

For information
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Legislative Council Panel on Manpower

Proposed amendments to the Employment Ordinance for the making of compulsory reinstatement or re-engagement orders for unreasonable and unlawful dismissals

Introduction

This paper updates Members on the progress of the proposal to amend the reinstatement/ re-engagement provisions of the Employment Ordinance (“EO”) (Cap. 57) and sets out the key elements of the proposed provisions.

Background

2. In Part VIA of 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 Labour Tribunal² (“LT”) may, subject to the mutual consent of the employer

¹ Unreasonable and unlawful dismissal refers to the situation where an employee is dismissed as mentioned in s.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, by reason of the employee exercising trade union rights or giving evidence for the enforcement of relevant labour legislation.

² For the purpose of hearing and adjudicating claims for remedies under Part VIA of EO, LT may, under EO and the Labour Tribunal Ordinance, transfer a claim to the Court of First Instance or the District Court for adjudication if it is of the opinion that for any reason the claim should not be heard and determined by it. The court may, in the same way as LT does, make all or any of the orders or awards as provided by EO.

and the employee, make an order for reinstatement or re-engagement³. If no order for reinstatement or re-engagement is made, LT may make an award of terminal payments⁴ and an additional award of compensation not exceeding \$150,000⁵ as it may consider just and appropriate.

3. According to the said Ordinance, in making an order for reinstatement or re-engagement, LT shall specify the terms on which reinstatement or re-engagement is to take place and, in the event that the employer fails to reinstate or re-engage the employee as required by the order, the amount of terminal payments and compensation to be payable to the employee. Under the existing provisions, if LT finds that an order for reinstatement or re-engagement is appropriate, it shall ask the employer and the employee whether they agree to the making of the order. If both the employer and the employee express agreement, LT shall make the order in accordance with that agreement.

Features of the legislative proposals

4. In respect of the circumstances of unreasonable and unlawful

³ An order for reinstatement is an order requiring the employer to treat the employee in all respects as if he/she had not been dismissed or as if there had been no variation of the terms of the contract of employment. An order for re-engagement is an order requiring the employer, his/her successor or an associated company to re-engage the employee in an employment on terms comparable to his/her original terms of the employment or in other suitable employment.

⁴ Terminal payments refer to:

- (a) the statutory entitlements under EO which the employee is entitled to but has not yet been paid upon termination of employment and other payments due to the employee under his/her contract of employment; and
- (b) those statutory entitlements for which the employee has not yet attained the minimum qualifying length of service but which the employee might reasonably be expected to be entitled to upon termination of employment had he/she been allowed to continue with his/her original employment or original terms of the contract of employment. In such cases, terminal payments shall be calculated according to the employee's actual length of service.

⁵ In determining an award of compensation and the amount of the award of compensation, LT shall take into account the circumstances of the claim which include the circumstances of the employer and the employee, the employee's length of service, the manner in which the dismissal took place, any loss sustained by the employee which is attributable to the dismissal, possibility of the employee obtaining new employment, any contributory fault borne by the employee, and any payments that the employee is entitled to receive in respect of the dismissal.

dismissal (“UUD”) of an employee, the Government has earlier on proposed amending EO to remove the employer’s consent as a prerequisite to an order for reinstatement or re-engagement made by LT. We have further proposed that the employer who fails to reinstate or re-engage the employee as required by the order has to pay a further sum, on top of the terminal payments and compensation, to the employee; and the employer’s default payment of the further sum shall be a criminal offence. The proposed amendments will also include amendments to clarify and supplement provisions on a re-engagement order. The above legislative proposals have been discussed in detail in past meetings of the Panel on Manpower (“Panel”) of Legislative Council (“LegCo”). The major features of the relevant legislative proposals are as follows:

(a) LT may make an order for reinstatement or re-engagement without the employer’s consent

