

Chapter 10: Employment Protection

The Part on Employment Protection of the Employment Ordinance aims at discouraging employers from dismissing or varying the terms of the employment contract of their employees in order to evade their liabilities under the Ordinance.

Eligibility and Remedies for Employment Protection

An employee may claim for remedies against an employer under the following situations:

Situation	Conditions	Remedies
Unreasonable Dismissal	<ol style="list-style-type: none">1. the employee has been employed under a continuous contract for a period of not less than 24 months; and2. the employee is dismissed other than for a valid reason as specified in the Ordinance	
Unreasonable Variation of the Terms of the Employment Contract	<ol style="list-style-type: none">1. the employee has been employed under a continuous contract;2. the terms of the employment contract are varied without the employee's consent;3. the employment contract does not contain an express term which allows such a variation; and4. the terms of the employment contract are varied other than for a valid reason as specified in the Ordinance	<ul style="list-style-type: none">• An order for reinstatement or re-engagement; or• An award of terminal payments
Unreasonable and Unlawful Dismissal	<ol style="list-style-type: none">1. the employee is dismissed other than for a valid reason as specified in the Ordinance; and2. the dismissal is in contravention of the law (see the part on “Statutory Restrictions on Termination of Employment Contract” in Chapter 9)	<ul style="list-style-type: none">• An order for reinstatement or re-engagement; or• An award of terminal payments and / or award of compensation not exceeding \$150,000

Valid Reasons for Dismissal or Variation of the Terms of the Employment Contract

The five valid reasons for dismissal or variation of the terms of the employment contract are:

- 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

The absence from work of an employee by reason of his / her compliance with a specific anti-epidemic requirement with a movement restriction does not constitute a valid reason for a dismissal or a variation of the terms of an employee's employment contract by his/her employer. (see the part on specific anti-epidemic requirements with movement restriction in Chapter 5 "Sickness Allowance")

Making a Claim for Remedies for Employment Protection

An employee who wishes to claim for remedies must serve a written notice to the employer in respect of his claim within three months from the effective date of termination of employment or variation of contract. This deadline may be extended for a further period up to six months if approved by the Commissioner for Labour. If an employee wishes to file a claim with the Labour Tribunal ("LT"), he must do so within nine months from the effective date of termination of employment or the variation of contract.

Remedies for Employment Protection

Remedies for Employment Protection, to be awarded by LT, include an order of reinstatement or re-engagement, an award of terminal payments and an award of compensation.

Order of Reinstatement or Re-engagement

An order for reinstatement is an order requiring the employer to treat the employee in all respects as if he had not been dismissed or as if there had been no variation of the terms of the employment contract.

An order for re-engagement is an order requiring the employer to re-engage the employee in an employment on terms comparable to his original terms of employment or in other suitable employment. An order for re-engagement may be varied by LT on application by the employee and with the agreement of the parties concerned to the effect that engagement of the employee by a successor or associated company of the original employer is to be treated as re-engagement by the original employer in compliance with the re-engagement order.

For unreasonable dismissal and unreasonable variation of the terms of the employment contract, an order for reinstatement or re-engagement will only be made if both the employer and the employee agree to it.

For unreasonable and unlawful dismissal¹, if LT considers the order is appropriate and reinstatement or re-engagement of the employee by the employer is reasonably practicable, such order can be made without the need to secure the employer's agreement.

NOTE: If the employer eventually does not reinstate or re-engage the employee as required by the order, the employer must 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 monetary remedies payable to the employee as ordered by LT. (* see Appendix 1 for details of calculation)

Where an employee is ordered to be reinstated or re-engaged, his rights and privileges, including seniority and pension rights, must be restored to him and the continuity of the period of employment shall not be treated as broken.

The employer may also be ordered to pay the employee any arrears of pay and statutory entitlements under the Employment Ordinance which the employee would have accrued if he has not been dismissed or his terms of employment contract has not been varied. Conversely, the employee may be ordered to pay

¹ Where an employee has been unreasonably and unlawfully dismissed before 19 October 2018, an order for reinstatement or re-engagement will only be made if both the employer and the employee agree to it.

the employer any amount that the employer has paid him because of the dismissal or the variation of the terms of the employment contract.

Award of Terminal Payments

If no order for reinstatement or re-engagement is made, LT may make an award of terminal payments to be payable by the employer to the employee as it considers fair and appropriate.

Terminal payments means: 1) the statutory entitlements under the Employment Ordinance which the employee is entitled to but has not yet been paid upon dismissal; 2) the entitlements the employee might reasonably be expected to be entitled to under the Employment Ordinance had he been allowed to continue his employment; and 3) any other payments due to the employee under his contract of employment.

An employee may be awarded terminal payments even if he has not attained the qualifying length of service required for the entitlements. In such case, the terminal payments shall be calculated according to his actual length of service.

Award of Compensation

An employee may be awarded compensation up to a maximum of \$150,000 if he is unreasonably and unlawfully dismissed, and no order for reinstatement or re-engagement is made by LT.

In determining the award of compensation, LT will consider the circumstances of a claim including:

1. the circumstances of the employer and the employee;
2. the period of employment of the employee;
3. how the dismissal took place;
4. the loss sustained by the employee as a result of the dismissal;
5. possibility of the employee obtaining new employment;
6. whether the employee should bear any fault for the dismissal; and
7. any payments, including terminal payments, that the employee is entitled to receive in respect of the dismissal.

Exclusion

This Part of the Employment Ordinance does not apply to claims involving dismissal on the grounds of sex, disability, family status or race. If an employee is dismissed on the grounds of sex, disability, family status or race, he may claim for remedies under the Sex Discrimination Ordinance, the Disability Discrimination Ordinance, the Family Status Discrimination Ordinance or the Race Discrimination Ordinance respectively.