

立法會
Legislative Council

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**Paper for the House Committee meeting
on 19 January 2018**

Report of the Bills Committee on Employment (Amendment) Bill 2017

Purpose

This paper reports on the deliberations of the Bills Committee on Employment (Amendment) Bill 2017 ("the Bill").

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.¹ Where an employee has been unreasonably and unlawfully dismissed, the court or Labour Tribunal ("LT") may, subject to the mutual consent of the employer and the employee, make an order for reinstatement² ("RI") or re-engagement³ ("RE"). If no order for RI

¹ Unreasonable and unlawful dismissal refers to the situation where an employee is dismissed 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 and before determination/settlement and/or payment of compensation under the Employees' Compensation Ordinance (Cap. 282), by reason of the employee exercising trade union rights or giving evidence for the enforcement of relevant labour legislation.

² Under section 32N(4) of EO, an order for RI 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.

³ Under section 32N(6) of EO, an order for RE 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.

or RE is made, the court or LT may make an award of terminal payments⁴ and an additional award of compensation⁵ 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.

3. To enhance employees' protection against unreasonable and unlawful dismissal ("UUD") as mentioned in section 32A(1)(c) of EO, the Administration introduced the Employment (Amendment) Bill 2016 ("the 2016 Bill") into the Fifth Legislative Council ("LegCo") in March 2016. According to the Administration, the purpose of the Bill is to amend EO to empower the court or LT to make a compulsory order without securing the consent of the employer for RI or RE of an employee who has been dismissed unreasonably and unlawfully, if the court or LT considers making such an order appropriate and compliance with it by the employer reasonably practicable. Under the proposed amendments, the court or LT may also 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 an order for RI or RE by the employer. An employer who fails to pay the further sum wilfully and without reasonable excuse will commit an offence as well.

4. The Bills Committee formed to study the 2016 Bill ("the Former Bills Committee") completed scrutiny of the Bill and raised no objection to the resumption of the Second Reading debate on the Bill. After the Former Bills Committee had reported its deliberations to the House Committee⁶ in June 2016, Members were informed by the Administration that the Labour Department ("LD") had, in accordance with the standing practice, reported to

⁴ 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 employment or original terms of the contract of employment. In such cases, the terminal payments shall be calculated according to the employee's actual length of service. (section 32O of EO)

⁵ 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)

⁶ 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>.

the Labour Advisory Board ("LAB") the detailed views made by members of the Former Bills Committee, including various views and suggestions as well as Committee stage amendments ("CSAs") proposed by members to the Bill. 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 before prorogation of the Fifth LegCo. The 2016 Bill thus lapsed at the end of the Fifth LegCo.

5. The Administration's consultation with LAB was concluded in September 2016. LAB agreed that the original proposals in the 2016 Bill should remain unchanged but the ceiling of the further sum should be raised from \$50,000 (as proposed in the 2016 Bill) to \$72,500. The Administration introduced the Bill in May 2017, which is essentially the same as the 2016 Bill except for increasing the ceiling for the further sum to \$72,500.

The Bill

6. The Bill seeks to amend EO so that, if an employee is dismissed in any of the circumstances mentioned in section 32A(1)(c) of EO, i.e. the employee concerned is dismissed without a valid reason and in contravention of a specified statutory provision:

- (a) the employer's agreement is not a prerequisite for ordering RI or RE of the employee;
- (b) the employer must pay a further sum to the employee if the employer fails to reinstate or re-engage the employee; and
- (c) the employer commits an offence if the employer wilfully and without reasonable excuse fails to pay the further sum.

The Bill also seeks 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.

7. The Bill will come into operation on a day to be appointed by the Secretary for Labour and Welfare by notice published in the Gazette.

