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**Legislative Council**

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**Panel on Manpower**

**Background brief prepared by the Legislative Council Secretariat  
for the meeting on 20 December 2016**

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

**Purpose**

This paper provides background information on the Administration's re-introduction of the Employment (Amendment) Bill 2016 and highlights members' past deliberations on the legislative proposal.

**Background**

2. Under Part VIA of the Employment Ordinance (Cap. 57) ("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. Where an employee has been unreasonably and unlawfully dismissed, the court or the Labour Tribunal ("LT") may, subject to the mutual consent of the employer and the employee, make an order for reinstatement<sup>1</sup> ("RI") or re-engagement<sup>2</sup> ("RE"). If no order for RI or RE is made, the court or LT may make an award of terminal payments and an

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<sup>1</sup> Under section 32N(4) of EO, an order for reinstatement is an order that the employer shall treat the employee in all respects as if he had not been dismissed or as if there had been no such variation of the terms of the contract of employment.

<sup>2</sup> Under section 32N(6) of EO, an order for re-engagement is an order that the employer must re-engage the employee in an employment on terms comparable to his original terms of the employment or in other suitable employment.

additional award of compensation not exceeding \$150,000 to the employee. 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 unreasonable and unlawful dismissal<sup>3</sup> ("UUD"), the Administration, following consultation with the Labour Advisory Board ("LAB") and the relevant stakeholders, introduced the Employment (Amendment) Bill 2016 ("the Bill") into the Legislative Council ("LegCo") on 2 March 2016. The 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 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.

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<sup>3</sup> 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.

## **Major deliberations of the Bills Committee**

5. The Bills Committee formed to study the Bill completed its scrutiny work and submitted its report to the House Committee in June 2016. The major concerns and views of the Bills Committee are summarized below.

### Circumstances to be considered in making an order for RI or RE

6. It was proposed under the Bill that 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. Having regard to the strained relationship between the employer and employee concerned in a case of UUD, some members were concerned about the circumstances and considerations under which the court or LT would make an order for RI or RE. The Administration advised that in determining whether an order for RI or RE should be made in a case of UUD, the court or LT had to take into account the circumstances of the case including the relationship between the employer and the employee, the relationship between the employee and other persons with whom the employee had connection in relation to the employment, the circumstances of the dismissal, any genuine difficulties that the employer might face when complying with the order.

### Amount of further sum

7. Some members expressed grave concern that an employer could evade the obligation to reinstate or re-engage an employee by paying the latter the further sum if the amount of the further sum was too low to provide sufficient deterrence against non-compliance with an order for RI or RE. Noting that the maximum amount of the further sum (i.e. \$50,000) was a consensus reached by LAB in 2007, these members considered that there was room for upward adjustment in the ceiling of the further sum in the light of wage and price movements in the last decade. To enhance the deterrent effect on those employers who failed to reinstate or re-engage an employee as ordered by the court or LT, some members suggested that the amount of the further sum should be set three months' wages of employees or \$50,000, whichever was greater. Some members took the view that the amount should instead be increased to six times the employee's average monthly wages with a limit up to \$100,000. There was also a suggestion that the amount of the further sum should be set at six times the employee's average monthly wages or \$100,000, whichever was greater, so as to ensure adequate protection for all employees, in particular high-salaried employees against UUD.

8. Some other members, however, considered that the proposed increase in the amount of the further sum would not only depart from the consensus reached by LAB, but also have impact on the affordability of small and medium enterprises.

9. The Administration drew members' attention to the fact that the further sum was in addition to the terminal payments and compensation which an employer was liable to pay if so ordered by the court or LT in a case of UUD. The Administration stressed that the proposed amount of the further sum as stipulated in the Bill was a consensus reached in LAB after detailed discussions by LAB members as well as the major employers' associations and employee unions which they represented. Any revised proposals should be brought back to LAB for further deliberation.

#### Legal consequences of non-compliance with an order for RI or RE

10. It was also proposed under the Bill that non-payment of the further sum would be made a criminal offence. Some members considered that the employer's failure to reinstate or re-engage the employee should also constitute an offence under EO, irrespective of whether the employer would pay the employee terminal payments, compensation and further sum ("the three sums") awarded by the court or LT. It was also suggested that if the employer failed to reinstate or re-engage the employee as ordered by the court or LT, the employee could choose not to accept the three sums, but file an application to the court or LT for an order for compliance.