5. We propose that in the circumstances of UUD of an employee, an employer’s consent, as a prerequisite to a reinstatement or re-engagement order made by LT in an employee’s claims for reinstatement or re-engagement, shall be removed. According to the legislative proposal, in considering an employee’s claim for reinstatement or re-engagement, if LT finds that an order for reinstatement or re-engagement is appropriate and compliance with the order by the employer reasonably practicable, it may make such an order even if the employer disagrees. In determining whether to make such an order, LT has to take into account the circumstances of the claim such as the relationship between the employee and the employer, the circumstances surrounding the dismissal, whether the employer may face any genuine difficulties in complying with the order and so on. We also propose that LT may request the Commissioner for Labour to submit a report on the circumstances of the case obtained in connection with the conciliation undertaken by the Labour Department (“LD”). However, the information contained in the report is to be submitted only with the consent of the employer and the employee.

(b) Further sum

6. Under the existing provisions of EO, in making an order for reinstatement or re-engagement, LT must specify, in addition to the terms on which reinstatement or re-engagement is to take place, (i) the amount of terminal payments and (ii) the amount of 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.

7. The proposal will further stipulate that in making of an order for reinstatement or re-engagement in the case of UUD, LT must at the same time

order a further sum to be paid to the employee by the employer in the event that the employer fails to reinstate or re-engage the employee as required by the order. This proposal on the one hand obliges an employer who has failed to reinstate or re-engage the employee as ordered to pay a further sum to the employee, and on the other requires the further sum be specified in the reinstatement or re-engagement order, sparing the employee the need to file another claim to LT again for the award of the further sum should the relevant circumstances arise. As the existing legislation has not empowered LT to order the employer to pay the further sum in addition to compensation and terminal payments, it is necessary to make amendment to EO.

8. Moreover, to enable an employee dismissed unreasonably and unlawfully to obtain the further sum the soonest possible without having to file another claim to LT when the employer fails to reinstate or re-engage him/her as required by the order, it is proposed that the further sum should be an amount set by law so that it can be specified in the order right at the time when the order is made. The further sum is proposed to be fixed at three times the employee's monthly wages, subject to a maximum of \$50,000.

(c) Non-payment of the further sum to be a criminal offence

9. Under the existing EO, an employer who wilfully and without reasonable excuse fails to pay a sum awarded by LT or the Minor Employment Claims Adjudication Board is a criminal offence. The sum covered by the offence includes the compensation awarded by LT in the circumstances of UUD. As the liabilities of paying the further sum and the compensation both arise from UUD, we propose that non-payment of the further sum should be treated in the same way as non-payment of compensation and thus made a criminal offence, with the level of penalty to be pitched at the same level⁶ as non-payment of compensation.

(d) Clarifying and supplementary amendment to the re-engagement provision

10. The existing section 32N(6) of EO stipulates that an order for re-engagement is one that requires the employee to be engaged by the employer, or by "a successor of the employer or an associated company". On the other

⁶ An employer who wilfully and without reasonable excuse fails to pay a sum awarded by LT is liable to prosecution and, on conviction, to a maximum fine of \$350,000 and 3 years of imprisonment. If such an offence committed by a partner of a firm or a body corporate is attributable to the consent, connivance or neglect of the other partner of the firm, or a director or responsible person of the body corporate, such partner, director or person commits the like offence.

hand, section 32N(3)⁷, the provision empowering LT to make a re-engagement order, stipulates that LT shall make an order for reinstatement or re-engagement after obtaining the agreement of the employer and the employee. This section, however, has made no reference to the employer's successor or associated company. Moreover, the employer's successor or associated company is not a party to the employee's claim. We consider it necessary to make legislative amendment to state clearly that the obligation to re-engage the employee under a re-engagement order all along rests on the employer. Nevertheless, with the consent of the employee, the employer's obligation under the order to re-engage the employee can be taken to have been fulfilled if the employer's successor or associated company re-engages the employee on terms comparable to those specified in the order.

