



## **II. REPORT**

The date of First Reading of the Bill is 2 March 2016. Members may refer to the LegCo Brief (File Ref.: LD LAB/CR/38 706(C)) issued by the Labour and Welfare Bureau on 11 February 2016 for further details.

### **Object of the Bill**

2. The Bill seeks to amend the Employment Ordinance (Cap. 57) to remove the employer's agreement as the pre-requisite for making a reinstatement<sup>1</sup> or re-engagement<sup>2</sup> order in the event of an employee being dismissed by the employer under section 32A(1)(c) of Part VIA of Cap. 57<sup>3</sup> (unreasonable and unlawful dismissal) and for related matters.

### **Background**

3. At present, in cases of unreasonable and unlawful dismissal, the court<sup>4</sup> or Labour Tribunal may make an order for reinstatement or re-engagement under section 32N of Cap. 57. Such order can only be made with the agreement of both an employee and his employer. If no order is made under section 32N of Cap. 57, the court or Labour Tribunal may make an award of terminal payments (including payment in lieu of notice, severance payment, sickness allowance etc.) under section 32O and an award of compensation not exceeding \$150,000 under section 32P of Cap. 57. The Administration proposes to remove the employer's agreement as a prerequisite for making the above order in the event of unreasonable and unlawful dismissal.

### **Provisions of the Bill**

4. The main provisions of the Bill are summarized in the following paragraphs.

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<sup>1</sup> Under section 32N(4), 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.

<sup>2</sup> Under section 32N(6), 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.

<sup>3</sup> Section 32A(1)(c) provides that an employee may be granted remedies against his employer where he is dismissed by the employer other than for a valid reason within the meaning of section 32K and in contravention of the law, such as dismissal during pregnancy and paid sick leave.

<sup>4</sup> Under section 32J(3), court refers to the Court of First Instance or the District Court.

### Making an order for reinstatement or re-engagement without the employer's consent

5. Clause 4 amends section 32N of Cap. 57 by, among others, empowering the court or Labour Tribunal to make an order for reinstatement or re-engagement in the absence of the employer's consent in the event of unreasonable and unlawful dismissal if it finds that the making of the order is reasonably practicable.

### Consequences for non-compliance

6. New sections 32NA and 32NB are added to Cap. 57 to impose an additional liability on employers for non-compliance with an order for reinstatement or re-engagement. In the event of unreasonable and unlawful dismissal, on top of the terminal payments and compensation under the existing sections 32O and 32P respectively, an employer has to pay to his employee a further sum which is set at three times the employee's average monthly wages but subject to a maximum of \$50,000 (the further sum) for non-compliance with the relevant order.

### Variation and relief

7. Clauses 7 and 8 seek to add new sections 32PA, 32PB and 32PC to Cap. 57 to —

- (a) provide for an alternative way for an employer to discharge his obligation under a re-engagement order by empowering the court or Labour Tribunal to make an order for variation of the original order to the effect that engagement of the employee by the original employer's successor or associated company would be treated as compliance with the original order (new sections 32PA and 32PB); and
- (b) allow an employer to apply to the court or Labour Tribunal for relief from the liability to pay the further sum on the ground that the reinstatement or re-engagement of the employee becomes no longer reasonably practicable because of reasons attributed to the employee or because of a change of circumstances beyond the employer's control since the making of the order (new section 32PC).

### Offence

8. Clauses 9 and 10 seek to amend sections 43N and 43P of Cap. 57 to the effect that an employer commits an offence and is liable on conviction to a fine of \$350,000 and to imprisonment for three years if —

- (a) the employer fails to reinstate or re-engage the employee so ordered; and
- (b) where there is non-compliance with an order for reinstatement or re-engagement, the employer wilfully and without reasonable excuse fails to pay the terminal payments, compensation or the further sum to the employee.

### Transitional provisions

9. If the Bill is passed, the new statutory scheme would apply to dismissal or notification of dismissal which takes effect on or after the commencement date of the relevant provisions of the Bill. For dismissal or notification of dismissal which takes effect before the commencement date, the former provisions would continue to apply (clause 12).

### Consequential amendments

10. Parts 3 to 5 of the Bill propose consequential amendments to a number of legislation including the Labour Tribunal Ordinance (Cap. 25), the Labour Tribunal (General) Rules (Cap. 25A) and the Labour Tribunal (Forms) Rules (Cap. 25C).

### **Commencement**

11. The Bill, if passed, would come into operation on a day to be appointed by the Secretary for Labour and Welfare by notice published in the Gazette.

### **Public Consultation**

12. According to paragraph 15 of the LegCo Brief, the Labour Advisory Board had several rounds of discussion on the legislative proposal in 2000, 2002, 2004, 2007 and 2011 and broad consensus on the legislative proposal was reached.

## **Consultation with LegCo Panel**

13. According to the Clerk to the Panel on Manpower, the Panel was consulted at its meeting on 15 December 2015 on the legislative proposal. Although members raised no objection to the legislative proposal, some members expressed concerns about adequacy of protection for employees, particularly the proposed amount of the further sum and the penalty on employers concerned for non-payment of the further sum.

## **Conclusion**

14. In view of the concerns expressed by members of the Panel on Manpower, it is recommended that a Bills Committee be formed to study the Bill in detail. Meanwhile, the Legal Service Division is scrutinizing the legal and drafting aspects of the Bill.

Prepared by

CHUI Ho-yin, Alvin  
Assistant Legal Adviser  
Legislative Council Secretariat  
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