

Employment (Amendment) Bill 2016

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A BILL

To

Amend Parts VIA and IXB of the Employment Ordinance so that, for a dismissal in any of the circumstances mentioned in its section 32A(1)(c), the employer's agreement is not a pre-requisite for ordering reinstatement or re-engagement, a failure to comply with the order entails an additional liability to pay a further sum and a failure to pay the sum is covered by the offence under its section 43P; to clarify, and supplement as necessary, provisions on engagement by the employer's successor or associated company under an order for re-engagement; and to provide for incidental and connected matters.

Enacted by the Legislative Council.

Part 1

Preliminary

1. Short title and commencement

- (1) This Ordinance may be cited as the Employment (Amendment) Ordinance 2016.

- (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Labour and Welfare by notice published in the Gazette.
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Part 2

Amendments to Employment Ordinance

2. Employment Ordinance amended

The Employment Ordinance (Cap. 57) is amended as set out in sections 3 to 12.

3. Section 32J amended (jurisdiction of Labour Tribunal)

(1) Section 32J(2)—

Repeal

everything before “under this Part”

Substitute

“(2) The Labour Tribunal does not have jurisdiction to inquire into, hear or determine a claim”.

(2) Section 32J—

Repeal subsection (3)

Substitute

“(3) A claim under this Part over which the Labour Tribunal has jurisdiction may be transferred under section 10 of the Labour Tribunal Ordinance (Cap. 25) but may be so transferred only to the Court of First Instance or the District Court.

(4) The Court of First Instance or the District Court may, for a claim so transferred to it, make all or any of the orders and awards provided for under sections 32N, 32O, 32P, 32PA and 32PC.

(5) Apart from a transfer under subsection (3), neither the Court of First Instance nor the District Court has jurisdiction over a claim under this Part.”.

4. Section 32N amended (order for reinstatement and re-engagement)

(1) Section 32N—

Repeal subsection (3)**Substitute**

- “(3) If the court or Labour Tribunal finds that an order for reinstatement or re-engagement is appropriate—
- (a) it must explain to the employer and the employee what order for reinstatement or re-engagement may be made; and
 - (b) it must ask the employer and the employee whether they agree to the making of such an order.
- (3A) If the employer and the employee express agreement, the court or Labour Tribunal must make an order for reinstatement or re-engagement pursuant to the agreement.
- (3B) For a dismissal of an employee in any of the circumstances mentioned in section 32A(1)(c), even though only the employee expresses agreement, the court or Labour Tribunal must make an order for reinstatement or re-engagement if it finds that reinstatement or re-engagement of the employee by the employer is reasonably practicable.
- (3C) Before making a finding for the purposes of subsection (3B), the court or Labour Tribunal—
- (a) 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

- (b) must take into account the circumstances of the claim, including—
 - (i) the circumstances of the employer and of the employee;
 - (ii) the circumstances surrounding the dismissal;
 - (iii) any difficulty that the employer might face in the reinstatement or re-engagement of the employee; and
 - (iv) the relationship between the employer and the employee, and between the employee and other persons with whom the employee has connection in relation to the employment.
- (3D) Before making a finding for the purposes of subsection (3B), the court or Labour Tribunal may, with the agreement of the employer and the employee, request the Commissioner to provide to it a report containing information that—
 - (a) relates to the circumstances of the claim; and
 - (b) was obtained in connection with the conciliation held under the Labour Tribunal Ordinance (Cap. 25).
- (3E) On receiving the request, the Commissioner must prepare the report, seek the agreement of the employer and the employee to the contents of the report and—
 - (a) if the employer and the employee agree to the contents of the report—provide the report to the court or Labour Tribunal; or

(b) if the employer or the employee fails to agree to the contents of the report—inform the court or Labour Tribunal of the failure and the fact that the report cannot be provided to it.”.

(2) Section 32N(4)—

Repeal

everything from “employment, and on making” to “take place”

Substitute

“employment. On making the order, the court or Labour Tribunal must specify the terms on which the employee must be reinstated,”.

(3) Section 32N(4)—

Repeal paragraphs (b), (c) and (d)

Substitute

“(b) a term to the effect that, for reckoning the employee’s existing and future entitlements under this Ordinance and the employee’s contract of employment, the continuity of the employee’s period of employment is not to be treated as broken by—

(i) if the contract was terminated by the employer by payment in lieu of notice—the employee’s absence from work between the last date on which the employee rendered services to the employer and the date of reinstatement; or

(ii) in any other case—the employee’s absence from work between the relevant date and the date of reinstatement;

(c) the date by which the employee must be reinstated; and

(d) a term to the effect that, if the employee is not reinstated on the terms specified in the order by the date so specified, the employer must pay to the employee the sums mentioned in section 32NA(1) by the date specified for that purpose in the order.”.

(4) Section 32N(6)—

Repeal

“the employee shall be engaged by the employer, or by a successor of the employer or by an associated company,”

Substitute

“the employer must re-engage the employee”.

(5) Section 32N(6)—

Repeal

everything from “employment, and on making” to “take place”

Substitute

“employment. On making the order, the court or Labour Tribunal must specify the terms on which the employee must be re-engaged,”.

(6) Section 32N(6)—

Repeal paragraph (a).

