Labour Department (Headquarters) 勞工處（總處）

Your reference 來函編號 : CB2/BC/3/15
Our reference 本處檔案編號 : LD CR 38/706 Pt.28
Tel. number 電話號碼 : 2852 4099
Fax number 傳真機號碼 : 2544 3271

14 June 2016

Clerk to the Bills Committee
(Attn: Ms Betty MA)
Legislative Council
1 Legislative Council Road
Central
Hong Kong

(Fax: 2185 7845)

Dear Ms MA,

Bills Committee on Employment (Amendment) Bill 2016
Meeting on 7 June 2016

Thank you for your letter of 2 June 2016. We set out below the Government's response to the five sets of Committee stage amendments ("CSAs") proposed by Hon LEE Cheuk-yan to the Employment (Amendment) Bill 2016 ("the Bill").

Set 1 (Clause 4)

2. This set of CSAs proposes that if the employer has engaged a permanent replacement for the employee, the court or Labour Tribunal (LT) must not take that fact into account in determining whether reinstatement or re-engagement of the employee by the employer is reasonably practicable unless (i) it was not practicable for the employer to not engage a permanent replacement; or (ii) after the lapse of a reasonable period during which the employer has not heard from the employee that the employee wished to be reinstated or re-engaged, it was no longer reasonable for the employer to not engage a permanent replacement.

3. As the time for the employee to be able to obtain an order for reinstatement or re-engagement by the court or LT is usually not known, it is not unlikely that the employer would normally hire a replacement employee to fill the vacancy as soon as the dismissed employee has left. This is especially so given that many employers in Hong Kong are small-and-medium sized enterprises (amounting to 98% of the establishments in Hong Kong), which have limited capacity in making deployment of staff to absorb the workload of the dismissed employee. Moreover, it is relevant to note that under the Employment Ordinance ("EO") (Cap. 57), an employee may make a claim for remedies with LT within nine months after the dismissal. In other words, the employee may raise his/her wish for being reinstated or re-engaged on any day within nine months after the dismissal. There would thus be problems requiring an employer not to engage a replacement till after a period of time without having heard from the previously dismissed employee that he/she wishes to be reinstated or re-engaged. In addition, the proposed CSAs are undesirable as it would give rise to the dismissal of the replacement employee when a reinstatement or re-engagement order is made.

4. We wish to point out that the proposed section 32N(3C) of the Bill has spelt out the relevant circumstances that the court or LT must take into account in determining whether reinstatement or re-engagement of the employee by the employer is reasonably practicable. Whether the engagement of a replacement employee would render it not reasonably practicable for the employer to reinstate or re-engage the dismissed employee is to be determined by the court or LT on individual case merits (for example, whether it is possible to re-deploy the replacement employee to other posts, whether it is appropriate to make an order for re-engagement instead of reinstatement so that the dismissed employee would take up another post in the same company, etc.). We therefore consider it not appropriate to further restrict the circumstances to be considered by the court or LT in making a finding on whether it is reasonably practicable for the employer to reinstate or re-engage the dismissed employee.

Set 2 (Clause 5)

5. This set of CSAs proposes amendments to the amount of the "further sum". Under the Bill, a further sum is payable to the employee

if the employer does not reinstate or re-engage the employee as required by a reinstatement or re-engagement order made by the court or LT in an unreasonable and unlawful dismissal (UUD) case. The relevant CSAs propose a number of amendments to the proposed section 32NA(1)(b) of the Bill including (i) deleting "lesser" and substituting "greater"; (ii) deleting "50,000" and substituting "100,000"; and (iii) deleting "3 times" and substituting "6 times". The proposed amendments imply that when the circumstances to pay the further sum arises, the employer will be required to pay to the employee at least $100,000 or 6 months' wages of the employee, whichever is the higher. By virtue of the proposed CSAs, the proposed ceiling of $50,000 for the further sum will be removed.

6. With the minimum amount of the further sum set at $100,000 under the proposed CSAs, an employer may be required to pay a disproportionate amount of further sum to the employee for not reinstating or re-engaging the employee (for example, a part-time employee with monthly wages of $4,000 would get a further sum equivalent to 25 months' wages). On the other hand, by increasing the amount of the further sum to six months' wages of an employee and by removing the proposed ceiling of the further sum, the amount of further sum for an employee with high monthly wages may be a substantial amount (for example, an employee who earns $50,000 per month would receive a further sum of $300,000). It is important to point out that an employee may already have been awarded terminal payments and compensation for being unreasonably and unlawfully dismissed under EO. The further sum is in addition to the terminal payments and compensation which the employer has a liability to pay if he does not reinstate or re-engage the employee as ordered by the court or LT in a UUD case.

7. During the deliberations in the past Bills Committee meetings, we note that there were also views from some Members that a ceiling should be set for the further sum. Bearing in mind the further sum is in addition to terminal payments and compensation (which may amount to $150,000), some Members expressed concerns about the affordability of employers, especially the small-and-medium sized enterprises in meeting the further sum requirement.

8. Under the Government's proposal, the further sum is set at three times the employee's average monthly wages or $50,000, whichever is the lesser. As pointed out in our previous reply dated 6 May 2016 (LC Paper No. CB(2)1439/15-16(01)), this amount is a consensus reached by

the Labour Advisory Board ("LAB") after detailed discussions involving LAB Members as well as the major employers' associations and employee unions which they represent. Whilst LAB, having discussed the various proposals from Members of the Bills Committee, agreed that the ceiling for the further sum as proposed in the Bill might be increased in its May 2016 meeting, LAB members advised that they would need time to further consult their respective organisations before they could discuss the subject further at LAB. The Labour Department will inform the Bills Committee if and when LAB has reached a new consensual view on this matter. Given the latest proposed CSAs, the Labour Department will need to bring the matter back to LAB for discussion.

