

For information
on 20 December 2016

Legislative Council Panel on Manpower

Progress of the lapsed Employment (Amendment) Bill 2016

Introduction

This paper briefs Members on a revised proposal to amend the reinstatement¹ (RI) or re-engagement² (RE) provisions of the Employment Ordinance (EO) (Cap. 57) and sets out the key elements of the 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 dismissed³. In unreasonable and unlawful dismissal (UUD) cases, the Labour Tribunal⁴ (LT) may, subject to the mutual consent of the employer and the employee, make an

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 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 (i.e. unlawful), 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) or by reason of the employee exercising trade union rights or giving evidence for the enforcement of relevant labour legislation.

⁴ For the purpose of hearing and adjudicating claims for remedies under Part VIA of EO, LT may, under EO and the Labour Tribunal Ordinance (Cap.25), 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. With respect to a claim so transferred, the Court of First Instance or the District Court may, in the same way as LT does, make all or any of the orders or awards as provided by EO.

order for RI or RE. If no order for RI or RE is made, LT may make an award of terminal payments⁵ and an additional award of compensation⁶ not exceeding \$150,000 as it may consider just and appropriate.

3. According to Part VIA of EO, in making an order for RI or RE, LT shall specify the terms on which RI or RE 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 paid by the employer to the employee.

4. On 2 March 2016, the Government introduced the Employment (Amendment) Bill 2016 (the Bill) into the Legislative Council (LegCo) to amend EO –

- (a) to provide that where an employee who has been unreasonably and unlawfully dismissed makes a claim for remedies under Part VIA of EO, LT may, without the agreement of the employer, make an order for RI or RE if, taking into account the circumstances of the claim, LT considers that the order is appropriate and compliance with the order by the employer is reasonably practicable;
- (b) to provide that where LT makes an order for RI or RE in the circumstances set out in (a) above, the order shall also specify a further sum, which is set at three times the employee's average monthly wages, subject to a maximum of \$50,000, to be paid by the employer to the employee if the employer eventually does not reinstate or re-engage the employee as required by the order;
- (c) to make it a criminal offence if the employer wilfully and without reasonable excuse fails to pay the further sum specified in the relevant RI or RE order; and

⁵ 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 expect 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. (section 32O of EO).

⁶ 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. (section 32P of EO).

- (d) to clarify that the obligation to re-engage the employee under an order for RE all along rests with the employer, not his/her successor or associated company, and that such an order will be regarded as having been complied with if, with the agreement of the employee, the employer and the successor or associated company of the employer, the employee is engaged by the successor or associated company on or before the date specified by the RE order.

5. LegCo formed a Bills Committee to scrutinize the Bill. Members of the Bills Committee expressed various views/suggestions and proposed some Committee stage amendments (CSAs) to the Bill. In accordance with the standing practice, the Government passed the views/suggestions/proposed CSAs to the Labour Advisory Board (LAB) for consideration. LAB members expressed that they needed time to deliberate on these matters. As there was insufficient time to complete the relevant processes, the Bill lapsed at the end of the 2012-16 term pursuant to Rule 11(4) of the Legislative Council Rules of Procedure and section 9(4) of the Legislative Council Ordinance (Cap. 542).

The Bill

6. The details of the Bill are as follows.

(a) Making order for RI or RE without employer's agreement

7. In a case of UUD, the employee is not only dismissed by the employer without a valid reason but the dismissal itself is prohibited by law (e.g. dismissal of an employee during pregnancy or 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) or by reason of the employee exercising trade union rights or giving evidence for the enforcement of relevant labour legislation). According to the existing Part VIA of EO, an employee under the above circumstances may claim remedies against his/her employer and LT may make an order for RI or RE subject to the mutual agreement of the employer and the employee. Without the employer's agreement, no order for RI or RE could be made by LT. We propose that for UUD cases, the employer's agreement as a prerequisite to ordering for RI or RE be removed so that LT may make such an order if the employee seeks RI or RE and if LT finds that the order is appropriate and compliance with the order by the employer is reasonably practicable.

8. We propose that, in making an order for RI or RE without the requirement of the employer's agreement, LT will need to take into account the circumstances of the case having regard to a number of factors and will only make such an order when it considers that the order is appropriate and that compliance with the order by the employer is reasonably practicable. Before LT determines whether to make such an order for RI or RE, the employer and the employee will be given an opportunity to present their cases in respect of the making of the order. 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 with facts agreed by the employer and the employee.

(b) Further sum to be paid by the employer for non-compliance with an order for RI or RE for UUD cases

9. Under the existing Part VIA of EO, in making an order for RI or RE, LT must specify, in addition to the terms on which RI or RE is to take place, that in the event that the employer eventually fails to reinstate or re-engage the employee, the employer must pay to the employee (i) the amount of terminal payments; and (ii) for UUD cases, the amount of compensation (up to a maximum of \$150,000) as it considers just and appropriate in the circumstances.

