

立法會
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**Paper for the House Committee meeting
on 17 June 2016**

Report of the Bills Committee on Employment (Amendment) Bill 2016

Purpose

This paper reports on the deliberations of the Bills Committee on Employment (Amendment) Bill 2016 ("the Bill").

Background

2. Under Part VIA of the Employment Ordinance (Cap. 57) ("EO"), employees are afforded employment protection under different circumstances, including the right to claim remedies against their employers if they have been unreasonably and unlawfully dismissed¹. Where an employee has been unreasonably and unlawfully dismissed, the court or Labour Tribunal ("LT") may, subject to the mutual consent of the employer and the employee, make an order for reinstatement² ("RI")/re-engagement³ ("RE"). If no order for RI/RE is made, the court or LT may make an award of terminal payments and an

¹ Unreasonable and unlawful dismissal refers to the situation where an employee is dismissed as mentioned in section 32A(1)(c) of EO, viz., the employee is dismissed other than for a valid reason as specified under EO (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 reason of substance), and the dismissal is in contravention of labour legislation, including 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), by reason of the employee exercising trade union rights or giving evidence for the enforcement of relevant labour legislation.

² Under section 32N(4) of EO, an order for RI 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.

³ Under section 32N(6) of EO, an order for RE 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.

additional award of compensation not exceeding \$150,000 to the employee. The court or LT, however, has no power to make an order for RI/RE without the employer's consent, even if it considers such an order appropriate.

3. According to the Administration, to enhance employees' protection against unreasonable and unlawful dismissal ("UUD"), it has, in consultation with the Labour Advisory Board ("LAB") and relevant stakeholders, proposed to amend EO to empower the court or LT to make a compulsory order without securing the consent of the employer for RI/RE of an employee who has been dismissed unreasonably and unlawfully, if the court or LT considers making such an order appropriate and compliance with it by the employer reasonably practicable. Under the proposed amendments, the court or LT may also order the employer to pay a further sum subject to a maximum of \$50,000 to the employee in the event of non-compliance with the RI/RE order by the employer. An employer who fails to pay the further sum wilfully and without reasonable excuse will commit an offence as well.

Object of the Bill

4. The Bill seeks to amend EO so that, if an employee is dismissed in any of the circumstances mentioned in section 32A(1)(c) of EO, i.e. 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 prerequisite for ordering RI or RE 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) the employer commits an offence if the employer wilfully and without reasonable excuse fails to pay the further sum.

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

5. The Bill will come into operation on a day to be appointed by the Secretary for Labour and Welfare by notice published in the Gazette.

The Bills Committee

6. At the House Committee meeting on 11 March 2016, members agreed to form a Bills Committee to study the Bill. Under the chairmanship of

Mr WONG Ting-kwong, the Bills Committee held five meetings with the Administration. The membership of the Bills Committee is in **Appendix I**. The Bills Committee has also received views from 17 organizations and individuals at one of its meetings. A list of organizations and individuals which/who have given views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

Making an order for RI or RE

7. Clause 4 of the Bill seeks to amend section 32N of EO to, among others, empower the court or LT to make an order for RI or RE without the requirement of the employer's agreement for UUD cases, after taking into account a number of factors. Under the proposed section 32N(4)(d) and 32N(6)(g), on making an order for RI or RE for UUD cases, the court or LT must specify in the order that if the employee is not reinstated or re-engaged as required by the order, the employer must pay to the employee the sums mentioned in the proposed new section 32NA(1). The sums include:

- (a) the amount of terminal payments that would have been awarded under section 32O if neither an RI nor RE order had been made;
- (b) on top of the terminal payments, the amount of compensation not exceeding \$150,000 that would have been awarded under section 32P if neither an RI nor RE order had been made; and
- (c) a further sum which is \$50,000 or three times the employee's average monthly wages, whichever is lesser.

Circumstances to be considered in making an RI/RE order

8. Having regard to the strained relationship between the employer and employee concerned in a case of UUD, some members have asked about the circumstances and considerations under which the court or LT would make an order for RI or RE.

9. The Administration has advised that the Bill seeks to remove the employer's agreement as a prerequisite to the making of an order for RI or RE by the court or LT in a case of UUD in considering an employee's claim for RI or RE, if the court or LT finds that an order for RI or RE is appropriate and compliance with the order by the employer is reasonably practicable. In doing so, the court or LT has to take into account the circumstances of the case including the relationship between the employer and the employee, the relationship between the employee and other persons with whom the employee

has connection in relation to the employment, the circumstances of the dismissal, any genuine difficulties that the employer may face when complying with the order. Both the employer and the employee would be given an opportunity to present his/her case before the court or LT makes the order. The Bill further proposes that the court or LT may, with the agreement of the employer and employee concerned, request the Commissioner for Labour to submit a report containing information that relates to the circumstances of the claim obtained in connection with the conciliation conducted by the Labour Department.

