

立法會
Legislative Council

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Panel on Manpower

Background brief prepared by the Legislative Council Secretariat for the meeting on 15 December 2015

Proposed amendments to the reinstatement and re-engagement provisions under the Employment Ordinance

Purpose

This paper summarises past discussions of the Panel on Manpower ("the Panel") on the Administration's proposal to empower the Labour Tribunal ("LT") to make a compulsory order for reinstatement or re-engagement of an employee who has been dismissed unreasonably and unlawfully, and to require the employer to pay a further sum to the employee for failing to comply with such an order.

Existing protection in respect of unreasonable and unlawful dismissal

2. Under the relevant provisions of Part VIA of the Employment Ordinance (Cap. 57) ("EO"), if an employee is unlawfully dismissed¹ and the employer fails to provide a valid reason as specified in EO for the dismissal², LT may, subject to the mutual consent of the employer and the employee, make an order for reinstatement/re-engagement. If no order for reinstatement/re-engagement is made, LT may make an award of terminal payments and/or an award of

¹ Unlawful dismissal refers to the situation where the employee is dismissed in contravention of labour legislation, including dismissal during pregnancy and maternity leave, during paid sick leave, after work-related injury, or by reason of the employee exercising trade union rights or giving evidence or information in any proceedings or inquiry in connection with the enforcement of EO, work accidents or work safety legislation.

² The valid reasons for dismissal stipulated in EO refer to an employee's conduct, his capability/qualification for performing the job, redundancy or other genuine operational requirements of the business, compliance with legal requirements, and any other reason of substance.

compensation not exceeding \$150,000 to the employee. LT, however, has no power to make an order for reinstatement/re-engagement without the employer's consent, even if it considers such an order appropriate.

Administration's proposal to amend the reinstatement and re-engagement provisions under EO

3. To enhance employees' protection against unreasonable and unlawful dismissal, the Administration has, in consultation with the Labour Advisory Board ("LAB") and relevant stakeholders, proposed to amend EO to empower LT to make a compulsory order without securing the consent of the employer for reinstatement/re-engagement of an employee who has been dismissed unreasonably and unlawfully, if LT considers making such an order appropriate and compliance with it by the employer reasonably practicable; and to 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 order by the employer.

Deliberations of the Panel

Legislative timetable

4. While expressing support for the proposed amendments, members had time and again raised concern about the legislative timetable for introducing the amendment bill into the Legislative Council ("LegCo"), having regard to the fact that the Panel was first briefed on the Administration's proposal in 2003. Members were of view that the Administration should expedite the drafting of the relevant legislative proposal.

5. The Administration advised that in the process of drafting the bill to amend EO to incorporate the proposed amendments, it introduced another bill, which was subsequently enacted to become the Employment (Amendment) Ordinance 2010 ("E(A)O 2010"), to create an offence relating to an employer's failure to pay any sum payable under an award of LT or the Minor Employment Claims Adjudication Board. The scope of the new offence under E(A)O 2010, which covered non-payment of remedies awarded on the ground of unreasonable and unlawful dismissal, would have read-across implications on the legislative proposal on compulsory reinstatement and re-engagement. LAB had asked the Administration to re-visit the proposal taking into account the full implications of the operation of E(A)O 2010.

6. The Administration further advised that pursuant to the operation of E(A)O 2010 in October 2010, wilful defaults of the sums awarded by LT or the

Minor Employment Claims Adjudication Board, including the award of compensation that arose from unreasonable and unlawful dismissal, had been made a criminal offence, with culpable employers liable to a maximum fine of \$350,000 and imprisonment for three years. Since non-payment of an award of compensation made in circumstances of unreasonable and unlawful dismissal has been made a criminal offence, the Administration had to consider how non-payment of the proposed further sum, which was triggered in the event of unreasonable and unlawful dismissal, should be dealt with. After further consultation with and upon securing the consensus of LAB as well as relevant stakeholders on the legislative proposal on compulsory reinstatement and re-engagement, the Administration would report the matter to the Panel with a view to introducing an amendment bill into LegCo as early as possible.

7. In its response to members' enquiry about the progress of the relevant legislative proposal, the Administration advised in 2014 that as the bill involved complicated legal issues, the Labour Department ("LD") and Department of Justice were conducting discussions on the contents of the bill and ways of resolving the technical issues concerned, and that they were striving to finalise the bill.