10. We propose that in making an order for RI or RE in a case of UUD, LT must at the same time order a further sum on top of the terminal payments and compensation 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. Same as the terminal payments and compensation stipulated under the existing provisions of EO, this further sum will be specified at the time when the order for RI or RE is made, thereby sparing the affected employee the need to file another application to LT and enabling the employee to obtain the further sum the soonest possible in the event that he/she is not reinstated or re-engaged as required by the order. The further sum should be an amount set by law and set at three times the average monthly wages of the employee, subject to a maximum of \$50,000.

11. We also propose that an employer may apply for relief from paying the further sum if it becomes no longer reasonably practicable for the employer to reinstate or re-engage the employee as required by the order because of reasons attributable to the employee or because of change of circumstances after the making of the order beyond the employer's control. In determining any such application, LT may take into account any relevant considerations. LT may grant relief, wholly or partly, to the employer from paying the further sum or may make any order that it considers just and appropriate in the circumstances.

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

12. Under the existing EO, an employer who wilfully and without reasonable excuse fails to pay, among others, the compensation awarded by LT for UUD cases commits a criminal offence and is subject to a maximum fine of \$350,000 and 3 years of imprisonment on conviction. If such an offence committed by a partner of a firm or a body corporate is committed with the consent or connivance of, or attributable to the neglect of, the other partner or any person concerned in the management of the firm, or a director or responsible person of the body corporate, such partner, director or person commits the like offence. We propose that non-payment of the further sum also be made a criminal offence, with the penalty and personal liability of the partner or director or the responsible person of the employer to be pitched at the same levels as non-payment of compensation awarded by LT for UUD cases. This is consistent with the offence relating to non-payment of the compensation which involves UUD cases.

(d) Clarifying amendments to the re-engagement provisions

13. The existing section 32N(6) of EO stipulates that an order for RE is one that requires the employee to be engaged by the employer, or by “a successor of the employer or an associated company”. However, section 32N(3), which empowers LT to make an RE order, stipulates that LT shall make the order after getting the agreement of the employer and the employee. Section 32N(3) does not make any reference to the employer’s successor or associated company. 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 on how an order made by LT may involve a successor or associated company and, in the case of such an order being made, what is the liability of the employer if the successor or associated company fails to engage the employee. We propose that legislative amendments be made to remove the doubt and make necessary supplementary provisions on the respective obligations of the employer and the successor or the associated company.

14. The purpose of enlisting the successor or associated company of the employer into an RE order is to provide an additional avenue for the employer to discharge his/her obligation under such an order. An employer’s obligation to re-engage the employee under an RE order should all along rest with the employer. To facilitate the successor or associated company of an employer to engage the employee where it is agreed by the employee, the employer and the employer’s successor or associated company, we propose that the relevant parties, viz. the employee, employer and successor or associated company, may by a written agreement made among themselves specify the terms of

engagement. On the employee's application, LT may vary the RE order so that the employee may be engaged by the successor or associated company if LT is satisfied that the terms on which the alternative employer is to engage the employee are comparable to the terms on which the original employer is required by the original order to re-engage the employee. On engagement of the employee by the employer's successor or associated company under the varied order, the RE obligation made under the original order would be taken as having been fulfilled. If the employee is not engaged by the successor or associated company and if the original employer has not re-engaged the employee, the original employer must pay to the employee terminal payments, compensation and the further sum as specified in the order. We propose that legislative amendments be made to put the above into effect.

Deliberations on the Bill

15. In scrutinizing the Bill, one of the major concerns of members of the Bills Committee was the amount of the further sum. Some members put forth different suggestions and/or proposed CSAs for increasing the amount of the further sum. On the other hand, some members considered it necessary to impose a cap on the amount of the further sum having regard to the affordability of employers, particularly those of small and medium-sized enterprises.

16. Members of the Bills Committee also expressed various views/suggestions and/or proposed CSAs over other aspects of the Bill including, among others, non-compliance of an order for RI or RE. While some members expressed the view that an employer should not be forced to reinstate or re-engage an employee given their already sour relationship, some members opined that the employer's failure to reinstate or re-engage the employee should constitute an offence under EO. Besides, while the Bill aimed to deal with UUD cases, CSAs were put forth proposing that cases of unreasonable dismissal, other than UUD cases, should also be covered by the Bill and that the employee affected by an unreasonable dismissal should also be eligible for compensation awarded under section 32P of EO.

17. The legislative proposals under the Bill were formulated on the basis of the consensus of LAB after detailed discussions involving LAB members as well as the major employers' associations and employee unions which they represented. The Labour Department reported to LAB in full the detailed views/suggestions/proposed CSAs of members of the Bills Committee and consulted LAB's views. After detailed discussions, LAB members did not support the views/suggestions/proposed CSAs put forth by Members of the Bills Committee. They reached a consensus in September 2016 that the further sum should remain to be set at three times the employee's average monthly wages but the ceiling of the further sum should be raised from \$50,000 to \$72,500.

Way forward

18. With LAB reaching a new consensus on the ceiling of the further sum, the Government plans to introduce a revised bill into LegCo to reflect this consensus, i.e. raise the ceiling from \$50,000 to \$72,500. Other features of the legislative proposal would be same as those of the previous bill, as outlined in paragraphs 6 to 14 above.

19. Members are invited to note and comment on the above legislative proposals.

Labour and Welfare Bureau
Labour Department
December 2016