

Employers beware – proposed new Hong Kong law may give disgruntled employees greater leverage in exit negotiations

On 17 May 2017, Hong Kong's Legislative Council (LegCo) had its first reading of a proposed bill that would amend the city's Employment Ordinance (EO). The amendment would make it easier for employees to claim reinstatement where a court or tribunal finds they have been unlawfully and unreasonably dismissed.

Present position

Under Hong Kong law, employees can seek a court order for reinstatement of their employment if they have been unlawfully and unreasonably dismissed. However, the court will only make such an order if the employer agrees to it.

Reinstatement

At present, an employee who has been unlawfully and unreasonably dismissed without a valid reason in the following circumstances can seek a reinstatement order:

- dismissal during paid maternity leave;
- dismissal during paid sick leave;
- dismissal for giving evidence or information in employment-related proceedings or inquiries;
- dismissal due to involvement with trade union membership or activities; or

- dismissal of an injured employee in contravention of the relevant statute, the Employees' Compensation Ordinance.

The changes

The proposed new law says that for unlawful and unreasonable dismissals, even though only the employee expresses agreement, the court or tribunal *must* make an order for reinstatement if it finds that reinstatement would be *reasonably practicable*.

In determining whether it is reasonably practicable to make the reinstatement order, the court will take into account:

- the circumstances of both parties;
- the circumstances of the dismissal;
- the relationship between the employer and employee;
- the relationship between the employee and other people in the workplace; and

- any genuine difficulties that the employer might face in complying with the order.

Key issues

- Presently, both the employer and employee must agree to an employee's reinstatement.
- The proposed new law means that only the employee's agreement is required.
- Disgruntled employees may use the provisions to demand greater financial compensation.
- Employers should take action to ensure they manage problematic situations early on.

Where the court or tribunal orders reinstatement, the proposed new law will have the effect of preserving the continuity of the employee's period of employment, important for calculating matters such as leave entitlement,

maternity benefits, any applicable probation period and so on.

If the employee is not reinstated pursuant to the court order, the employer will then be required to pay additional compensation to the employee capped at HK\$72,500.

This will be in addition to any damages they may have had to pay. Employers who wilfully and without reasonable excuse fail to pay the additional sum would commit an offence.

An unwelcome threat

The option of reinstatement is rarely used in employment disputes. By the time things get this far, the essential relationship of trust and confidence between employer and employee is likely to have broken down irretrievably.

Employers should of course ensure they do not dismiss employees unlawfully and unreasonably. There should be a valid reason for dismissal, for example, the employee's conduct, capability, redundancy or any credible reason of substance. These reasons must be wholly unconnected with pregnancy, work injury, any trade union affiliation, or any sick leave the employee may have taken. The reasons should be briefly documented.

However, the risk is that disgruntled employees – who may themselves be most to blame for deterioration in relationships in the office – may use these new provisions to trump any attempt to terminate their employment by abusing their entitlement to sick leave, their union affiliation or by claiming they have injured themselves in the course of their work.

If dismissed, they could potentially use the threat of reinstatement as well as the other usual recourses to

demand greater financial compensation from the company, effectively holding the company to ransom.

Best practice for employers

Where the relationship starts to break down – and even before the proposed new law comes into force - there are things employers can do to protect themselves.

Where there is unethical conduct or an ongoing pattern of disruptive behaviour, HR should be involved at an early stage to keep a contemporaneous note and any conflict situations that arise because of it.

Employers should be prepared to explain to a court or tribunal the status of the parties' relationship, (where applicable) how the employee's behaviour is disruptive and any other significant genuine reasons attributable to the employee that would make it impracticable to keep him or her.

Employers may also consider introducing an absence management programme to deal with unacceptable patterned absences and malingers. Systems should be introduced to provide accurate statistics on absenteeism and alert HR when the level of such absences becomes alarming. Whilst support should be provided to employees with genuine health issues, disciplinary action should be taken against employees when patterned absences are unjustifiable.

The proposed bill will next be debated by LegCo's Bills Committee on 16 June 2017. Whilst the impact of the proposed new provisions may not be immediate, employers can do much to

protect themselves now by implementing best practice initiatives across their business.

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