

Civil Service Pay : the legal issues

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The current debate concerning a possible reduction in civil service pay has thrown up important legal issues. Would a pay reduction be lawful and consistent with the Basic Law?

2. The Department of Justice is confident that a limited pay reduction, achieved through legislation, would be both lawful and consistent with the Basic Law.

Pay adjustment mechanism

3. The current pay adjustment mechanism takes into account the net pay trend indicators derived from the pay trend survey, the state of the economy, budgetary considerations, movements in the cost of living, the Staff Sides' pay claims and civil service morale. It is flexible enough to take account of reductions as well as increases, since some of these factors are capable of upward and downward movements. But if the result of applying these factors suggests that there should be a reduction of pay, the question now is how best we could achieve it.

The need for legislation

4. As a general rule, the terms of a contract cannot be unilaterally varied by one party. And so, without the agreement of the employee, an employer cannot generally reduce an employee's pay.

5. In civil servants' contracts, the Government reserves the right (normally in clause 20) to alter any of the terms of appointment or conditions of service should the Government at any time consider this to be necessary. This might appear to give the Government the right to reduce salaries unilaterally. But decided cases indicate that the courts are unlikely to accept that this general power of variation applies to such a fundamental term as the salary. It would therefore not be safe to regard that provision as authorising a unilateral pay reduction.

6. There is another route that is open to some employers. They may be able to terminate employees' contracts by notice and offer them re-employment on a lower salary. However, a large proportion of civil servants have permanent contracts that cannot be terminated by notice. For those without permanent contracts, the termination route is theoretically possible. But the prospect of dismissing civil servants en masse, with no guarantee that

they would accept re-employment on lower salaries, would raise serious concerns about the smooth operation of the Government, and of deliveries of services to the public.

7. It has been suggested that there is a further route open to the government, namely to reach an agreement with the civil service. However, even if such an agreement were reached with civil service central consultative councils, it would not prevent individual civil servants from challenging any agreed pay reduction.

8. Faced with these difficulties, the only safe way to achieve a lawful reduction in civil service pay is through legislation. If legislation to reduce pay is enacted the risk of a successful legal challenge would be significantly reduced.

Basic Law issues

9. But if there is to be a civil service pay reduction, would it be lawful and consistent with the Basic Law? And if so, would any legislation to give effect to such pay reduction be consistent with the Basic Law?

10. Article 100 provides that public servants serving in all Hong Kong government departments before the establishment of the Hong Kong SAR “may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before.” Assuming that the pay reduction does not make the salaries of civil servants lower than they were on 30 June 1997, there would be no breach of that Article.

11. Moreover, in a case decided in 1998, the court held that Article 100 was intended to ensure continuity of employment so that no public servant suffers as a consequence of the transition itself, but was not intended to inhibit the introduction of new measures for the good governance of Hong Kong. The Association of Expatriate Civil Servants had challenged the introduction, after Reunification, of a Chinese language proficiency requirement for those civil servants who wished to transfer to permanent terms of service. After explaining the purpose of Article 100, the court held that it had not been breached by the introduction of this new requirement.

12. Article 103 of the Basic Law provides that Hong Kong’s previous system of management for the public service, including special bodies for advising on their pay and conditions, shall be maintained. The emphasis here is on the system, rather than on the pay and conditions themselves.

13. The system for pay adjustments, which has been in place since

1974, has been described earlier. The application of that system this year reflects the downward trend of relevant factors and, in particular, the downturn in the economy and our deficit budget. If the revised pay levels give full effect to the established system, there would therefore be no breach of Article 103.

14. Article 160 of the Basic Law provides that contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the Hong Kong SAR, provided that they do not contravene the Basic Law. The contractual rights of civil servants who were employed on 30 June 1997 are within this provision. But the pay of those who remain in Government employment has been increased since that date by between 4.99% (for directorate officers at D3 and above) and 11.32%.

15. Assuming that the proposed pay reductions would not bring salaries to a level below that on 30 June 1997, the right to the salary as at that date would be fully recognized and protected.

16. Can it be argued that the rights protected by Article 160 include a right not to have any legislative interference with a subsisting contract? Given that laws previously in force can be amended by legislation, provided that the amendments are consistent with the Basic Law, it would be extraordinary if contractual rights could not be modified by legislation. Article 160 cannot have been intended to have that effect. It is primarily a savings provision, to ensure that contractual rights did not fall away as a result of Reunification.

17. The proposed pay reduction has taken full account of all relevant factors under the established civil service pay adjustment mechanism, which is itself consistent with Article 103 of the Basic Law. The legislative approach now proposed would simply be a new measure to give effect to a justified decision made under the established mechanism. Applying the reasoning that governs Article 100, it would also be a measure for the good governance of Hong Kong. Thus, the proposed legislative pay reduction is consistent with the Basic Law. The argument that Article 160 prohibits such a reduction cannot therefore be accepted.

Conclusion

18. The proposed pay reduction is controversial. But the legal issues should be put on one side. It is clear that, if there is to be a reduction, legislation is needed. And it is clear that a limited pay reduction would be consistent with the Basic Law.