(7) Section 32N(6)—

Repeal paragraphs (e), (f) and (g)

Substitute

“(e) a term to the effect that, for reckoning the employee’s existing and future entitlements under this Ordinance and the employee’s contract of employment, the continuity of the employee’s period of employment is not to be treated as broken by—

- (i) if the contract was terminated by the employer by payment in lieu of notice—the employee’s absence from work between the last date on which the employee rendered services to the employer and the date of re-engagement; or
 - (ii) in any other case—the employee’s absence from work between the relevant date and the date of re-engagement;
 - (f) the date by which the employee must be re-engaged; and
 - (g) a term to the effect that, if the employee is not re-engaged on the terms specified in the order by the date so specified, the employer must pay to the employee the sums mentioned in section 32NA(1) by the date specified for that purpose in the order.”.
- (8) Section 32N—
- Repeal subsection (8).**
- (9) At the end of section 32N—
- Add**
- “(9) This section has effect subject to sections 32PA, 32PB and 32PC.
- (10) If the employer pays the sums mentioned in section 32NA(1) by the date specified for that purpose in an order for reinstatement or re-engagement (as varied under section 32PA or 32PC, if applicable), the employee is not entitled to enforce the other terms of the order (as so varied, if applicable).”.

5. Sections 32NA and 32NB added

After section 32N—

Add

“32NA. Sums specified for purposes of section 32N(4)(d) and (6)(g)

- (1) For the purposes of section 32N(4)(d) and (6)(g), the following sums are payable by the employer to the employee—
 - (a) the sums that would have been awarded if neither an order for reinstatement nor an order for re-engagement had been made, namely—
 - (i) the amount of terminal payments that would have been awarded under section 32O; and
 - (ii) if the employee has been dismissed in any of the circumstances mentioned in section 32A(1)(c)—the amount of compensation that would have been awarded under section 32P; and
 - (b) if the employee has been dismissed in any of the circumstances mentioned in section 32A(1)(c), a sum that is the lesser of the following—
 - (i) \$50,000;
 - (ii) 3 times the employee’s average monthly wages as calculated in accordance with section 32NB.
- (2) In determining the amounts mentioned in subsection (1)(a)(i) and (ii), the court or Labour Tribunal must not take into account the sum mentioned in subsection (1)(b).
- (3) The Commissioner may, by notice published in the Gazette, amend subsection (1)(b)(i) by substituting another amount for the amount specified in that subsection.

32NB. Calculation of average monthly wages for section 32NA

- (1) This section applies in calculating an employee's average monthly wages for the purposes of section 32NA(1)(b)(ii).
- (2) In subsections (3), (4) and (5)—
wages (工資) includes a sum of money paid by an employer in respect of any of the following days—
 - (a) a day of maternity leave, a day of paternity leave, a rest day, a sickness day, a holiday or a day of annual leave taken by the employee;
 - (b) a day of leave taken by the employee with the agreement of the employer;
 - (c) a normal working day on which the employee is not provided with work by the employer;
 - (d) a day of absence from work of the employee due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap. 282).
- (3) The employee's average monthly wages are the average monthly wages earned by the employee during—
 - (a) the period of 12 months immediately before the date of termination of the contract of employment; or
 - (b) if the employee has been employed by the employer for a period shorter than 12 months immediately before the date of termination of the contract of employment—the shorter period.

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- (4) The average monthly wages are to be calculated without regard to—
- (a) any period (*excluded period*) during the 12-month period or shorter period for which the employee was not paid wages or full wages because of—
 - (i) any maternity leave, paternity leave, rest day, sickness day, holiday or annual leave taken by the employee;
 - (ii) any leave taken by the employee with the agreement of the employer;
 - (iii) the employee's not being provided with work by the employer on a normal working day; or
 - (iv) the employee's absence from work due to temporary incapacity for which compensation is payable under section 10 of the Employees' Compensation Ordinance (Cap. 282); and
 - (b) any wages paid to the employee for the excluded period.
- (5) To avoid doubt, if the amount of the wages paid to an employee in respect of a day covered by the definition of *wages* in subsection (2) is only a fraction of the amount earned by the employee on a normal working day, the employee's average monthly wages are to be calculated without regard to the wages and the day.

- (6) Despite subsection (3), if for any reason it is impracticable to calculate an employee's average monthly wages in the manner provided in that subsection, the amount may be calculated by reference to—
- (a) the wages earned by a person who was employed at the same work by the same employer during the period of 12 months immediately before the date of termination of the employee's contract of employment; or
 - (b) if there is no such person—the wages earned by a person who was employed in the same trade or occupation and at the same work in the same district during the period of 12 months immediately before the date of termination of the employee's contract of employment.”.

6. Section 32O amended (award of terminal payments)

Section 32O(6)—

Repeal

everything after “terminal payments”

Substitute a full stop.