10. Mr LEE Cheuk-yan takes the view that in considering whether it is reasonably practicable for the employer to comply with an order for RI or RE, the court or LT should not take into account the fact that the employer has already engaged a permanent replacement to take up the original position of the dismissed employee, unless the employer shows that it is not practicable for him not to arrange for a permanent replacement. Members note that Mr LEE has indicated his intention to move Committee stage amendments ("CSAs") to the Bill to require the court or LT not to take into account that fact. The Administration has pointed out that as the time for the employee to be able to obtain an order for RI or RE 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 enterprises, 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 EO, the employee may make a claim for RI or RE with LT 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 an RI or RE order is made.

Remedies specified in an order for RI or RE

11. Some members have expressed concern about whether the employee concerned needs to revert to the court or LT for remedies in case the employer fails to reinstate or re-engage him. The Administration has advised that under the existing provisions of EO, the court or LT must specify in its order for RI or RE the amount of terminal payments and compensation as it considers just and appropriate in the circumstances, to be paid to the employee by the employer if the employer fails to reinstate or re-engage the employee as ordered. To enable an employee who is dismissed unreasonably and unlawfully to obtain the terminal payments, compensation and further sum the soonest possible without having to file another claim to the court or LT in the event that the employer fails to reinstate or re-engage him/her as required by the order, same as the

existing arrangement for terminal payments and compensation, it is proposed that the further sum should be ordered by the court or LT at the same time when an order for RI or RE is made.

12. Concern has been raised about whether the reinstated/re-engaged employee would be awarded any remedies during the intervening period between the date of dismissal and date of RI/RE. The Administration has explained that the existing legislation does not provide for wage payments, which are payable in respect of work done, in the aforesaid intervening period. Nonetheless, under the current provisions of EO, if the court or LT considers just and appropriate in the circumstances, it may specify as part of the remedies any amount payable by the employer to the employee in respect of any arrears of pay and statutory entitlements under EO which the employee might reasonably be expected to have had but for the dismissal, for the period between the date of dismissal and the date of RI or RE. In considering whether or not to award remedies to the employee, the court or LT would take into account the individual circumstances of the case, including the taking of other employment by the employee concerned during the intervening period. On the other hand, the reinstated or re-engaged employee may be ordered by the court or LT to restore to the employer any amount in respect of any statutory entitlements that the employee has been paid by the employer under EO and that the employee should not have had upon RI or RE.

13. Some members have expressed concern whether an employer of a UUD case may under the Bill, by paying the proposed further sum (the maximum being \$50,000), evade the liability to pay the compensation under section 32P (which may be up to \$150,000). The Administration has explained that the proposed new section 32NA(2) spells out clearly that the court or LT must not take into account the further sum in determining the amounts of terminal payments and compensation. It is therefore clear that the employer's liability to pay the further sum is in addition to his/her liability to pay the terminal payments and compensation. If the employee is not reinstated or re-engaged as required by an order for RI or RE made in a UUD case, depending on the adjudication of the court or LT, the employer may be liable to pay all the three sums specified in the order, viz. terminal payments, compensation and further sum.

An order for RI or RE being in force

14. Some members have enquired how long an order for RI or RE would remain in force and whether the employer can arrange another position for the reinstated employee or terminate the employment afterwards if there are reasonable grounds for doing so. The Administration has pointed out that employers cannot unilaterally change the terms of employment contract. Any variation of individual employment terms should be subject to the mutual

agreement between the employer and the employee, the terms of the employment contract and in accordance with the relevant provisions under EO. Besides, the employee is protected under Part VIA of EO if he/she is dismissed.

15. Some members have sought clarification about the remuneration of the reinstated or re-engaged employees whose original employment comprises basic wages, tips and commissions. Mr IP Kin-yuen has expressed concern about the impact of an order for RE on the calculation of length of service of teaching staff who is involved in a case of UUD and is later re-engaged by another school belonging to the same sponsoring body, given that the salary of teachers would largely be commensurate with their years of service.

16. The Administration has advised that under an order for RI, the employer is required to treat the employee in all aspects as if he/she has not been dismissed or as if there has been no variation of the terms of the employment contract. Where an employee is re-engaged as required by an order for RE, the continuity of the employee's period of employment is not to be treated as broken by the employee's absence from work between the date of dismissal and the date of re-engagement for reckoning his/her entitlements under EO and his/her employment contract. In the written agreement made among the employee, employer and employer's successor or associated company concerned, among others, the terms have to spell out 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 successor or associated company for reckoning the employee's existing and future entitlements under EO and his/her employment contract.