Wage payment during the intervening period

8. Some members were concerned whether a reinstated employee would be entitled to payment of wages for the period he was out of work. According to the Administration, the existing legislation did not provide for wage payment in the intervening period. This was because wages were payable in respect of work done. The law should not provide for wage payment when no work was performed. This position would remain unchanged after the proposed amendments. In considering whether to award to the employee payment of an amount equivalent to his lost wages, 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. An employee, upon a reinstatement order of LT, should be treated in all aspects as if he had not been dismissed or as if there had been no variation of the terms of the employment contract. In the case where an employee was re-engaged by his employer's successor or associated company, his previous length of service with the original employer would be reckoned as service with the new employer.

Safeguard against evasion of responsibility to comply with a reinstatement/re-engagement order

9. Clarification was sought on whether the proposed amendments could plug the loophole for an irresponsible employer to evade his responsibility to comply with a reinstatement/re-engagement order. Some members expressed

doubt as to whether the further sum would have conversely given employers an alternative to evade from carrying out the compulsory reinstatement order. There was a suggestion that to plug the possible loophole that the employer might opt to pay a further sum rather than complying with the compulsory order, a provision should be made for LT to exercise discretion to make a compulsory order straightly for reinstatement or re-engagement.

10. The Administration advised that under the proposal, a re-engagement order would be directed at the employer and hence, he could not shift the responsibility to his successor or associated company. The employer could only relieve his obligation to comply with such order if his successor or associated company re-engaged the employee concerned and if the employee consented. If the employer failed to comply with the proposed compulsory order to reinstate or re-engage the employee, the latter should be entitled to a further sum of three times of his monthly wages, subject to a maximum of \$50,000. This sum would be over and above the terminal payments and award of compensation.

Adequacy of protection

11. Some members were of the view that the proposed amount of the further sum was too low and insufficient to ensure protection for employees, especially the professional and high-salaried employees, against unreasonable and unlawful dismissal. Queries were raised about the basis of calculation of the sum and whether the Administration would consider increasing the sum to a maximum of \$100,000 or six times of the monthly wages of the employee concerned. There were suggestions that the cap should be removed so as to stay on par with other discrimination ordinances in Hong Kong, and employees unlawfully dismissed and awaiting the making of reinstatement order by LT should be compensated for their wages unpaid.

12. Members were advised that the proposed further sum, capped at \$50,000, was calculated based on the findings from past cases that the average monthly salary of employees was around \$10,000. It would be payable to the employee in the event of non-compliance with the compulsory order of reinstatement or re-engagement by the employer. It would be over and above the terminal payments and award of compensation stipulated under the existing provisions of EO.

Monitoring mechanism

13. Some members were concerned about the measures adopted by the Administration to ensure that employees could receive payments awarded by LT. The Administration advised that it was also concerned about the failure of

some employees in obtaining the judgment sum awarded by LT. Past cases indicated that it was mostly employees of medium and small-sized companies who failed to obtain the judgment sum. The Administration would continue to work closely with the Judiciary to explore feasible improvement measures on execution of awards made by LT.

Relevant papers

14. A list of the relevant papers on LegCo website is in the **Appendix**.

Council Business Division 2
Legislative Council Secretariat
10 December 2015

Appendix

Relevant papers on Proposed amendments to the reinstatement and re-engagement provisions under the Employment Ordinance

| Committee | Date of meeting | Paper |
|-------------------|--------------------------------|----------------------------------------------------------------------------------------------|
| Panel on Manpower | 20.11.2003 (Item IV) | Agenda Minutes |
| Panel on Manpower | 17.1.2008 (Item III) | Agenda Minutes |
| Panel on Manpower | 21.1.2010 (Item V) | Agenda Minutes |
| Panel on Manpower | 23.2.2010 (Item II) | Agenda Minutes |
| Panel on Manpower | 17.6.2010 (Item II) | Agenda Minutes |
| Panel on Manpower | 21.10.2010 (Item II) | Agenda Minutes |
| Panel on Manpower | 20.10.2011 (Item II) | Agenda Minutes |
| Panel on Manpower | 20.1.2012 (Item V) | Agenda Minutes |
| Panel on Manpower | 19 November 2013 (Item III) | LC Paper Nos. CB(2)555/13-14(01) and (02) |
| Panel on Manpower | 9 October 2014 (Item III) | LC Paper No CB(2)383/14-15(01) |