7. Sections 32PA and 32PB added

After section 32P—

Add

“32PA. Alternative compliance with order for re-engagement

- (1) For the purposes of this section—

- (a) ***order for re-engagement*** (再次聘用的命令) means an order for re-engagement made under section 32N and includes such an order as varied under this section or section 32PC;
- (b) ***successor*** (繼承人), in relation to an employer who employed an employee for the purposes of an undertaking or part of an undertaking, means (subject to paragraph (c)) a person who, in consequence of a change in the ownership of that undertaking or part (whether the change occurred by virtue of a sale or other disposition or by operation of law), has become the owner of that undertaking or part;
- (c) the definition of ***successor*** in paragraph (b) has effect (subject to the necessary modifications) in relation to a case where—
- (i) the person who owned an undertaking or part of an undertaking immediately before a change is one of the persons who own it immediately after the change (whether as partners, trustees or otherwise); or
 - (ii) the persons who owned an undertaking or part of an undertaking immediately before a change (whether as partners, trustees or otherwise) include the persons, or one or more of the persons, who own it immediately after the change,
- as it has effect where the previous owner and the new owner are wholly different persons; and
- (d) ***associated company*** is to be construed in accordance with section 32E(3) and (4).

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- (2) If the court or Labour Tribunal made an order for re-engagement (*principal order*) against an employer (*original employer*), it may, on application, order variation of the principal order to the effect that engagement of the employee by a successor or associated company of the original employer (*alternative employer*) is to be treated as re-engagement by the original employer in compliance with the principal order.
- (3) An application for the purposes of subsection (2) may only be made if—
- (a) there is a written agreement among—
 - (i) the original employer;
 - (ii) the employee; and
 - (iii) the alternative employer;
 - (b) the agreement states the parties' agreement that engagement of the employee by the alternative employer is to be treated as re-engagement in compliance with the principal order;
 - (c) the agreement states the terms on which the alternative employer is to engage the employee in order for the engagement to be treated as re-engagement in compliance with the principal order, including—
 - (i) the nature of the employment;
 - (ii) the remuneration for the employment;
 - (iii) any rights and privileges, including seniority and pension rights, that must be given to the employee;

- (iv) a term to the effect that the employee's period of employment with the original employer is to be counted as a period of employment of the employee with the alternative employer for reckoning the employee's existing and future entitlements under this Ordinance and the employee's contract of employment with the alternative employer; and
- (v) a term to the effect that the continuity of the employee's period of employment—
 - (A) is not to be treated as broken by the change of employer from the original employer to the alternative employer; and
 - (B) is not to be treated as broken by—
 - (I) if the employee's contract of employment with the original employer was terminated by the original employer by payment in lieu of notice—the employee's absence from work between the last date on which the employee rendered services to the original employer and the date of engagement of the employee by the alternative employer; or
 - (II) in any other case—the employee's absence from work between the relevant date and the date of engagement of the employee by the alternative employer; and

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- (d) the agreement states that the parties agree that, if the alternative employer engages the employee, the terms mentioned in paragraph (c) are to form part of the employee's contract of employment with the alternative employer.
- (4) The application may only be made by the employee, and must be accompanied by the agreement or a copy of the agreement.
- (5) The application may only be made—
- (a) not later than the date by which the employee must be re-engaged under the principal order; or
- (b) within such extended time as may be allowed by the court or Labour Tribunal.
- (6) An order of variation may only be made under this section if the court or Labour Tribunal is satisfied that the terms on which the alternative employer is to engage the employee, as specified in the agreement, are comparable to the terms on which the original employer is to re-engage the employee under the principal order, except the terms mentioned in section 32N(6)(f) and (g).
- (7) An order of variation made in relation to an application under this section—
- (a) must specify that, in order for the engagement to be treated as re-engagement in compliance with the principal order, the alternative employer must engage the employee on the terms specified in the agreement by the date specified for that purpose in the order of variation;

- (b) must specify the legal consequences following from the alternative employer engaging the employee, as provided under section 32PB;
 - (c) must specify that, subject to paragraphs (a) and (b), the principal order remains in full force and the original employer must re-engage the employee, except that the date by which the employee must be re-engaged by the original employer is also the date mentioned in paragraph (a); and
 - (d) must specify that the original employer must pay to the employee the sums mentioned in section 32NA(1) by the date specified for that purpose in the order of variation if, by the date mentioned in paragraph (a), the employee is not re-engaged in accordance with the order (which means neither actually so re-engaged nor treated as so re-engaged).
- (8) Each of the following dates as specified under subsection (7) in an order of variation may be the same as or different from that date as specified in the principal order—
- (a) the date by which the employee must be engaged;
 - (b) the date by which the original employer must pay the sums mentioned in section 32NA(1).

32PB. Legal consequences following from alternative employer engaging employee

- (1) This section applies if—

- (a) an order of variation is made under section 32PA to the effect that engagement of the employee by the alternative employer is to be treated as re-engagement by the original employer in compliance with the principal order; and
- (b) the alternative employer engages the employee on or before the date by which the employee must be re-engaged, as specified in the order of variation,

and an expression in this section that also appears in section 32PA has the same meaning as it has in that section.