Set 3 (Clauses 4, 8, 14 and 18)

9. This set of CSAs proposes that apart from cases of UUD, the court or LT may also make an order for reinstatement or re-engagement without the agreement of the employer for cases of unreasonable dismissal ("UD"). Currently in both UUD and UD cases, EO stipulates that the agreement of both employer and employee are required for the court or LT to make an order for reinstatement or re-engagement.

10. UD refers to the situation where an employee is dismissed as mentioned in s.32A(1)(a) of EO, viz., the employee is dismissed by the employer because the employer intends to extinguish or reduce any right, benefit or protection conferred or to be conferred upon the employee by EO. An employee shall be taken to have been so dismissed unless a valid reason as specified under EO is shown for the dismissal (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 reasons of substance). Whereas in a case of UUD, an employee is dismissed without a valid reason as set out above and the dismissal is also in contravention of labour legislation. The relevant labour legislation includes dismissal during pregnancy and maternity leave, during paid sick leave, after work-related injury and before determination/settlement and/or payment of compensation under the Employees' Compensation Ordinance (Cap. 282) or by reason of the employee exercising trade union rights or giving evidence for the enforcement of relevant labour legislation.

11. The Bill seeks to empower the court or LT to make an order for reinstatement or re-engagement without the agreement of the employer for cases of UUD only. Where the employer has not only dismissed the employee without a valid reason as specified under EO, the dismissal is also in contravention of labour legislation. To strengthen the protection for employees in UUD cases, the Bill seeks to empower the court or LT to make an order for reinstatement or re-engagement without the agreement of the employers concerned.

12. The main object of the Bill does not cover UD cases. In an UD case, the employer is not in contravention of any labour legislation. The proposed CSAs would appear to fall outside the scope of the Bill and we are seeking legal advice on this.

Set 4 (adding new Clauses 3A and 6A and amendments to Clauses 5 and 12)

13. This set of CSAs proposes that employees subject to UD may be awarded compensation under section 32P of EO which, under the existing EO, is only applicable to UUD cases.

14. In a case of UD, other than an order for reinstatement or re-engagement (where there is agreement of both the employer and the employee), the court or LT may also make an award of terminal payments to the employee. Terminal payments refer to the statutory entitlements under EO that the employee has not been paid and that the employee is entitled to upon dismissal, or that he/she might reasonably be expected to be entitled to under EO had he/she been allowed to continue his/her employment to attain the minimum qualifying length of service required for the entitlements under EO, and any other payments due to the employee under his/her contract of employment.

15. Under EO, a compensation under section 32P can only be made for UUD cases, but not UD cases. A compensation to an employee in an UUD case may be awarded by the court of LT up to a maximum of $150,000 as it considers just and appropriate in the circumstances. In determining whether to make an award of compensation and the amount of the award of compensation, LT shall take into account the circumstances of the claim which include the circumstances of the employer and the employee, the employee's length of service, the manner in which the dismissal took place, any loss sustained by the employee

which is attributable to the dismissal, possibility of the employee obtaining new employment, any contributory fault borne by the employee, and any payments that the employee is entitled to receive in respect of the dismissal.

16. The main object of the Bill does not cover UD cases, nor does it seek to expand the scope of coverage of the compensation under section 32P. The proposed CSAs would appear to fall outside the scope of the Bill and we are seeking advice on this.

Set 5 (Clauses 3, 4, 7, 8, 9, 10, 11, 12, 14 and 18 and adding new Clause 5A)

17. This set of CSAs seeks to provide that if the employer does not reinstate or re-engage the employee in accordance with a reinstatement or re-engagement order, the employee may choose not to accept the payment of terminal payments, compensation and the further sum, and to file an application to the court or LT for an order for compliance. If the employer does not comply with the order for compliance, the employee may make an application to the court, and the employer would be required to pay to the employee the three sums mentioned above and would be subject to (i) a maximum fine of $350,000 (part or whole of the fine may be paid to the employee); (ii) imprisonment for a maximum term of 3 years; and/or (iii) sequestration of property.

18. Under the Bill, where the court or LT makes an order for reinstatement or re-engagement in an UUD case, it shall specify that in the event that the employer fails to reinstate or re-engage the employee as ordered, three sums are payable to the employee, namely: (i) the amount of terminal payments that would have been awarded under section 32O if neither a reinstatement nor re-engagement order had been made; (ii) the amount of compensation that would have been awarded under section 32P if neither a reinstatement nor re-engagement order had been made; and (iii) the further sum. The three sums are to be specified in the order for reinstatement or re-engagement at the time when the order is made. Under such an arrangement, the employee would be automatically entitled to the three sums if the employer does not comply with the order, thereby sparing the employee the need to file another application to LT for adjudication of his/her entitlement to the three sums. If the employer pays the above three sums in accordance with the order, the employee is not entitled to enforce the other terms of the order.

19. It is the consensus of LAB that instead of penalizing the employer for a fine or imprisonment, the employee shall be paid the three sums in an expeditious manner and the employer's obligation to reinstate or re-engage the employee should be relieved after paying the three sums. This arrangement is considered a pragmatic one which strikes a right balance between the interests of employers and employees. LAB discussed the matter again in depth at its meeting held in May 2016 and maintained its consensus that non-compliance of a reinstatement or re-engagement order should not be criminalised.

20. In view of the above, we oppose all five sets of CSAs as proposed by Hon LEE Cheuk-yan. However, in keeping with our standing practice, we will take the matter back to LAB for discussion.

Yours sincerely,

(Ms Melody LUK)
for Commissioner for Labour

c.c. DoJ