Proposal to extend the applicability of an order for RI/RE

17. Mr LEE Cheuk-yan takes the view that to safeguard employees' protection against unreasonable dismissal, other than UUD cases, cases of unreasonable dismissal should also be covered. Members note that Mr LEE has indicated his intention to propose CSAs to the Bill to the effect that the employer's agreement is not a prerequisite for ordering RI or RE of an employee who has been dismissed unreasonably, and that the employee concerned should also be eligible for compensation awarded under section 32P of EO. The Administration has drawn members' attention to the main object of the Bill which seeks to enhance employees' protection against UUD. Mr LEE's proposed CSAs would appear to fall outside the scope of the Bill.

Amount of further sum

18. Some members have expressed the view that the proposed further sum under the proposed new section 32NA is too low to provide sufficient deterrence for the employers not to comply with an order for RI or RE, nor

provide adequate protection for employees, in particular high-salaried employees, against UUD. They have expressed concern that an employer can evade the obligation to reinstate or re-engage an employee by paying the latter with the further sum, which has defeated the purpose of safeguarding employees' rights of RI or RE in a UUD case. Noting that the consensus on the proposed amount of the further sum was reached by LAB in 2007, these members consider that there is room for upward adjustment in the amount of the further sum. They have called on the Administration to consider increasing the maximum amount of the further sum.

19. To enhance the deterrence on an employer's failure to reinstate or re-engage an employee as ordered by the court or LT, Mr SIN Chung-kai has indicated his intention to propose a CSA to clause 5 of the Bill to the effect that the further sum will be set three months' wages of employees or \$50,000, whichever is the greater.

20. The Administration has advised that the effect of Mr SIN Chung kai's proposed CSA would be to remove the proposed ceiling of \$50,000 for the further sum. With the minimum amount of the further sum set at \$50,000 under the proposed CSA, an employer may be required to pay a further sum that far exceeds three months' wages to the employee for not reinstating or re-engaging the employee, depending on the employee's wages. On the other hand, by removing the ceiling of the further sum, the amount of further sum for an employee with high monthly wages may be a substantial amount. The Administration has stressed that the further sum is in addition to the terminal payments and compensation which an employer has a liability to pay if so ordered by the court or LT in a UUD case.

21. Some members including Mr Andrew LEUNG, Mr YIU Si-wing and Mr CHUNG Kwok-pan consider that Mr SIN's proposed CSA would increase significantly the amount of the further sum. This would not only depart from the consensus reached by LAB, but also would have impact on the affordability of small and medium enterprises.

22. Some other members including Mr LEUNG Yiu-chung and Mr POON Siu-ping have also expressed reservations about Mr SIN's proposed CSA. They consider that under Mr SIN's proposed CSA, the maximum amount of the further sum for low-paid employees would still be capped at \$50,000. Mr LEUNG Yiu-chung has indicated that he intends to propose a CSA to the Bill to the effect that the amount of the further sum will be set six times the employee's average monthly wages or \$100,000, whichever is the lesser. Mr LEE Cheuk-yan has also indicated that he would propose CSAs to the Bill such that the amount of the further sum will be set six times the employee's average monthly wages or \$100,000, whichever is the greater; and that the amount of the further sum would be revised by resolution of the Legislative

Council instead of by notice published in the Gazette by the Commissioner for Labour.

23. The Administration has explained that the amount of the further sum is a consensus reached by LAB after thorough discussion involving LAB members as well as the major employers' associations and employee unions which they represent, and that LAB was apprised of the latest developments of the proposals under the Bill in late 2015. The Administration has pointed out that CSAs proposed by members represent deviations from the consensus of LAB. The Administration would need to consult LAB again on the proposals. After having consulted LAB in May 2016, the Administration has further advised that whilst LAB agreed that the ceiling for the further sum might be increased, but they would need time to further consult their respective organisations before they could discuss the subject further at LAB. The Administration will inform Members if and when LAB has reached a new consensual view on this matter. As the different sets of CSAs proposed by Mr LEE Cheuk-yan are received after LAB was last consulted in May 2016, the Administration will, in accordance with the established practice, need to take the matter back to LAB for further discussion. The Administration notes that Members strongly urge the Administration to foster the discussion of LAB on the matter as early as possible in order not to delay the coming into operation of the Bill. LD will bring back the subject to LAB as soon as practicable.