- (2) The terms on which the alternative employer is to engage the employee, as specified under section 32PA(7)(a) in the order of variation, form part of the employee's contract of employment with the alternative employer.
- (3) The following applies for reckoning the existing and future entitlements of the employee under this Ordinance and the employee's contract of employment with the alternative employer—
 - (a) the employee's period of employment with the original employer is to be counted as a period of employment of the employee with the alternative employer; and
 - (b) the continuity of the employee's period of employment—
 - (i) is not to be treated as broken by the change of employer from the original employer to the alternative employer; and
 - (ii) is not to be treated as broken by—

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- (A) if the employee's contract of employment with the original employer was terminated by the original employer by payment in lieu of notice—the employee's absence from work between the last date on which the employee rendered services to the original employer and the date of engagement of the employee by the alternative employer; or
- (B) in any other case—the employee's absence from work between the relevant date and the date of engagement of the employee by the alternative employer.
- (4) In subsection (3)(a), a reference to the employee's period of employment with the original employer is a reference to the period of employment of the employee with the original employer that, had the original employer re-engaged the employee in accordance with the principal order, would have been counted for reckoning the employee's existing and future entitlements under this Ordinance and the employee's contract of employment with the original employer.
- (5) The engagement of the employee by the alternative employer is treated as re-engagement by the original employer in compliance with the principal order.
- (6) Any amount specified under section 32N(7) in the principal order as payable by the employer to the employee remains payable by the original employer to the employee. Any amount specified under that section in that order as required to be restored by the

employee to the employer remains required to be restored by the employee to the original employer.

- (7) For calculating an amount specified in the principal order under section 32N(7), references in the principal order to re-engagement and to the date of re-engagement are respectively treated as references to the engagement of the employee by the alternative employer and to the date of the engagement.”.

8. Section 32PC added

Before section 32Q—

Add

“32PC. Relief from paying sum mentioned in section 32NA(1)(b)

- (1) This section applies if an order for reinstatement or re-engagement is made under section 32N in respect of an employee dismissed in any of the circumstances mentioned in section 32A(1)(c), whether or not the order is varied under this section or section 32PA (which order (as so varied, if applicable) is referred to in this section as the *principal order*).
- (2) The employer against whom the principal order is made may apply for it to be varied to the effect that the employer is relieved from the liability to pay the sum mentioned in section 32NA(1)(b).
- (3) An application under subsection (2) may only be made on the ground that it is no longer reasonably practicable for the employer to reinstate or re-engage the employee in accordance with the principal order—
 - (a) because of reasons attributable to the employee;or

- (b) because, since the court or Labour Tribunal last found that reinstatement or re-engagement of the employee is reasonably practicable, a change of circumstances has occurred beyond the employer's control.
- (4) The application may only be made to the court, or the Labour Tribunal, that made the principal order.
- (5) The application may only be made—
 - (a) not later than 7 days after the date by which the employee must be reinstated or re-engaged under the principal order; or
 - (b) within such extended time as may be allowed by the court or Labour Tribunal.
- (6) Before determining the application, the court or Labour Tribunal must give an opportunity to the employer and the employee to present each of their cases in respect of the application.
- (7) In determining the application, the court or Labour Tribunal may take into account any relevant considerations.
- (8) The court or Labour Tribunal may—
 - (a) refuse the application;
 - (b) order that the principal order be varied to the effect that the employer be relieved, wholly or partly, from the liability to pay the sum mentioned in section 32NA(1)(b); or
 - (c) make any order that it considers just and appropriate in the circumstances, including specifying a later date as the date by which the employee must be reinstated or re-engaged.”.

9. Section 43N amended (interpretation of Part IXB)

- (1) Section 43N(1), definition of *specified entitlement*, paragraph (j)(ii)—

Repeal

“; or”

Substitute a semicolon.

- (2) Section 43N(1), definition of *specified entitlement*, paragraph (k)—

Repeal the semicolon**Substitute**

“; or”.

- (3) Section 43N(1), definition of *specified entitlement*, after paragraph (k)—

Add

- (1) any of the following sums payable under an order for reinstatement or re-engagement made under section 32N (as varied under section 32PA or 32PC, if applicable)—
- (i) the sum mentioned in section 32NA(1)(a)(i), to the extent that the sum would have been awarded as entitlements falling within paragraph (j) if neither an order for reinstatement nor an order for re-engagement had been made;
 - (ii) the sum mentioned in section 32NA(1)(a)(ii);
 - (iii) the sum mentioned in section 32NA(1)(b);”.

10. Section 43P amended (offence of employer’s failure to pay any sum payable under award of tribunal)

- (1) Section 43P(1)(a), after “entitlement”—

Add

“(whether or not the specified entitlement is payable only on any condition being met)”.

- (2) After section 43P(3)—

Add

“(4) Subsection (5) applies to an award that is an order for reinstatement or re-engagement made under section 32N (as varied under section 32PA or 32PC, if applicable) (which order (as so varied, if applicable) is referred to in subsection (5) as the *order*).

(5) Where the order specifies a date (*specified payment date*) as the date by which the employer must pay to the employee a sum if the employer fails to reinstate or re-engage the employee on the terms specified in the order by the date so specified, the specified payment date is, on that failure, the date on which the sum is, by the terms of the award, payable for the purposes of subsection (1)(b)(ii).”.

11. Section 43R amended (proof of certain matters in proceedings for offence under section 43P)

- (1) After section 43R(4)(c)—

Add

“(ca) for proceedings relating to an award that is an order for reinstatement or order for re-engagement—

- (i) whether a decision has been made in relation to an application made for the purposes of section 32PA or 32PC (if applicable) in respect of the order and, if so, the particulars of the decision; and
 - (ii) whether an application made for the purposes of section 32PA or 32PC (if applicable) in respect of the order is pending and, if so, the particulars of the application;”.
- (2) Section 43R—

Repeal subsection (6)**Substitute**

“(6) In this section—

order for re-engagement (再次聘用的命令) means an order for re-engagement made under section 32N and includes such an order as varied under section 32PA or 32PC;

order for reinstatement (復職的命令) means an order for reinstatement made under section 32N and includes such an order as varied under section 32PC;

registrar of a court (司法常務官) means—

- (a) the Registrar of the High Court; or
- (b) the Registrar of the Court of Final Appeal.”.

