

立法會 *Legislative Council*

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Bills Committee on Employment (Amendment) Bill 2017

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper provides background information on the Administration's proposal to amend the reinstatement¹ ("RI") or re-engagement² ("RE") provisions of the Employment Ordinance (Cap. 57) ("EO"), and summarizes the discussion of the Panel on Manpower ("the Panel") on the latest legislative proposal.

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 dismissed.³ In unreasonable and unlawful dismissal ("UUD") cases, the court or the Labour

¹ Reinstatement is re-employment of the employee by the employer and the employer is 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.

² Re-engagement is employment of the employee by the employer, or by a successor of the employer, or by an associated company on terms comparable to his/her original terms of the employment or in other suitable employment.

³ Unreasonable and unlawful dismissal refers to the situation where an employee is dismissed in 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, by reason of the employee exercising trade union rights or giving evidence for the enforcement of relevant labour legislation.

Tribunal ("LT") may, subject to the mutual consent of the employer and the employee, make an order for RI or RE. If no order for RI or RE is made, the court or LT may make an award of terminal payments and an additional award of compensation not exceeding \$150,000 to the employee as it may consider just and appropriate. The court or LT, however, has no power to make an order for RI or RE without the employer's consent, even if it considers such an order appropriate.

The Employment (Amendment) Bill 2016

3. To enhance employees' protection against UUD, the Administration, following consultation with the Labour Advisory Board ("LAB") and the relevant stakeholders, introduced the Employment (Amendment) Bill 2016 ("the 2016 Bill") into the Legislative Council ("LegCo") on 2 March 2016. The 2016 Bill sought to amend EO so that, if an employee was dismissed by his/her employer under any of the circumstances mentioned in section 32A(1)(c) of Part VIA of EO, i.e. UUD:

- (a) the employer's agreement was no longer a pre-requisite for ordering RI or RE of the employee;
- (b) the employer had to pay to the employee a further sum which was set at three times the employee's average monthly wages but subject to a maximum of \$50,000 for non-compliance with the relevant order; and
- (c) the employer who wilfully and without reasonable excuse failed to pay the further sum would commit an offence.

4. The 2016 Bill also sought 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 Bills Committee formed to study the 2016 Bill completed scrutiny of the Bill in June 2016 and raised no objection to the resumption of the Second Reading debate on the Bill. After the Bills Committee had reported its deliberations to the House Committee,⁴ Members were informed by the Administration that the Labour Department ("LD") had, in accordance with the

⁴ The deliberations of the Bills Committee on Employment (Amendment) Bill 2016 are detailed in its report (LC Paper No. CB(2)1748/15-16), which is available at the LegCo website at <http://www.legco.gov.hk/yr15-16/english/hc/papers/hc20160617cb2-1748-e.pdf>.

standing practice, reported to LAB the detailed views made by members of the Bills Committee, including views and suggestions on the amount of the further sum. While LAB agreed that the ceiling for the further sum might be increased, no consensus was reached on the increased ceiling of the further sum. LAB members had advised that they would need time to further consult their respective organizations on the suggestions. The Administration therefore did not envisage that the Second Reading debate of the Bill could be resumed within the Fifth LegCo. The 2016 Bill thus lapsed at the end of the Fifth LegCo.

The Employment (Amendment) Bill 2017

6. The Administration introduced The Employment (Amendment) Bill 2017 ("the 2017 Bill") into LegCo on 17 May 2017. According to the LegCo Brief (File Ref: LD LAB/CR 38/706(C)) issued by the Labour and Welfare Bureau on 2 May 2017, the 2017 Bill is essentially the same as the 2016 Bill except for increasing the ceiling for the further sum from \$50,000 to \$72,500.

Deliberations of the Panel on the revised legislative proposal

7. The Panel was consulted on the revised proposal to amend the RI or RE provisions of EO and the salient features of the legislative proposal at its meeting on 20 December 2016. The deliberations are summarized in the following paragraphs.

Ceiling of the further sum

8. Some members considered that the proposed revised ceiling of the further sum (i.e. \$72,500) was still too low to provide adequate protection for employees, in particular higher-salaried employees, who were unreasonably and unlawfully dismissed. Noting that there were three to four cases in a year in which the employees requested RI or RE, these members were of the view that a further upward adjustment in the ceiling of the further sum would not bring significant impact on the vast majority of employers. There was a suggestion that an employer who failed to reinstate or re-engage an employee as ordered by the court or LT should be subject to a higher amount of the further sum, say, \$150,000 to \$200,000.

9. The Administration explained that the further sum was in addition to the terminal payments and compensation (up to a maximum of \$150,000) which an employer was liable to pay to the employee if the employer did not comply with

an order for RI or RE made in a case of UUD. The total cost to be borne by an employer for non-compliance for RI or RE could be substantial. Having regard to the affordability of employers, particularly those of small and medium enterprises, it was considered that the proposed revised ceiling of the further sum would achieve sufficient deterrence against non-compliance with an order for RI or RE by the employer. Members were advised that currently around 75% of employees had a monthly salary below \$25,000, the revised ceiling of the further sum was thus considered adequate to protect most employees.

10. The Administration had also drawn members' attention to the fact that the revised ceiling of the further sum was a hard-earned consensus reached by LAB following rounds of discussion. It appealed to members' understanding that the 2016 Bill had already been thoroughly scrutinized by the Bills Committee in the previous term of LegCo. Any significant amendments proposed to the revised bill would have to be reverted to LAB for consideration in accordance with the standing practice, and hence would inevitably delay its implementation.

11. Regarding some members' concern about whether a review mechanism would be established for the amount of the further sum, the Administration advised that the 2016 Bill had already provided for a mechanism to adjust the ceiling of the further sum by way of subsidiary legislation. These members, however, remained concerned that there was a lack of mechanism under EO requiring the Commissioner for Labour to review the amount of the further sum within a specified period. They asked whether the Administration would consider reviewing the amount of the further sum one to two years after the legislative proposal coming into effect. The Administration advised that the review on the amount of the further sum could be considered where appropriate after its implementation.

Scope of applicability of an order for RI or RE

12. Some members pointed out that during the deliberations of the former Bills Committee on the 2016 Bill, a few Members had indicated their respective intention to propose Committee stage amendments ("CSAs") to several aspects of the Bill, including allowing employees who were dismissed unreasonably and unlawfully to resume the original position if they so wished and extending the Bill to cover unreasonable dismissal cases. These members noted with concern that these proposed CSAs, which in their view could safeguard the rights of those employees participating in trade union activities, had not been incorporated in the revised bill.

13. The Administration explained that the main object of the legislative proposal was to enhance employees' protection against UUD. As proposed

under the 2017 Bill, the court or LT might make an order for RI or RE in a case of UUD without the employer's agreement if the employee sought RI or RE and the court or LT found that such an order was appropriate and compliance with the order by the employer was reasonably practicable. In making such an order, the court or LT had to take into account the circumstances of the case having regard to a number of factors, including the relationship between the employer and the employee concerned. The Administration stressed that the revised bill had balanced the interests of both employers and employees. Any significant amendments proposed to the 2017 Bill would have to be brought back to LAB for deliberation.

Relevant papers

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

Council Business Division 2
Legislative Council Secretariat
15 June 2017

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)
Panel on Manpower	15 December 2015 (Item V)	Agenda Minutes

Committee	Date of meeting	Paper
House Committee	--	Report of the Bills Committee on Employment (Amendment) Bill 2016 LC Paper No. CB(2)1816/15-16(01)
Panel on Manpower	20.12.2016 (Item V)	Agenda Minutes

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