The Bills Committee

8. At the House Committee meeting on 19 May 2017, members agreed to form a Bills Committee to study the Bill. Under the chairmanship of

Hon WONG Ting-kwong, the Bills Committee held three meetings with the Administration. The membership of the Bills Committee is in **Appendix I**. The Bills Committee has also received views from 20 organizations and individuals at one of its meetings. A list of organizations and individuals which/who have given views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

Making an order for RI or RE by the court or LT

9. Clause 4 of the Bill seeks to amend section 32N of EO to, among others, empower the court or LT to make an order for RI or RE without the employer's agreement as a prerequisite in a case of UUD in considering an employee's claim for RI or RE, if it finds that RI or RE of the employee by the employer is reasonably practicable. In doing so, the court or LT has 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 has connection in relation to the employment, the circumstances of the dismissal, any difficulties that the employer may face when complying with the order.

10. Members note that under the proposed section 32N(3D), in making a finding for the purpose of section 32N(3B) of whether the making of an order for RI or RE is reasonably practicable, the court or LT may, with "the agreement of the employer and the employee", request the Commissioner for Labour ("the Commissioner") to provide a report containing information obtained in connection with the conciliation held under the Labour Tribunal Ordinance (Cap. 25). In addition, under the proposed section 32N(3E), if the employer or the employee fails to agree to the contents of the report prepared by the Commissioner, the report cannot be provided. Some members cast doubt about the effectiveness of the proposed sections 32N(3D) and 32N(3E) given that it would be difficult to obtain the agreement of the employer and employee to the contents of the report.

11. The Administration has explained that the conciliation undertaken by the LD is conducted on the basis of confidentiality and non-prejudicial to the legal rights of the employer and the employee. The proposed section 32N(3D), which reflects a consensus reached by LAB, 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 employee in connection with the conciliation. To uphold the confidential and non-prejudicial nature of conciliation, the agreement of the employer and employee is made the prerequisite for the making of request for the report by the court or LT and the information to be included in the report to be prepared by the Commissioner. The

Administration has pointed out that under the proposed section 32N(3C), before making a finding for the purpose of section 32N(3B), the court or LT must give an opportunity to the employer and the employee to present each of their cases in respect of the making of an order for RI or RE and take into account a number of specified circumstances. The court or LT may decide whether to request for a report in making such a finding.

Scope of the applicability of an order for RI or RE

12. Some members have expressed concern about whether employees who are not employed under a continuous contract under EO⁷ and foreign domestic helpers ("FDHs") are afforded protection under the Bill. Some members take the view that the scope of the Bill should be extended to cover unreasonable dismissal cases, in particular dismissal for reasons of sexual orientation, political and religious affiliations of the employees concerned.

13. The Administration has advised that employees who are not employed under a continuous contract under EO are covered by the Bill under certain circumstances. For example, dismissal of employees after work-related injury and before determination/settlement and/or payment of compensation under the Employees' Compensation Ordinance (Cap. 282) or by reason of their exercising trade union rights are regarded as unlawful dismissal under EO.

14. The Administration has further advised that the main object of the Bill is to enhance protection of employees, including FDHs, against UUD as specified in EO, of which the dismissal is prohibited by law and is a criminal offence. At the moment there is no plan to extend compulsory RI or RE to other types of dismissal.

Employer's liability to pay sum specified in an order for RI or RE

15. Under the proposed section 32N(4)(d) and 32N(6)(g), on making an order for RI or RE for UUD cases, the court or LT must specify in the order that if the employee is not reinstated or re-engaged as required by the order, the employer must pay to the employee the sums mentioned in the proposed new section 32NA(1). The sums include:

- (a) the amount of terminal payments that would have been awarded under section 32O if neither an RI nor RE order had been made;
- (b) on top of the terminal payments, the amount of compensation not exceeding \$150,000 that would have been awarded under section

⁷ Schedule 1 to EO defines continuous contract as a contract of employment under which an employee has been employed continuously by the same employer for four weeks or more and has worked for 18 hours or more in each week.

32P if neither an RI nor RE order had been made; and

- (c) a further sum which is \$72,500 or three times the employee's average monthly wages, whichever is lesser.

16. Members note that under the existing provisions of EO, in determining an award of compensation and the amount of compensation, the court or LT should, according to EO, 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 takes 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. Members further note that the amount of further sum is set based on the latest consensus of LAB made in September 2016. Some members express support for the decision of LAB and the early implementation of the Bill to facilitate settlement of labour disputes arising from UUD cases.