11. The Administration advised that it was the consensus of LAB that instead of penalizing the employer with a fine or imprisonment, the employee should be paid the three sums awarded by the court or LT in an expeditious manner and the employer's obligation to reinstate or re-engage the employee should be relieved thereafter.

#### Engagement of the employee by the employer's successor or associated company

12. Some members held the view that it was inappropriate for the associated company to assume the statutory responsibility to re-engage the employee concerned. These members pointed out that as the RE arrangement had to be agreed by the three parties concerned, viz. the employee, employer and successor or associated company, it would be more appropriate for the dispute to be settled out of the court.

13. The Administration stressed that the associated company would not be compelled to re-engage the employee unless the associated company itself, together with the original employer and the employee concerned, reached an agreement to do so. The Administration further explained that in the written agreement made among them, there must be terms concerning the associated rights and obligation of the parties. If the successor or associated company eventually did not re-engage the employee, the original employer's obligation under the order for RE was not relieved. The original employer had to pay to the employee the three sums as specified in the order if the former had not re-engaged the employee either.

Committee stage amendments proposed by individual Members to the Bill

14. During the deliberations of the Bills Committee, some Members have indicated their respective intention to propose Committee stage amendments ("CSAs") to several aspects of the Bill, including the circumstances to be considered by the court or LT in making an order for RI or RE order in a case of UUD, scope of applicability of an order for RI or RE, amount of further sum and criminalization of non-compliance of an order for RI or RE. Members may wish to refer to the Report of the Bills Committee for details.

15. Members may also wish to note that after the Bills Committee had reported its deliberations to the House Committee, the Secretary for Labour and Welfare wrote to the Chairman of the House Committee on 22 June 2016 advising that the Labour Department had reported to LAB various views and suggestions made by members of the Bills Committee. Members were informed that LAB did not support the various suggestions but agreed that the ceiling for further sum might be increased, though no consensus was reached on the increased ceiling of the further sum. LAB members advised that they would need time to further consult their respective organizations before they could discuss the subject of increased ceiling further at LAB. The Administration would, based on the result of the consultation, bring the matter to LAB for further deliberation with a view to fostering consensus. LAB members also advised that they would need time to deliberate on Members' other proposed CSAs to the Bill. The Administration further advised that the Government did not envisage that the Second Reading debate on the Bill would be able to be resumed within the Fifth LegCo. As a result, the Bill lapsed upon the prorogation of the Fifth LegCo on 16 July 2016.

### **Latest development**

16. The Administration will update the Panel on Manpower on the latest deliberation of LAB on the subject of increased ceiling of further sum and the salient features of the re-introduced bill at the meeting on 20 December 2016.

17. The Employment (Amendment) Bill has been included in the Administration's 2016-2017 Legislative Programme.

### **Relevant papers**

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

Council Business Division 2  
Legislative Council Secretariat  
15 December 2016

## 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)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Panel on Manpower	17.1.2008 (Item III)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Panel on Manpower	21.1.2010 (Item V)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Panel on Manpower	23.2.2010 (Item II)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Panel on Manpower	17.6.2010 (Item II)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Panel on Manpower	21.10.2010 (Item II)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Panel on Manpower	20.10.2011 (Item II)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Panel on Manpower	20.1.2012 (Item V)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Panel on Manpower	19 November 2013 (Item III)	<a href="#">LC Paper Nos.</a> <a href="#">CB(2)555/13-14(01)</a> and <a href="#">(02)</a>
Panel on Manpower	9 October 2014 (Item III)	<a href="#">LC Paper No</a> <a href="#">CB(2)383/14-15(01)</a>
Panel on Manpower	15 December 2015 (Item V)	<a href="#">Agenda</a> <a href="#">Minute</a>
Bills Committee on Employment (Amendment) Bill 2016	--	<a href="#">Report</a>

<b>Committee</b>	<b>Date of meeting</b>	<b>Paper</b>
House Committee	--	<a href="#">LC Paper No. CB(2)1816/15-16(01)</a>

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