Engagement of the employee by the employer's successor or associated company

24. The proposed new sections 32PA and 32PB in clause 7 provide for alternative compliance with an order for RE by the employer's successor or associated company. On the need for the proposed new sections 32PA and 32PB, the Administration has explained that there is ambiguity in the existing EO provisions on RE by the employer's successor or associated company. Besides, given that the employer's successor or associated company is not a party to the proceedings relating to the employee's claim, there is doubt as to how an order made by the court or LT may involve a successor or associated company. There is hence a need to remove the doubt and make necessary supplementary provisions on the arrangement for RE of the employee by the employer's successor or associated company and the respective obligations of the employer and the successor or the associated company under an RE order.

25. According to the Administration, the proposed new section 32PA seeks to provide an additional avenue for the employer to discharge the obligation under an RE order i.e. the employee being re-engaged by the employer's successor or associated company. With the consent of the employee, the employer's obligation under the order to re-engage the employee may be deemed to have been fulfilled if the employer's successor or associated company engages the

employee on comparable terms. Such arrangement has to be agreed by the three parties concerned, viz. the employee, employer and successor or associated company, and the terms must be specified in a written agreement made among the three parties concerned and endorsed by the court or LT.

26. Some members including Mr Andrew LEUNG and Mr CHUNG Kwok-pan have expressed the view that it is not appropriate for the associated company to assume the statutory responsibility to re-engage the employee concerned. As the RE arrangement has to be agreed by the three parties concerned, it would be more appropriate for the dispute to be settled out of the court.

27. The Administration has stressed that the associated company would not be compelled to re-engage the employee unless the associated company itself, together with the original employer and the employee concerned, reach an agreement to do so. In the written agreement made among them, there have to be terms concerning the associated rights and obligation of the parties. If the successor or associated company eventually does not re-engage the employee, the original employer's obligation under the order for re-engagement is not relieved. The original employer has to pay to the employee terminal payments, compensation and further sum (if applicable) if the former has not re-engaged the employee either.

Legal consequences for failing to pay further sum under an order for RI or RE

28. Clauses 9 and 10 amend sections 43N and 43P of EO respectively to the effect 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" as defined under the proposed section 43N(1)(k) payable on that failure.

29. Mr LEE Cheuk-yan takes the view that the employer's failure to reinstate or re-engage the employee should constitute an offence under EO, irrespective of whether the employer would pay the employee with terminal payments, compensation and further sum awarded by the court or LT. Mr LEE Cheuk-yan has further indicated that he intends to propose CSAs to the Bill to provide that the court or LT should obtain the concerned employee's express agreement to include the terminal payments, compensation and further sum in the order for RI or RE. If the employee does not expressly agree to the term, the employee may apply to the court or LT for an order for compliance against the employer if the employee is not reinstated or re-engaged in accordance with

the terms specified in the order for RI or RE. If the employer fails to comply with the order for compliance, the employee may make an application to the court, and the employer is required to pay to the employee the terminal payments, compensation and further sum and is liable to a fine, imprisonment and/or sequestration of property.

30. The Administration has explained that under the existing EO, an employer who wilfully and without reasonable excuse fails to pay, among others, the compensation awarded by the court or LT for UUD cases commits a criminal offence and is subject to a maximum fine of \$350,000 and three years' imprisonment on conviction. For the sake of maintaining consistency with the offence related to the non-payment of the compensation which involves UUD cases, it is proposed that the non-payment of further sum also be made a criminal offence, with the penalty, and personal liability of the partner or director or the responsible persons of the employer who consented to or connived at the commission of the offence, to be pitched at the same level as those applicable to non-payment of compensation awarded by the court or LT for UUD cases.

31. The Administration has advised that in drawing up the legislative proposal, reference has been made to overseas practices in respect of the making of compulsory RI or RE order. The Administration has further advised that Mr LEE's proposed order for compliance would inevitably prolong the process by which an employee can obtain the terminal payments, compensation and further sum in the event that he/she is not reinstated or re-engaged by the employer as ordered. It also departs from the consensus of LAB that, instead of penalizing the employer with a fine or imprisonment, the employee shall be paid the said 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. LAB discussed the matter again in depth at its meeting held in May 2016 and maintained its consensus that non-compliance of an RI or RE order should not be criminalized.

Variation of an RE order

32. Members note that under the proposed new section 32PA(4), an application for variation of an RE order may only be made by the employee. Some members have expressed concern about what actions the employer can take if the employee fails, refuses or neglects to make an application for variation of an RE agreement even when an re-engagement agreement has been entered into by all relevant parties.