17. Some other members, however, note with concern that of the 25 UUD cases in which the employees requested RI and RE handled by LD between 2012 and 2016, employees involved in 12 of these cases received monthly wages over \$24,000. These members have expressed the view that the amount of further sum under the proposed new section 32NA is still too low to provide adequate protection for employees, in particular high-salaried employees, against UUD. Some members have also expressed concern that an employer can evade the obligation to reinstate or re-engage an employee by paying the latter with the further sum, which has defeated the purpose of safeguarding employees' rights of RI or RE in a UUD case. These members take the view that the ceiling of further sum should be increased to, say, in the region of \$100,000 to \$200,000 or six times the average monthly wages of employees, whichever is the higher.

18. The Administration has advised that the proposed new section 32NA(2) spells out clearly that the court or LT must not take into account the further sum in determining the amounts of terminal payments and compensation. It is therefore clear that the employer's liability to pay the further sum is in addition to his/her liability to pay the terminal payments and compensation. If the employee is not reinstated or re-engaged as required by an order for RI or RE made in a UUD case, depending on the adjudication of the court or LT, the employer may be liable to pay all the three sums specified in the order, viz. terminal payments, compensation and further sum.

19. The Administration has further drawn members' attention to the fact that the views of members of the Former Bills Committee on the amount of further sum including increasing the amount to \$100,000 have been fully reported to

LAB for its consideration. After thorough deliberations, LAB has reached a new consensus on the maximum amount of the further sum as currently proposed in the Bill. Any significant changes to the current legislative proposal would have to be reverted to LAB for consideration in accordance with the standing practice, which would inevitably delay its implementation. The Administration has stressed that LAB is an important and effective platform for representatives of employers and employees to discuss and negotiate on labour policies. There has been much discussion on non-compliance with an order for RI or RE and it is pragmatic for the employee to be paid the further sum without further legal proceedings. Besides, such employees may make a civil claim for all losses or damages arising from the dismissal against the employer, if the employees are not satisfied with the monetary remedies awarded by the court or LT.

20. While respecting LAB's views on the revised ceiling of the further sum, some members have expressed concern about whether there is any review mechanism for making adjustments to the amount of the further sum. The Administration has advised that although there is no mechanism in place for regular review of the amount of the further sum, such review would be considered where appropriate after its implementation.

Relief from paying the further sum by the employer

21. Some members have expressed concern about the circumstances under which the employer can apply for and obtain relief from the liability to pay the further sum. The Administration has advised that under the proposed new section 32PC in clause 8 of the Bill, an employer is allowed to apply to the court or LT for relief from the liability to pay the further sum mentioned in the proposed new section 32NA(1)(b), if it is no longer reasonably practicable for the employer to reinstate or re-engage the employee because of reasons attributable to the employee or because a change of circumstances has occurred beyond the employer's control since the making of the order.

22. Some members have enquired whether "a change of circumstances" just includes any relevant events happened after the order was made and before the specified date for RI or RE. The Administration has advised that the employer becomes liable to pay the further sum if the employee is not reinstated or re-engaged by the date specified in the order. Events occurring after that date may not be relevant to the employer's failure to reinstate or re-engage the employee as ordered. Nevertheless, the court or LT would take into account any relevant considerations in determining whether it may wholly or partly relieve the employer from paying the further sum depending on the circumstances of the case.

Employees' entitlements during the intervening period

23. Some members have raised concern about whether the employee in a UUD case would be entitled to wage payment and employee's benefits or awarded any remedies during the intervening period between the date of dismissal and the date of RI/RE.

24. The Administration has explained that under EO, wages mean all remuneration payable to an employee in respect of work done or work to be done. Nonetheless, 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 or 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 or RE.

Variation of an order for RE

25. Members note that the proposed new sections 32PA and 32PB in clause 7 of the Bill provide for an alternative way for an employer to discharge his obligation under an order for RE by empowering the court or LT to make an order for variation of the original order to the effect that the engagement of the employee by the original employer's successor or associated company would be treated as compliance with the original order.

