

Bills Committee on Employment (Amendment) Bill 2017

The Government's response to issues as requested by the Bills Committee at its meeting on 24 November 2017

This paper sets out the Government's response to issues as requested by the Bills Committee on Employment (Amendment) Bill 2017 (the Bill) at its meeting held on 24 November 2017.

Reporting of information obtained in connection with conciliation or mediation to the court in other legal proceedings

2. In deliberating the proposed section 32N(3D) and (3E) of the Bill, Members asked about the report to be provided by the Commissioner for Labour (C for L) to the court or Labour Tribunal (LT) containing information obtained in connection with conciliation undertaken by the Labour Department (LD), and the agreement of the employer and the employee to the content of the report. Members requested LD to provide information about conciliation or mediation in other legal proceedings such as divorce cases.

3. In general, family mediation is a process designed to help separating/divorcing couples to reach a mutually acceptable agreement regarding the arrangements for their children and/or the resolution of other financial matters. The process involves a mediator who will facilitate the parties to communicate and resolve issues in dispute in a confidential setting. All mediation communication¹ is confidential and must not be disclosed except under specified circumstances, for example, with the consent of all parties and the mediator, or where there are reasonable grounds to believe that the disclosure is necessary to prevent danger of injury to a person or of serious harm to the well-being of a child, or with the leave of the court.²

¹ As defined in section 2(1) of the Mediation Ordinance (Cap. 620)—
“mediation communication” means—

- (a) anything said or done;
- (b) any document prepared; or
- (c) any information provided,

for the purpose of or in the course of mediation, but does not include an agreement to mediate or a mediated settlement agreement.

² Section 8 of the Mediation Ordinance provides—

- (1) A person must not disclose a mediation communication except as provided by subsection (2) or (3).

4. As far as the conciliation service provided by LD is concerned, it comes under the Labour Tribunal Ordinance (Cap. 25), and the Mediation Ordinance (Cap. 620) does not apply to it³. Moreover, conciliation is conducted by LD on the basis of confidentiality and being non-prejudicial to the legal rights of the employer and the employee concerned. The proposed section 32N(3D) in the Bill reflects a consensus reached by the Labour Advisory Board that the court or LT may request C for L to provide a report containing information of the claim obtained in connection with the conciliation. The proposed section 32N(3D) and (3E) aims to provide the court or LT a statutory channel, where it is desirable to do so, to obtain the information revealed by the employer and the

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- (2) A person may disclose a mediation communication if—
- (a) the disclosure is made with the consent of—
 - (i) each of the parties to the mediation;
 - (ii) the mediator for the mediation or, if there is more than one, each of them; and
 - (iii) if the mediation communication is made by a person other than a party to the mediation or a mediator—the person who made the communication;
 - (b) the content of the mediation communication is information that has already been made available to the public, except for information that is only in the public domain due to an unlawful disclosure;
 - (c) the content of the mediation communication is information that is otherwise subject to discovery in civil proceedings or to other similar procedures in which parties are required to disclose documents in their possession, custody or power;
 - (d) there are reasonable grounds to believe that the disclosure is necessary to prevent or minimize the danger of injury to a person or of serious harm to the well-being of a child;
 - (e) the disclosure is made for research, evaluation or educational purposes without revealing, or being likely to reveal, directly or indirectly, the identity of a person to whom the mediation communication relates;
 - (f) the disclosure is made for the purpose of seeking legal advice; or
 - (g) the disclosure is made in accordance with a requirement imposed by law.
- (3) A person may disclose a mediation communication with leave of the court or tribunal under section 10—
- (a) for the purpose of enforcing or challenging a mediated settlement agreement;
 - (b) for the purpose of establishing or disputing an allegation or complaint of professional misconduct made against a mediator or any other person who participated in the mediation in a professional capacity; or
 - (c) for any other purpose that the court or tribunal considers justifiable in the circumstances of the case.
- (4) In this section—
“child” means a person under the age of 18 years.

³ See item 1 of Schedule 1 to the Mediation Ordinance.

employee in connection with the conciliation. The information may only be provided with the agreement of the employer and the employee. This helps ensure that the confidential and non-prejudicial basis of the conciliation which the parties agree to undergo would not be affected.

Entitlement of an employee to wage payment and employment benefits or compensation during the intervening period between the date of dismissal and the date of reinstatement (RI) or re-engagement (RE) in an unreasonable and unlawful dismissal (UUD) case

5. Under the Employment Ordinance (EO) (Cap. 57), wages mean all remuneration payable to an employee in respect of work done or work to be done. On the other hand, in the case of RI/RE of an employee in an UUD case, the existing section 32N(5) and (7) of EO provides that on the making of an order for RI/RE, if the court or LT considers just and appropriate in the circumstances, it may specify 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/RE.

Labour and Welfare Bureau
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