986] HKLY 705. This case dealt with the court’s jurisdiction under RHC O 45 r 11.” (Emphasis added)

In the same case, Rogers VP said:

“Order 45 r 11 empowers a court to order a stay of execution of a judgment or order on the grounds of matters which have occurred since the date of the judgment or order. In the case of *London Permanent Benefit Building Society v de Baer* [1969] 1 Ch 321 Plowman J considered that the matters referred to in the rule were those which **would have prevented the order being made, or which would have led to a stay of execution if they had already occurred at the date of the order.**” (Emphasis added)

10. In *Tam Ho Man* (supra.), the court dealt with a situation in which, after judgment had been entered, the plaintiff issued a bankruptcy notice against the defendant, and the defendant sought a stay of execution upon the basis that the defendant would pay the judgment debt by instalments. Hunter J said:

“All the examples given are matters which go to the question of the validity of that judgment against that defendant. They are very far removed from matters which go to the enforcement of that judgment e.g. the giving of a notice of bankruptcy... Those passages in Bouvier [Volume 1 of Bouvier’s Dictionary] certainly have served to confirm my initial impression on reading the rule. **‘On the ground of matters which have occurred since the date’ refers to matters which go to the validity of the judgment, and which if established before the court, might justify the court in saying that, this is not a judgment which on the material now placed before it, it will allow to be executed upon.**” (Emphasis added)

11. In *Gobind Mohan v Robertson Double*, HCA 7754/1995 unreported 30 August 1995, Findlay J dealt with an application to stay an order of examination on the grounds that terms of settlement had been agreed between the parties. The cases of *Tam Ho Man* and *London Permanent Benefit Building Society* (supra.) were cited. Findlay J referred to the latter case where Plowman J held that the fact that defendant had ‘now put his affairs in order and made arrangement to pay off the arrears and to comply with his

obligations ... duly and promptly' did not give a ground for a stay of execution because it was implicit in the rule that 'the matters referred to are matters which would or might have prevented the order being made, or would or might have led to stay of execution if they had already at the date of that order.'

12. According to the understanding of Findlay J, those two cases stated:

"that the ground to justify a stay or other relief must be such that, if it had arisen before the judgment or order was granted, would have persuaded the court not to grant the judgment or order, or, if it did grant the judgment or order, to grant a stay or other appropriate relief. That was not the case on the facts before Hunter J or Plowman J. There the defendants were pleading for a mitigation of the consequences of the judgments, not because of anything that might have persuaded the courts not grant the judgments, but because of personal factors that might have raised the sympathy of the judges, but no more..." (paragraph 6, emphasis added)

Findlay J went on to explain the facts in the case before him under the principles in the two cases—

"The situation before me is different. Here, Mohan [the applicant] says, in effect, that after the judgment had been entered against him, he 'paid' the judgment debt; he waived claims against Robertsons and they waived claims against him. If this alleged negotiated settlement had arisen before the judgment, it would have been a ground on which to refuse judgment. A court would not enter judgment ordering a party to pay a sum of money that had already been paid, or was no longer due. According, I find that, under Order 45, rule 11, I have jurisdiction to grant the relief claimed." (paras. 7-8)

13. In view of the authorities extracted above, the meaning of the "validity of the original order" should be considered in the relevant context. Matters as referred to in Order 45 rule 11 are those which would have prevented the order from being made, or would have led to a stay of

execution if they had already occurred at the date of the order.

14. The proposed alternative compliance application under section 32PA may only be made by the employee and must be accompanied by a written agreement to that effect among the original employer, the employee and the alternative employer. If an employee has already reached such an agreement with the employer and the alternative employer, it is not envisaged to be necessary for the employer to apply for a stay of execution of the original order against him/her pending the determination of the alternative compliance application; it does not make much sense that if an employee is applying for an alternative compliance application which is pending the court's determination, he/she will seek to enforce the original order. If such a situation had materialized before the reinstatement or re-engagement order was made by the court, it is not unreasonable to expect that the court would have been persuaded not to make the said order which otherwise would be against the wish of all the parties concerned. On reliance of *Gobind Mohan*, we take the view that the court may invoke Order 45 rule 11 to order a stay of execution should there be such an application for stay of execution pending the determination of the alternative compliance application.

15. Insofar as the proposed relief application under section 32PC is concerned, it may only be made on the grounds that it is no longer reasonably practicable for the employer to reinstate or re-engage the employee in accordance with the original order (section 32PC(2) and (3)). Had the impracticability been known to the court before the reinstatement or re-engagement order was made, it is not unreasonable to expect that the court would have been persuaded not to make the said order against the employer which would otherwise be futile. On reliance of *Gobind Mohan*, we take the view that the court may invoke Order 45 rule 11 to order a stay of execution should there be such an application for stay of execution pending determination of the relief application.

Inherent jurisdiction

16. In *Credit Lyonnais*, Ma CJHC (at para. 2) expressed "no doubt that the court retains an inherent jurisdiction, in suitable cases, to make orders

staying execution quite apart from those situations expressly permitted under the Rules of the High Court (namely, RHC O.45, r.11, O.47, r.1 and O.59, r.13). By the term "suitable cases" are meant those situations in which the inherent jurisdiction of the court is required to be exercised so as to avoid injustice, prevent abuse, preserve the dignity of the court or to facilitate the administration of justice."

17. Ma CJHC also saw no good reason why the inherent jurisdiction of the court to stay execution generally should not equally apply, *inter alia*, to those situations where new evidence emerges after the relevant judgment, showing that it was not valid (see para. 6 of *Credit Lyonnais*).

18. In the case of the District Court, under section 48(1) of the District Court Ordinance (Cap. 336), it has the same power as the Court of First Instance in any proceedings before it, to grant relief or redress either absolute or conditionally which ought to be granted or given.

19. In the light of the above, we take the view that apart from Order 45 rule 11, the courts have inherent jurisdiction or otherwise to order a stay of execution pending the determination of an alternative compliance application and a relief application under the proposed sections 32PA and 32PC.

Yours sincerely,



(Ms Melody Luk)
for Commissioner for Labour