33. The Administration has advised that the policy intent is that the obligation to re-engage the employee under an RE order all along rests on the employer. To safeguard the interests of the employee and clearly define the

respective rights and obligations of the parties under the arrangement, the proposed new section 32PA spells out that the RE 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 order is to be made by the employee. As endorsed by LAB, under this arrangement, the employee's consent is the prerequisite for the court or LT considering an offer of RE by the employer's successor and associated company. If the employee does not make an application for variation of the RE order after the RE agreement is made, the original RE order as made by the court or LT remains in force.

Relief from paying the further sum

34. The proposed new section 32PC allows an employer to apply to the court or LT for relief from the liability to pay the further sum if it is no longer reasonably practicable for the employer to reinstate or re-engage the employee because of reasons attributable to the employee or because a change of circumstances has occurred beyond the employer's control since the making of the order. Some members have enquired whether "a change of circumstances" just includes any relevant events happened after the order was made and before the specified date for RI or RE, or it also includes all the relevant events that occurred within the seven days or the extended period as stated in the proposed subsections 5(a) and 5(b).

35. The Administration has advised that the employer becomes liable to pay the further sum if the employee is not reinstated or re-engaged by the date specified in the order. Given the liability of the employer to pay the further sum arises if the employee is not reinstated or re-engaged by the specified date for RI or RE, it appears that under normal circumstances, events occurring after that date may not be relevant to the employer's failure to reinstate or re-engage the employee as ordered. Nevertheless, the court or LT may take into account any events which it considers relevant in determining whether relief from paying the further sum should be granted.

Related amendments

36. Members note that Parts 3 to 5 of the Bill seek to make a number of related amendments to the Labour Tribunal Ordinance (Cap. 25) and its subsidiary legislation to provide for:

- (a) the procedures for making an application for the purposes of the proposed new section 32PA or 32PC of EO; and
- (b) forms for applications for the purposes of the proposed new sections 32PA and 32PC, and the related notice of hearing and a

certificate of a LT award or order.

37. Members also note that the RI/RE arrangement proposed under the Bill would apply to cases where the date of dismissal, or the date of notice if prior notice of dismissal is given, on or after the commencement date of the relevant provisions of the Bill.

Committee stage amendments

38. The Bills Committee takes note that Mr LEE Cheuk-yan, Mr LEUNG Yiu-chung and Mr SIN Chung-kai have indicated their respective intention to propose CSAs to the Bill as mentioned in paragraphs 10, 17, 19, 22 and 29 above. The CSAs proposed by Mr LEE Cheuk-yan and Mr SIN Chung-kai are in **Appendices III and IV** respectively.

39. The Bills Committee will not propose any CSAs to the Bill.

Resumption of Second Reading debate

40. The Bills Committee raises no objection to the resumption of the Second Reading debate on the Bill.

Advice sought

41. Members are invited to note the deliberations of the Bills Committee.

Bills Committee on Employment (Amendment) Bill 2016

Chairman Hon WONG Ting-kwong, SBS, JP

Members Hon LEE Cheuk-yan (since 1 April 2016)
Hon LEUNG Yiu-chung
Hon Andrew LEUNG Kwan-yuen, GBS, JP
Hon Cyd HO Sau-lan, JP
Hon IP Kwok-him, GBS, JP
Hon Alan LEONG Kah-kit, SC
Hon WONG Yuk-man
Hon Frankie YICK Chi-ming, JP
Hon YIU Si-wing, BBS
Hon Gary FAN Kwok-wai
Hon CHAN Yuen-han, SBS, JP
Hon KWOK Wai-keung
Hon SIN Chung-kai, SBS, JP
Hon IP Kin-yuen
Hon POON Siu-ping, BBS, MH
Hon TANG Ka-piu, JP
Dr Hon CHIANG Lai-wan, JP
Hon CHUNG Kwok-pan
Hon Alvin YEUNG Ngok-kiu

(Total : 20 members)

Clerk Miss Betty MA

Legal Adviser Mr Alvin CHUI

Date 1 April 2016

Bills Committee on Employment (Amendment) Bill 2016

List of organizations/individuals which/who have given oral representation to the Bills Committee

1. Manpower Concern Group
2. Labour Party
3. 民生議政
4. 合味道杯麵之友
5. Liberal Party
6. Ms Christine FONG Kwok-shan, Sai Kung District Council member
7. Great Tsing Yi
8. Hong Kong Buildings Management and Security Workers General Union
9. Hong Kong Professional Teachers' Union
10. Hong Kong Chef Union
11. Hong Kong Confederation of Trade Unions
12. Mr CHONG Ka-wai
13. The Federation of Hong Kong & Kowloon Labour Unions
14. Neighbourhood and Worker's Service Centre
15. Mr WONG Kai-yeung
16. Mr LEUNG Kam-wai, Kwai Tsing District Council member
17. Mr LAI Chi-po