12. Section 77 added

After section 76—

Add

“77. Transitional provisions relating to Employment (Amendment) Ordinance 2016

- (1) A specified provision applies to a claim by an employee for remedies under Part VIA if the material date for the employee falls on or after the specified date for the specified provision.
- (2) Subsection (1) applies regardless of whether or not the employee’s contract of employment was entered into before that specified date.
- (3) A former provision applies to a claim by an employee for remedies under Part VIA if the material date for the employee falls before the specified date for the former provision.
- (4) Subsection (3) applies regardless of whether or not proceedings in respect of the claim have begun before that specified date.
- (5) In this section—

former provision (原有條文) means section 32J, 32N, 32O, 43N, 43P or 43R, or any part of the section, as was in force immediately before it was amended by the Employment (Amendment) Ordinance 2016 (2016);

material date (關鍵日期) means—

- (a) in relation to an employee dismissed in any of the circumstances mentioned in section 32A(1)(a) or (c)—
 - (i) if the employer has notified the employee of the dismissal before it took effect—the date on which the employee was notified;
 - or

- (ii) in any other case—the date on which the dismissal took effect; or
- (b) in relation to an employee the terms of whose contract of employment have been varied in the circumstances mentioned in section 32A(1)(b)—
 - (i) if the employer has notified the employee of the variation before it took effect—the date on which the employee was notified; or
 - (ii) in any other case—the date on which the variation took effect;

specified date (指明日期)—

- (a) in relation to a former provision, means the commencement date of the provision of the Employment (Amendment) Ordinance 2016 (of 2016) that—
 - (i) repeals the former provision; or
 - (ii) amends the former provision to become a specified provision; or
- (b) in relation to a specified provision, means the commencement date of the provision of that Ordinance that—
 - (i) adds the specified provision; or
 - (ii) amends a former provision to become the specified provision;

specified provision (指明條文) means section 32J, 32N, 32NA, 32NB, 32O, 32PA, 32PB, 32PC, 43N, 43P or 43R, or any part of the section.”

Part 3

Related Amendment to Labour Tribunal Ordinance

13. Labour Tribunal Ordinance amended

The Labour Tribunal Ordinance (Cap. 25) is amended as set out in section 14.

14. Section 30A added

Part 5, after section 30—

Add

“30A. Applications for purposes of sections 32PA and 32PC of Employment Ordinance

(1) In this section—

alternative compliance application (替代遵令申請) means an application to the tribunal that—

- (a) is made for the purposes of section 32PA(2) of the Employment Ordinance (Cap. 57) in relation to an order for re-engagement against an employer (*original employer*) in respect of an employee; and
- (b) seeks to vary the order to the effect that engagement of the employee by a successor or associated company of the original employer (*alternative employer*) is to be treated as re-engagement by the original employer in compliance with the order;

order for re-engagement (再次聘用的命令) means an order for re-engagement made under section 32N of the Employment Ordinance (Cap. 57) (as varied under section 32PA or 32PC of that Ordinance, if applicable);

order for reinstatement (復職的命令) means an order for reinstatement made under section 32N of the Employment Ordinance (Cap. 57) (as varied under section 32PC of that Ordinance, if applicable);

relief application (寬免申請) means an application to the tribunal that—

- (a) is made under section 32PC(2) of the Employment Ordinance (Cap. 57) in relation to an order for reinstatement or re-engagement against an employer in respect of an employee dismissed in any of the circumstances mentioned in section 32A(1)(c) of that Ordinance; and
 - (b) seeks to vary the order to the effect that the employer is relieved from the liability to pay the sum mentioned in section 32NA(1)(b) of that Ordinance.
- (2) An alternative compliance application must be in the prescribed form.
 - (3) On an alternative compliance application being made in accordance with subsection (2) and with section 32PA of the Employment Ordinance (Cap. 57), the registrar—
 - (a) must fix a place and date for hearing the application; and

- (b) must serve a notice, in the prescribed form, of the place and date of the hearing on the original employer, the alternative employer and the employee.
 - (4) A relief application—
 - (a) must be in the prescribed form;
 - (b) must state the grounds for making the application and the facts relevant to the application; and
 - (c) must be accompanied by the documents relevant to the application.
 - (5) On a relief application being made in accordance with subsection (4) and with section 32PC of the Employment Ordinance (Cap. 57), the registrar—
 - (a) must fix a place and date for hearing the application; and
 - (b) must serve a notice, in the prescribed form, of the place and date of the hearing on the employer and the employee.
 - (6) Unless the tribunal otherwise orders, neither an alternative compliance application, nor a relief application, operates as a stay of execution of the order in relation to which the application is made.
 - (7) A stay of execution because of an alternative compliance application or relief application may be subject to such conditions as to costs, payment into the tribunal, the giving of security or otherwise as the tribunal thinks fit.”
-

Part 4

Related Amendment to Labour Tribunal (General) Rules

15. Labour Tribunal (General) Rules amended

The Labour Tribunal (General) Rules (Cap. 25 sub. leg. A) are amended as set out in section 16.