26. Some members have enquired about the rationale of the proposed new section 32PA(4) under which an application for variation of an order for RE may only be made by the employee. They have enquired what actions the employer can take if the employee fails, refuses or neglects to make an application for variation of an RE agreement even when an RE agreement has been entered into by all parties concerned, viz. the employee, employer and successor or associated company.

27. According to the Administration, the policy intent is that the obligation to re-engage the employee under an order for RE all along rests on the employer. To safeguard the interests of the employee and clearly define the respective rights and obligations of the parties under the arrangement, the proposed new section 32PA spells out that the RE terms must be specified in a written agreement made among the employee, the employer and the employer's successor or associated company, and that application to vary the order for RE is to be made by the employee. If the employee does not make an application for variation of the order for RE after the RE agreement is made, the original order for RE as made by the court or LT remains in force.

Calculation of employment period for re-engaged employees

28. Some members have pointed out that cumulative working experience or work-related training was a prerequisite for acquiring certain professional qualifications. These members have expressed concern about how the employment period of an employee, who is dismissed and is later re-engaged by his/her employer under an order for RE, will be calculated under the RE arrangement.

29. The Administration has explained that under an order for RE, the continuity of the employee's period of employment is not to be treated as broken by the employee's absence from work between the date of dismissal and the date of RE for reckoning his/her entitlements under EO and his/her employment contract.

Offence of employer's failure to pay further sum

30. Clauses 9 and 10 of the Bill amend sections 43N and 43P of EO respectively to the effect that an employer commits an offence if the employer wilfully and without reasonable excuse fails to pay the further sum to the employee.

31. Some members take the view that the employer's failure to reinstate or re-engage the employee as required by an order for RI or RE should be made a criminal offence under EO, even though the employer would pay the employee with terminal payments, compensation and further sum awarded by the court or LT. This would enhance the deterrent effect against UUD of employees, particularly those who have participated in trade union activities.

32. The Administration has explained that instead of imposing criminal liability on the employer who fails to reinstate or re-engage the employee as required by the court or LT, it is the consensus of LAB that the employee concerned should be paid the terminal payments, compensation and further sum in an expeditious manner. To this end, it is proposed under the Bill that the further sum would be specified at the time when the order for RI or RE is made, thereby sparing the employee the need to file another application to the court or LT and enabling the employee to obtain the further sum the soonest possible if he is not reinstated or re-engaged as required by the order. The Administration has stressed that this is a pragmatic arrangement which strikes a reasonable balance between the interests of employers and employees.

33. The Administration has further explained that under the existing EO, an employer who wilfully and without reasonable excuse fails to pay, among others, compensation awarded by LT for UUD cases commits a criminal offence and is subject to a maximum fine of \$350,000 and three years'

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 another partner of the firm, or a director or responsible person of the body corporate, such partner, director or person commits the like offence. For the sake of consistency, it is proposed that non-payment of further sum also be made a criminal offence with the penalty and personal liability of the partner or director or the responsible persons of the employer to be pitched at the same level as non-payment of compensation awarded by LT for UUD cases.

34. Some members have raised the concern about whether disobeying the orders made by the court or LT would constitute an offence of contempt of court. The legal adviser to the Bills Committee has pointed out that an award or order made by LT may be registered in the District Court in accordance with rule 12 of the Labour Tribunal (General) Rules (Cap. 25A). Under section 38 of the Labour Tribunal Ordinance (Cap. 25), the award or order, on registration, becomes a judgment of the District Court and may be enforced accordingly. The Rules of the District Court (Cap. 336H) provides for an order of committal against a person who disobeys a judgment or order made by the District Court. According to the Administration, a total of 147 awards or orders made by LT in respect of all claims disposed of by LT were registered from 2012 to 2016 in accordance with rule 12 of the Labour Tribunal (General) Rules.

Related amendments

35. Members note that Parts 3 to 5 of the Bill seek to make a number of related amendments to the Labour Tribunal Ordinance (Cap. 25) and its subsidiary legislation to provide for:

- (a) the procedures for making an application for the purposes of the proposed new section 32PA or 32PC of EO; and
- (b) forms for applications for the purposes of the proposed new sections 32PA and 32PC, and the related notice of hearing and a certificate of an LT award or order.