List of organisation which has provided written views to the Bills Committee

1. 梁山同好會

Employment (Amendment) Bill 2016

Committee Stage

Amendments to be moved by the Honourable LEE Cheuk-yan

(Set 1)

<u>Clause</u>	<u>Amendment Proposed</u>
4(1)	At the beginning of the proposed section 32N(3C)(b), by adding “subject to subsection (3CA),”.
4(1)	By adding after the proposed section 32N(3C)— “(3CA) If the employer has engaged a permanent replacement for the employee, the court or Labour Tribunal must not take that fact into account in determining, for the purposes of subsection (3B), whether it is reasonably practicable to comply with an order for reinstatement or re-engagement, unless the employer shows— (a) that it was not practicable for the employer to arrange for the employee’s work to be done without engaging a permanent replacement; or (b) that— (i) the employer engaged the replacement after the lapse of a reasonable period, without having heard from the employee that the employee wished to be reinstated or re-engaged, and (ii) when the employer engaged the replacement it was no longer reasonable for the employer to arrange for the employee’s work to be done except by a permanent replacement.”.

Employment (Amendment) Bill 2016

Committee Stage

Amendments to be moved by the Honourable LEE Cheuk-yan
(Set 2)

<u>Clause</u>	<u>Amendment Proposed</u>
5	In the proposed section 32NA(1)(b), by deleting “lesser” and substituting “greater”.
5	In the proposed section 32NA(1)(b)(i), by deleting “\$50,000” and substituting “\$100,000”.
5	In the proposed section 32NA(1)(b)(ii), by deleting “3 times” and substituting “6 times”.
5	In the proposed section 32NA(3), by deleting “Commissioner may, by notice” and substituting “Legislative Council may, by resolution”.

Employment (Amendment) Bill 2016

Committee Stage

Amendments to be moved by the Honourable LEE Cheuk-yan

(Set 3)

<u>Clause</u>	<u>Amendment Proposed</u>
4(1)	In the proposed section 32N(3)(b), by deleting “the employer and the employee whether they agree” and substituting “the employee whether the employee agrees”.
4(1)	By deleting the proposed section 32N(3A).
4(1)	In the proposed section 32N(3B), by deleting everything before “the employee expresses” and substituting “If”.
8	In the proposed section 32PC(1), by deleting “32A(1)(c)” and substituting “32A(1)”.
14	In the proposed section 30A(1), in the definition of <i>relief application</i> , by deleting “32A(1)(c)” and substituting “32A(1)”.
18(1)	In the proposed Form 10B, by deleting “32A(1)(c)” and substituting “32A(1)”.

Employment (Amendment) Bill 2016

Committee Stage

Amendments to be moved by the Honourable LEE Cheuk-yan

(Set 4)

<u>Clause</u>	<u>Amendment Proposed</u>
New	By adding— “3A. Section 32M amended (remedies for employment protection) Section 32M(1), before the full stop— Add “and, in the case where the court or Labour Tribunal does not make an order under section 32N, the court or Labour Tribunal may, whether or not it has made an award of terminal payments under section 32O, make an award of compensation under and in accordance with section 32P to be payable to the employee by the employer as it considers just and appropriate in the circumstances”.”.
5	In the proposed section 32NA(1)(a)(ii), by deleting everything before “the amount”.
5	In the proposed section 32NA(1)(b), by deleting everything before “a sum”.
New	By adding— “6A. Section 32P amended (award of compensation) Section 32P(1)— Repeal everything after “the circumstances,” Substitute “if neither order for reinstatement nor order for re-engagement under section 32N is made.”.”.
12	In the proposed section 77— (a) in the definition of <i>former provision</i> — (i) by adding “, 32M” after “32J”; (ii) by adding “, 32P” after “32O”; (b) in the definition of <i>specified provision</i> —

- (i) by adding “, 32M” after “32J”;
- (ii) by adding “, 32P” after “32O”.