16. Rule 12 amended (registration of award or order in District Court)

Rule 12(1)—

Repeal

“stay of execution has not been ordered under section”

Substitute

“no stay of execution has been ordered under section 30A or”.

Part 5

Related Amendments to Labour Tribunal (Forms) Rules

17. Labour Tribunal (Forms) Rules amended

The Labour Tribunal (Forms) Rules (Cap. 25 sub. leg. C) are amended as set out in section 18.

18. Schedule amended

(1) The Schedule, after Form 10—

Add

“Form 10A [s. 30A(2)]

Labour Tribunal Ordinance
(Cap. 25)

APPLICATION MADE FOR THE PURPOSES OF SECTION 32PA OF THE EMPLOYMENT ORDINANCE (CAP. 57)

[title as in Form 1]

TO THE LABOUR TRIBUNAL.

This claim, made by me (a), was heard and determined by the tribunal. The tribunal made an order for re-engagement under section 32N of the Employment Ordinance (Cap. 57) on the day of 20....., for (b)
..... (*defendant*) to re-engage me by the (c) day of 20..... A copy of the order accompanies this application. (d)

I, (a), apply for variation of the order under section 32PA of the Employment Ordinance (Cap. 57) to the effect that engagement of me by (e) (**alternative employer**) is to be treated as re-engagement by the defendant in compliance with the order.

*The agreement/A copy of the agreement in respect of the proposed variation dated the day of 20..... made among myself, the defendant and the alternative employer (as mentioned in section 32PA(3) of the Employment Ordinance (Cap. 57)) accompanies this application. (f)

*The terms on which the alternative employer is to engage me are the same as the terms on which the defendant is to re-engage me under the order./The terms on which the alternative employer is to engage me are not the same as the terms on which the defendant is to re-engage me under the order. The terms that are different are as follows:

Dated this day of 20.....

.....
(Signature of claimant)

* Delete whichever is not applicable.

- Note: (a) Insert full name of the claimant making this application.
(b) Insert full name of the defendant.
(c) Insert date by which the claimant must be re-engaged.

- (d) If this application is made in relation to an order for re-engagement to which any variation has previously been made under section 32PA or 32PC of the Employment Ordinance (Cap. 57), a copy of the order made for each previous variation must also accompany this application.
- (e) Insert full name of the alternative employer. This application seeks to have the engagement of the claimant by the alternative employer to be treated as re-engagement by the defendant in compliance with the order for re-engagement.
- (f) The agreement among the claimant, the defendant and the alternative employer in respect of the proposed variation, or a copy of the agreement, must accompany this application.

Form 10B

[s. 30A(4)(a)]

Labour Tribunal Ordinance
(Cap. 25)

APPLICATION MADE FOR THE PURPOSES OF SECTION 32PC
OF THE EMPLOYMENT ORDINANCE (CAP. 57)

[title as in Form 1]

TO THE LABOUR TRIBUNAL.

In relation to the above claim in respect of a dismissal in certain circumstances mentioned in section 32A(1)(c) of the Employment Ordinance (Cap. 57), the tribunal made against *me/us (a) in favour of (b) (*claimant*) an order for *reinstatement/re-engagement under section 32N of that Ordinance on the day of 20..... A copy of the order accompanies this application. (c)

Under section *32N(4)(d)/32N(6)(g) of the Employment Ordinance (Cap. 57), the order specifies that, if *I/we fail to reinstate or re-engage the claimant by the (d) day of 20....., *I/we must pay to the claimant the sum of (e) \$..... by the (f) day of 20.....

*I/We apply for relief from the liability to pay that sum (state the relief sought)

The grounds for *my/our application are—
(state the grounds for making the application)

The facts relevant to *my/our application are—
(state the relevant facts)

The documents relevant to *my/our application accompany the application. (g)

Dated this day of 20.....

.....
*(*Signature of defendant, if an individual/Signature on behalf of defendant, if an unincorporated or incorporated company or a partnership)*

If the defendant is an unincorporated or incorporated company or a partnership, please also state the name of the person or partner who signs on behalf of the defendant (in BLOCK LETTERS):

* Delete whichever is not applicable.

- Note:*
- (a) Insert full name of the defendant making this application.
 - (b) Insert full name of the claimant.
 - (c) If this application is made in relation to an order for reinstatement/re-engagement to which any variation has previously been made under section 32PA or 32PC of the Employment Ordinance (Cap. 57), a copy of the order made for each previous variation must also accompany this application.
 - (d) Insert date by which the claimant must be reinstated/re-engaged.
 - (e) Insert amount of the sum mentioned in section 32NA(1)(b) of the Employment Ordinance (Cap. 57) that must be paid if the defendant fails to reinstate/re-engage the claimant.
 - (f) Insert date by which the sum must be paid.
 - (g) This application must state the grounds for making this application and the facts relevant to this application. The documents relevant to this application must accompany this application.
-

Form 10C

[s. 30A(3)(b) &
(5)(b)]

Labour Tribunal Ordinance
(Cap. 25)

NOTICE OF HEARING OF AN
APPLICATION MADE FOR THE PURPOSES OF SECTION
*32PA/32PC OF THE EMPLOYMENT ORDINANCE (CAP. 57)

[title as in Form 1]

TO ALL PARTIES INTERESTED.