Progress of the drafting work and other details

11. Upon obtaining the general support of the aforesaid proposal from the Labour Advisory Board and the Panel for putting the various items proposed into effect, LD and the Department of Justice have been working on drafting the amendment provisions and formulating the implementation procedures and details. As the proposed amendments involve the operation of LT, which will be enforcing the proposed amendments after its enactment, we need to consult the Judiciary in the drafting process. In the course of drafting, we find it necessary to include into the draft provisions the following two detailed items in view of the judicial proceedings and relevant principles involved.

(a) Relief from paying the further sum under exceptional circumstances

12. As mentioned in paragraph 8 above, it is proposed that when LT makes an order for reinstatement or re-engagement in respect of an UUD case, it shall specify in the order the amount of the further sum to be paid to the employee by the employer if the employer fails to reinstate or re-engage the employee as ordered so that the employee is, under such circumstances, entitled to the further sum without having to file a claim in LT again.

⁷ S.32N(3) of EO reads: Where the court or Labour Tribunal finds that an order for reinstatement or re-engagement, as the case may be, is appropriate, it shall explain to both the employer and the employee what order for reinstatement or re-engagement may be made, and shall ask them whether they agree to the court or Labour Tribunal making such an order. If the employer and the employee express such agreement, the court or Labour Tribunal shall make an order for reinstatement or re-engagement in accordance with that agreement.

13. Under the proposed “without having to file a claim in LT again” arrangement, it is necessary to empower LT to handle the circumstances that, after the making of the relevant order, the employer has justifiable reasons for not being able to reinstate or re-engage the employee. Hence, the amendment provisions will stipulate that, in respect of an order for reinstatement or re-engagement made for a UUD case, an employer who is unable to fulfil the reinstatement or re-engagement obligation under the order may make an application to LT for relief from the liability to pay the further sum. LT may take into account any relevant considerations, including whether it is due to reasons attributable to the employee or whether the circumstances after the making of the order have changed beyond the employer’s control such that it is no longer reasonably practicable for the employer to reinstate or re-engage the employee as required by the order. LT may grant relief, wholly or partly, to the employer from paying the further sum or make any order that it considers just and appropriate in the circumstances. Before determining the application, LT must give an opportunity to both the employer and the employee to present their cases in respect of the employer’s application.

(b) Incorporation of the arrangement of re-engagement by successor or associated company into the terms of a re-engagement order

14. As mentioned in paragraph 10 above, it is necessary to make amendments to clarify and supplement the re-engagement provisions and to state clearly that for the purpose of fulfilling the obligation under a re-engagement order, the concerned employer may, with the employee’s consent, arrange his/her successor or associated company to re-engage the employee on terms comparable to those specified in the order instead of re-engaging the employee himself

15. The legislative proposal will stipulate that the aforesaid arrangement for the successor or associated company to re-engage the employee has to be agreed by the three parties concerned – the employee, employer and successor or associated company – after LT has made an order for re-engagement. To safeguard the interests of the employee and clearly define the respective rights and obligations of the parties under the arrangement, it will be spelt out that the re-engagement terms must be specified in a written agreement made among the employee, employer and successor or associated company, and that application is to be made by the employee to LT to incorporate such terms into the original re-engagement order. It must also be specified in the terms that other than re-engagement by the employer, the employee may be re-engaged by the successor or associated company, and the associated rights and obligations of the parties.

16. The legislative proposal will also provide that the new terms added to the re-engagement order must specify that the re-engagement obligation under the order would be taken as having been fulfilled by the original employer if the employer's successor or associated company has re-engaged the employee on the terms specified in the order. Under such circumstances, the employee's period of employment and continuity of employment with the original employer will be brought under the successor or associated company for the purpose of reckoning his/her existing and future entitlements under EO and his/her employment contract. If the successor or associated company has not re-engaged the employee, the original employer's obligation under the order for re-engagement is not relieved and in such event, if the original employer has not re-engaged the employee himself, he/she has to pay to the employee terminal payments, compensation and further sum.

Conclusion

17. Members are invited to note the above proposals.

Labour and Welfare Bureau
Labour Department
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