36. Members also note that the RI/RE arrangement proposed under the Bill would apply to cases where the date of dismissal, or the date of notice if prior notice of dismissal is given, falls on or after the commencement date of the relevant provisions of the Bill.

Committee stage amendments

37. The Administration and the Bills Committee will not propose any CSAs to the Bill.

Resumption of Second Reading debate

38. The Bills Committee raises no objection to the resumption of the Second Reading debate on the Bill at the Council meeting of 31 January 2018.

Advice sought

39. Members are invited to note the deliberations of the Bills Committee.

Council Business Division 2
Legislative Council Secretariat
17 January 2018

Bills Committee on Employment (Amendment) Bill 2017

Membership list*

Chairman Hon WONG Ting-kwong, GBS, JP

Members Hon LEUNG Yiu-chung
Hon Abraham SHEK Lai-him, GBS, JP
Hon Frankie YICK Chi-ming, SBS, JP
Hon WU Chi-wai, MH
Hon YIU Si-wing, BBS
Dr Hon Fernando CHEUNG Chiu-hung
Hon POON Siu-ping, BBS, MH
Dr Hon CHIANG Lai-wan, JP
Hon Andrew WAN Siu-kin
Hon HO Kai-ming
Hon SHIU Ka-fai
Hon CHEUNG Kwok-kwan, JP
Hon LUK Chung-hung
Hon Jeremy TAM Man-ho

(Total : 15 members)

Clerk Ms Betty MA

Legal Adviser Mr Alvin CHUI

* Changes in membership are shown in Annex to Appendix I.

Bills Committee on Employment (Amendment) Bill 2017

Changes in membership

Member	Relevant date
Hon Andrew WAN Siu-kin	Since 16 June 2017
Hon Wilson OR Chong-shing, MH	Up to 25 June 2017

According to the Judgment of the Court of First Instance of the High Court on 14 July 2017, LEUNG Kwok-hung, Nathan LAW Kwun-chung, YIU Chung-yim and LAU Siu-lai have been disqualified from assuming the office of a member of the Legislative Council, and have vacated the same since 12 October 2016, and are not entitled to act as a member of the Legislative Council.

Bills Committee on Employment (Amendment) Bill 2017

List of deputations/individuals which/who have given oral representation to the Bills Committee

1. Community March
2. Hong Kong Chef Union
3. Hong Kong Confederation of Trade Unions
4. Hong Kong Employers of Domestic Helpers Association
5. Hong Kong Food & Environmental Hygiene Department Staff Rights Union
6. Labour Party
7. Left 21
8. Liberal Party
9. Miss NG Man-kwan
10. Mr NGAN Lit-fung
11. Mr TSE Tsun-yin
12. Mr Why
13. Support Group for Hong Kong Employers with Foreign Domestic Helpers
14. Task Force on Foreign Helper's Problem of Liberal Party
15. The Civic Party
16. The Hong Kong Federation of Trade Unions Rights and Benefits Committee
17. 民生議政
18. 政府前線僱員總會
19. 政府前線僱員總會第一標準員工分會
20. 街工勞工組

List of deputations/individuals which/who have provided written submissions only

1. A member of the public
2. A member of the public
3. Angie
4. Grace LAW
5. Hong Kong Society of Transitional Justice
6. Invisible Workers Nationwide
7. Kanice CHAN
8. LAU Ka-lung
9. Louisa WONG
10. O Brave New Hong Kong

11. PathFinders
12. Pui Yan Leung
13. Ribbon Rouge
14. Sarah CHEUNG
15. The Federation of Hong Kong & Kowloon Labour Unions
16. Umbrella Martyr's Union
17. Youth Ambassadors for Transitional Justice
18. 周小姐
19. 姜太
20. 彭小姐
21. 梁貫球
22. 甘先生
23. 蔡小姐
24. 關注香港家庭聘請家傭工會
25. 陳小姐
26. 陳達倫