

Employment (Amendment) (No.2) Ordinance 2018

Provisions on Reinstatement or Re-engagement Order for Unreasonable and Unlawful Dismissal

Brief Note

The Employment (Amendment) (No.2) Ordinance 2018 comes into operation on 19 October 2018. According to the subject amendment, where an employee has been **unreasonably and unlawfully dismissed** on or after 19 October 2018 and the employee makes a claim for reinstatement or re-engagement, the Labour Tribunal (“LT”) may make an order for reinstatement or re-engagement **without the need to secure the employer’s agreement**.

Unreasonable and unlawful dismissal

- The employee is dismissed other than for a valid reason as specified in the Employment Ordinance; **and**
- The dismissal is in contravention of the law

Unreasonable Dismissal

Dismissal other than for the following valid reasons

- the conduct of the employee
- the capability or qualifications of the employee for performing his work
- redundancy or other genuine operational requirements of the business
- statutory requirements (i.e. it would be contrary to the law to allow an employee to continue to work in his original position or to continue with the original terms in his employment contract)
- other substantial reasons

AND

Unlawful Dismissal

Dismissal which is in contravention of the law¹

- 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
- by reason of the employee exercising trade union rights
- giving evidence for the enforcement of relevant labour legislation

¹ See the part on “Statutory Restrictions on Termination of Employment Contract” in Chapter 9 of “A Concise Guide to the Employment Ordinance”.

Remedies

- Include an order of reinstatement or re-engagement, an award of terminal payments and an award of compensation.



Award of Terminal Payments and Compensation

- If no order for reinstatement or re-engagement is made by LT,
 - ▶ LT may make an award of terminal payments to be payable by the employer to the employee as it considers fair and appropriate.
 - ▶ An employee may also be awarded compensation up to a maximum of \$150,000.

Reinstatement or Re-engagement Order

- If the employee makes a claim for reinstatement or re-engagement, and LT considers that the order is appropriate and reinstatement or re-engagement of the employee by the employer is reasonably practicable, LT can make such order **without the employer's agreement**.
 - ▶ 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.
 - ▶ Re-engagement is re-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.
 - ▶ If the employer eventually does not reinstate or re-engage the employee as required by the order, the employer shall pay to the employee a further sum, amounting to three times the employee's average monthly wages and subject to a ceiling of \$72,500, on top of the above monetary remedies payable to the employee as ordered by LT. The employer will commit a criminal offence if he/she wilfully and without reasonable excuse fails to pay the further sum.

[Note: This brief note sets out in simple terms major changes to EO made by the subject amendment. The EO remains the sole authority for the provisions of the law explained. More information on this subject is available at the Labour Department's website: [http://www.labour.gov.hk/eng/news/EA\(2\)O2018.htm](http://www.labour.gov.hk/eng/news/EA(2)O2018.htm)]