The tribunal made an order for *reinstatement/re-engagement under section 32N of the Employment Ordinance (Cap. 57) on the day of 20..... in respect of this claim. *#A copy of the order accompanies this notice. Under the order, (*claimant*) is to be *reinstated/re-engaged by (*defendant*). (a)

*The claimant has applied for variation of the order for re-engagement under section 32PA of the Employment Ordinance (Cap. 57) to the effect that engagement of the claimant by (b) is to be treated as re-engagement by the defendant in compliance with the order.

*#A copy of the application accompanies this notice.

*The defendant has applied for relief under section 32PC of the Employment Ordinance (Cap. 57) from the liability under the order for *reinstatement/re-engagement to pay to the claimant the sum of (c) \$..... (which is payable if the defendant fails to *reinstate/re-engage the claimant by the (d) day of 20.....).

*#A copy of the application accompanies this notice.

TAKE NOTICE that, Presiding Officer, will hear the application at on the day of 20..... at

Dated this day of 20.....

.....
Registrar

L.S.

(e) This notice was served by me on at on the day of 20.....

.....
*(*Signature of recipient of notice/Signature on behalf of recipient of notice)*

.....
(Signature of process server)

* Delete whichever is not applicable.

Neither a copy of the order for reinstatement/re-engagement, nor a copy of the application, needs to accompany this notice as served on the party making the application.

Note: (a) If the application is made in relation to an order for reinstatement/re-engagement to which any variation has previously been made under section 32PA or 32PC of the Employment Ordinance (Cap. 57), a copy of the order made for each previous variation must also accompany this notice, except when this notice is served on the party making the application.

- (1) *an award of
- (2) *an order for the payment of
- (3) *an order under section 32N of the Employment Ordinance (Cap. 57) for the *reinstatement/re-engagement of the claimant with the following terms—

*[terms specified under *section 32N(4) and (5)/section 32N(6) and (7) of that Ordinance]*

- 2. *the order for re-engagement was varied by an order of the tribunal made under section 32PA of the Employment Ordinance (Cap. 57) on the day of 20..... to the effect as follows—

[terms specified under section 32PA(7) of that Ordinance]

- 3. *the order for *reinstatement/re-engagement was varied by an order of the tribunal made under section 32PC of the Employment Ordinance (Cap. 57) on the day of 20..... to the effect that

Dated this day of 20.....

**Registrar/Officer authorized by
Presiding Officer under rule
12(4) of the Labour Tribunal
(General) Rules*

L.S.

TO THE REGISTRAR, DISTRICT COURT.

The above certificate is presented by *me/us for registration in accordance with rule 12(2) of the Labour Tribunal (General) Rules (Cap. 25 sub. leg. A).

Dated this day of 20.....

.....
*(*Signature of party presenting
the certificate for registration, if
an individual/Signature on behalf
of party presenting the certificate
for registration, if an
unincorporated or incorporated
company or a partnership)*

If the party presenting the certificate for registration is an unincorporated or incorporated company or a partnership, please also state the name of the person or partner who signs on behalf of the party (in BLOCK LETTERS):

The above certificate is registered in the District Court.

Dated this day of 20.....

Registrar, District Court

L.S.

* Delete whichever is not applicable.

- Note:* (a) Insert full name of the party in whose favour the award or order is made.
- (b) Insert full name of the party against whom the award or order is made.”.
- _____

Explanatory Memorandum

The main object of this Bill is to amend the Employment Ordinance (Cap. 57) so that, if an employee is dismissed in any of the circumstances mentioned in section 32A(1)(c) of the Ordinance (which means in essence the employee concerned is dismissed without a valid reason and in contravention of a specified statutory provision)—

- (a) the employer's agreement is not a pre-requisite for ordering reinstatement or re-engagement of the employee;
- (b) the employer must pay a further sum to the employee if the employer fails to reinstate or re-engage the employee; and
- (c) a failure to pay the further sum is covered by the offence provisions (in section 43P of the Ordinance) on a failure to pay an award of specified entitlement.

The Bill also seeks to clarify the existing provision on engagement by the employer's successor or associated company under an order for re-engagement, and to make supplementary provisions on the procedure for such an arrangement.

Removing employer's agreement as pre-requisite for ordering reinstatement or re-engagement

2. Clause 4 amends section 32N of the Ordinance so that the employer's agreement will not be a pre-requisite for ordering reinstatement or re-engagement in a case where an employee is dismissed in circumstances mentioned in section 32A(1)(c) of the Ordinance (*section 32A(1)(c) case*). (The employer's agreement will remain as a pre-requisite for ordering reinstatement or re-engagement in a case where an employee is

dismissed in circumstances mentioned in section 32A(1)(a) of the Ordinance or where an employee's contract of employment is varied in circumstances mentioned in section 32A(1)(b) of the Ordinance.) Further, in a section 32A(1)(c) case—

- (a) express provisions are made—
 - (i) to 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; and
 - (ii) for the circumstances to be taken into account in determining whether reinstatement or re-engagement is reasonably practicable;
- (b) the court or Labour Tribunal will be empowered to request the Commissioner for Labour for a report containing information that relates to the circumstances of the claim.