Employment (Amendment) Bill 2016

Committee Stage

Amendments to be moved by the Honourable LEE Cheuk-yan

(Set 5)

<u>Clause</u>	<u>Amendment Proposed</u>
3(2)	In the proposed section 32J(4), by adding “, 32NC” after “32N”.
4(1)	By adding after the proposed section 32N(3E)— “(3EA) Before making an order for reinstatement or re-engagement, the court or Labour Tribunal must ask the employee whether the employee agrees to include a term mentioned in subsection (4)(d) or (6)(g) in the order to be made. (3EB) If the employee does not express an agreement under subsection (3EA), the court or Labour Tribunal— (a) must not include a term mentioned in subsection 4(d) or (6)(g) in the order for reinstatement or re-engagement to be made; and (b) must explain to the employer and the employee that the employee may apply to the court or Labour Tribunal for an order for compliance against the employer under section 32NC if the employee is not reinstated or re-engaged on the terms specified in the order to be made.”.
4(3)	In the proposed section 32N(4)(d), by adding at the beginning “(if the employee expresses an agreement for its inclusion)”.
4(7)	In the proposed section 32N(6)(g), by adding at the beginning “(if the employee expresses an agreement for its inclusion)”.
4(9)	In the proposed section 32N(9), by adding “32NC,” before “32PA”.
4(9)	In the proposed section 32N(10), by adding “32NC,” before “32PA”.
New	By adding— “5A. Sections 32NC and 32ND added Before section 32O— Add “32NC. Order for compliance (1) This section applies if—

- (a) an order for reinstatement or re-engagement is made by the court or Labour Tribunal under section 32N in respect of an employee dismissed in any of the circumstances mentioned in section 32A(1), whether or not the order is varied under section 32PA (which order (as so varied, if applicable) is referred to in this section as the **principal order**); and
 - (b) the principal order does not include a term mentioned in section 32N(4)(d) or (6)(g).
- (2) In this section, if the principal order is varied under section 32PA—
- (a) **employer** means the original employer;
 - (b) **original employer** in paragraph (a) has the same meaning as in section 32PA(2).
- (3) The employee may apply to the court or Labour Tribunal for an order for compliance against the employer if the employee is not reinstated or re-engaged on the terms specified in the principal order by the date so specified.
- (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 1 month after the day 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) make an order for compliance against the employer under subsection (9); or
 - (c) order that the principal order be varied under subsection (10).

- (9) If the court or Labour Tribunal finds that the employer does not have reasonable grounds for the non-compliance of the principal order, it must make an order for compliance against the employer. On making the order, the court or Labour Tribunal must specify the date by which the employee must be reinstated or re-engaged on the terms specified in the principal order, except the term mentioned in section 32N(4)(c) or (6)(f).
- (10) If the court or Labour Tribunal finds that the employer has reasonable grounds for the non-compliance of the principal order, it must order that the principal order be varied by—
 - (a) repealing the date in the term mentioned in section 32N(4)(c) or (6)(f) and substituting with a later date by which the employee must be reinstated or re-engagement; and
 - (b) subject to subsection (11), adding a term mentioned in section 32N(4)(d) or (6)(g).
- (11) In exercising its powers under subsection (10)(b), the court or Labour Tribunal may reduce the amount mentioned in section 32NA(1)(b) if it considers just and appropriate in the circumstances.
- (12) In determining for the purposes of subsections (9) and (10) whether or not the employer has reasonable grounds for the non-compliance of the principal order, it is for the employer to show 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.

32ND. Consequence of failure to comply with an order for compliance

- (1) This section applies if an order for compliance is made by the court or Labour Tribunal under section 32NC(9).

- (2) The employee may apply to the court for the exercise of its powers under subsections (7), (8) and (9) if the employee is not reinstated or re-engaged on the terms specified in the order for compliance by the date so specified.
- (3) The application may only be made to—
 - (a) the District Court if the order for compliance is made by the Labour Tribunal; or
 - (b) in any other case, the court that made the order for compliance.
- (4) The application may only be made—
 - (a) not later than 3 months after the day by which the employee must be reinstated or re-engaged under the order for compliance; or
 - (b) within such extended time as may be allowed by the court.
- (5) Before determining the application, the court must give an opportunity to the employer and the employee to present each of their cases in respect of the application.
- (6) In determining the application, the court may take into account any relevant considerations.
- (7) If the court finds that the employer has failed to comply with the order for compliance (with or without reasonable excuse), it must—
 - (a) order that the employer must pay to the employee the sums mentioned in section 32NA(1)(a)(i), (a)(ii) and (b); and
 - (b) specify the date by which the employer must pay the sums under paragraph (a).
- (8) If the court finds that the employer has failed to comply with the order for compliance without reasonable excuse, it may, in addition to the order under subsection (7), make 1 or more of the following orders—
 - (a) that the employer be imposed a maximum fine of \$350,000;
 - (b) that the employer be sentenced to a maximum imprisonment 3 years; and
 - (c) that the property of the employer be sequestered.

- (9) The court may order that the whole or any part of the fine mentioned in subsection 8(a) must be paid to the employee if it considers just and appropriate in the circumstances.”.”.

32ND. Enforcement of order for compliance

An order for compliance made under section 32NC(9) is enforceable in accordance with Order 45 of the Rules of the High Court (Cap. 4A).”.”.