Consequence of failure to reinstate or re-engage; employer's liability to pay further sum

3. Section 32N(4)(d) and (6)(g) of the Ordinance currently provides for liabilities arising if the employee is not reinstated or re-engaged as ordered. These are liabilities for sums representing terminal payments and compensation that would have been awarded under sections 32O and 32P of the Ordinance respectively if neither an order for reinstatement nor an order for re-engagement had been made. Clause 4(3) and (7) amends section 32N(4)(d) and (6)(g) of the Ordinance. Clause 5 adds new sections 32NA and 32NB to the Ordinance.
4. The new section 32NA elaborates on the employer's liabilities mentioned in paragraph 3 above. For a section 32A(1)(c) case, the new section 32NA(1)(b) imposes on the employer an

additional liability to pay to the employee a further sum that is the lesser of \$50,000 or 3 times the employee's average monthly wages. The new section 32NB provides for calculation of the average monthly wages.

5. Clause 8 adds a new section 32PC to the Ordinance to provide for a mechanism by which the employer may, under certain specific conditions, apply for and obtain relief from the liability to pay the further sum mentioned in the new section 32NA(1)(b).

Alternative compliance with order for re-engagement by successor or associated company of employer

6. The existing section 32N(6) of the Ordinance alludes to ordering engagement by a successor or associated company of the employer. Clause 7 adds new sections 32PA and 32PB to the Ordinance to clarify and supplement the concept by providing for—
 - (a) variation of an order for re-engagement made against an employer (*original employer*) to the effect that engagement of the employee by such a successor or associated company is to be treated as re-engagement in compliance with the order for re-engagement;
 - (b) an application for the variation; and
 - (c) the legal consequences following from the engagement by the successor or associated company.

Offence of failure to pay sum specified in order for reinstatement or re-engagement

7. At present, section 43P of the Ordinance contains an offence of failing, wilfully and without reasonable excuse, to comply with an award of specified entitlements (as defined by section 43N(1) of the Ordinance).
8. Clause 9 amends section 43N(1) of the Ordinance to extend the definition of *specified entitlement* to cover substantially the sums payable by an employer after failing to reinstate or re-engage an employee in accordance with an order for reinstatement or re-engagement.
9. Clause 10 amends section 43P of the Ordinance to—
 - (a) expressly cover an award subject to a condition, for clarity's sake; and
 - (b) state how section 43P of the Ordinance applies to an order for reinstatement or re-engagement that specifies any sum as payable if the employer fails to reinstate or re-engage an employee.
10. The effect is that an employer commits an offence if—
 - (a) the employer fails to reinstate or re-engage the employee as ordered; and
 - (b) the employer also fails, wilfully and without reasonable excuse, to pay specified entitlements payable on that failure (see paragraph 8 above).
11. Clause 11 expands section 43R of the Ordinance to enable the particulars of any pending application made for the purposes of the new section 32PA or 32PC, and the particulars of any decision made in relation to the application, to be proved in

criminal proceedings by a certificate issued by or on behalf of the registrar of the court or Labour Tribunal.

Related amendments to Labour Tribunal Ordinance (Cap. 25) and its subsidiary legislation

12. Clauses 13, 14, 15, 16, 17 and 18 are related amendments to the Labour Tribunal Ordinance (Cap. 25) and its subsidiary legislation.
13. Clause 14 adds a new section 30A to the Labour Tribunal Ordinance (Cap. 25). The new section 30A(2), (3), (4) and (5) provides for the procedures for making an application for the purposes of the new section 32PA or 32PC of the Employment Ordinance (Cap. 57) mentioned in paragraphs 5 and 6 above. The effect of the new section 30A(6) is that, unless the Labour Tribunal otherwise orders, the making of the application does not operate to stay the execution of the order for reinstatement or re-engagement sought to be varied under the new section 32PA or 32PC.
14. Clauses 15 and 16 are amendments to the Labour Tribunal (General) Rules (Cap. 25 sub. leg. A) consequential to the addition of the new section 30A to the Labour Tribunal Ordinance (Cap. 25).
15. Clauses 17 and 18 make related amendments to the Schedule to the Labour Tribunal (Forms) Rules (Cap. 25 sub. leg. C) by—
 - (a) adding new Forms 10A, 10B and 10C for applications made for the purposes of the new sections 32PA and 32PC of the Employment Ordinance (Cap. 57) and the related notice of hearing; and
 - (b) substituting a new Form 17 for a certificate of a Labour Tribunal award or order.

Technical amendments to sections 32J and 32O of Employment Ordinance

16. Clause 3 amends section 32J of the Employment Ordinance (Cap. 57). First, a reference to section 9 of the Labour Tribunal Ordinance (Cap. 25) is removed, which reference is obsolete because that section 9 was repealed. Second, the new section 32J(3), (4) and (5) clarifies that the Labour Tribunal may transfer claims under Part VIA (employment protection) of the Employment Ordinance (Cap. 57) to the Court of First Instance or the District Court, which will then have jurisdiction under that Part.

17. Clause 6 repeals a part of section 32O(6) of the Employment Ordinance (Cap. 57) that is obsolete.