- 7 In the proposed section 32PA(1)(a), by adding “32NC or” before “32PC”.
- 7 In the proposed section 32PA(6), by deleting “(g)” and substituting “(if applicable) section 32N(6)(g)”.
- 7 In the proposed section 32PA(7)(d), by adding “(if applicable)” at the beginning.
- 7 In the proposed section 32PA(8)(b), by adding “(if applicable)” at the beginning.
- 8 In the proposed section 32PC(1), by deleting “This” and substituting “Subject to subsection (1A), this”.
- 8 By adding after the proposed section 32PC(1)—
 “(1A) This section does not apply if—
 (a) the principal order does not include a term mentioned in section 32N(4)(d) or (6)(g); or
 (b) the principal order is varied under section 32NC(10).”.
- 9(3) In the proposed definition of *specified entitlement*, in paragraph (l), by adding “32NC,” before “32PA”.
- 10(2) In the proposed section 43P(4), by adding “32NC,” before “32PA”.
- 11(1) In the proposed section 43R(4)(ca)(i), by adding “32NC,” before “32PA”.
- 11(1) In the proposed section 43R(4)(ca)(ii), by adding “32NC,” before “32PA”.
- 11(2) In the proposed section 43R(6), in the definition of *order for re-engagement*, by adding “32NC,” before “32PA”.
- 11(2) In the proposed section 43R(6), in the definition of *order for reinstatement*, by adding “32NC or” before “32PC”.

- 12 In the proposed section 77(5), in the definition of *specified provision*, by adding “, 32NC, 32ND” after “32NB”.
- 14 In the heading of the proposed section 30A, by adding “**32NC**,” before “**32PA**”.
- 14 In the proposed section 30A(1), in the definition of *order for re-engagement*, by adding “32NC,” before “32PA”.
- 14 In the proposed section 30A(1), in the definition of *order for reinstatement*, by adding “32NC,” before “32PA”.
- 14 In the proposed section 30A(1), by adding in alphabetical order—
 “*compliance order application* (遵從命令申請) means an application to the tribunal that—
 (a) is made for the purposes of section 32NC(3) 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) of the Ordinance; and
 (b) seeks to order the employer to reinstate or re-engage the employee under the terms specified in the order for reinstatement or re-engagement.”.
- 14 By adding after the proposed section 30A(1)—
 “(1A) A compliance order application must be in the prescribed form.
 (1B) On a compliance order application being made in accordance with subsection (1A) and with section 32NC 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.”.
- 14 In the proposed section 30A(6), by adding “a compliance order application,” after “neither”.
- 14 In the proposed section 30A(7), by adding “a compliance order application,” after “because of”.
- 18(1) By adding before the proposed Form 10A—
 “Form 10AA [s. 30A(1A)]

(Cap. 25)

APPLICATION MADE FOR THE PURPOSES OF SECTION 32NC 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 *reinstatement/re-engagement under section 32N of the Employment Ordinance (Cap. 57) on the day of 20....., for (b) (defendant) to *reinstate/re-engage me by the (c) day of 20..... A copy of the order accompanies this application. (d)

I, (a), apply for an order for compliance against the defendant under section 32NC of the Employment Ordinance (Cap. 57).

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 reinstated/re-engaged.
 - (d) 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 of the Employment Ordinance (Cap. 57), a copy of the order made for each previous variation must also accompany this application.

_____”.

18(1) In the proposed Form 10C, in the heading, by deleting “*32PA/32PC” and substituting “*32NC/32PA/32PC”.

18(1) In the proposed Form 10C, by adding after the first paragraph—

“*The claimant has applied for an order for compliance against the defendant under section 32NC of the Employment Ordinance (Cap. 57).

*#A copy of the application accompanies this notice.”.

18(2) In the proposed Form 17, in paragraph 1., by adding—

“(4) *an order under section 32NC(9) of the Employment Ordinance (Cap. 57) for the *reinstatement/re-engagement of the claimant with the following terms—

[terms specified under section 32NC(9) of that Ordinance]

18(2) In the proposed Form 17, by adding—

“1A. *the order for *reinstatement/re-engagement was varied by an order of the tribunal made under section 32NC(10) of the Employment Ordinance (Cap. 57) on the day of 20..... to the effect as follows—

[terms specified under section 32NC(10) of that Ordinance]”.

Appendix IV

Bills Committee on Employment(Amendment) Bill 2016

Committee Stage

Amendments to be moved by Hon SIN Chung-kai

Clause

Amendment Proposed

5

In the proposed section 32NA(1)(b), by deleting
“lesser” and substituting “larger” .