

**Panel on Manpower
Meeting on 24 April 2003**

**Agenda item IV :
Financial assistance to workers affected by atypical pneumonia**

On 23 April 2003, the Hon Lee Cheuk-yan sought legal opinion from the Administration on his questions relating to no-pay leave in the context of the impact of atypical pneumonia on employees. This paper sets out the Administration's response.

Question 1 : *If the employee's remuneration does not depend on his being provided by the employer with work of the kind he is employed to do (such as on fixed monthly salary terms), is the employer required to obtain the consent of the employee before making no-pay leave arrangement?*

Administration's response : The rights and obligations of an employer and an employee are governed by their contract of employment which is an agreement that can be in writing or oral, express or implied. In the case of a contract of employment whereby the employee's remuneration is at a fixed monthly rate rather than his remuneration being dependent on his being provided by the employer with work of the kind he is employed to do, and if the employment contract does not provide that the employer may arrange the employee to take no pay leave, the employer should obtain the employee's consent before implementing no pay leave arrangement.

Question 2 : *If the no-pay leave arrangement is made by the employer without the consent of the employee, will it be taken as a case of non-payment of wages or a dismissal in any form?*

Administration's response : In the above circumstances, if the employer has unilaterally arranged no pay leave without the employee's consent and their employment contract does not so permit, the employer should abide by his obligation to pay wages under the employment contract. The employee can claim wages for the period of no pay leave according to the employment

contract. As to whether the employee can deem the act as constructive dismissal, this shall be subject to whether the employer's unilateral arrangement of no pay leave amounts to a fundamental breach of the employment contract to the detriment of the employee. This should be determined according to the facts of individual cases.

Question 3 : Should the no-pay leave arrangement, even made under the mutual consent of the employer and the employee, be in no way contravene the provision of Section 31E of the Employment Ordinance (Cap57)?

Administration's Section 31E of the Employment Ordinance provides that response : where an employee is employed under a contract on such terms and conditions that his remuneration thereunder depends on his being provided by the employer with work of the kind he is employed to do, the employee is taken to be laid off in the following circumstances:

- (a) where the total number of days on which no work is provided and no wages is paid exceeds half of the total number of normal working days in any four consecutive weeks; or
- (b) where the total number of days on which no work is provided and no wages is paid exceeds one-third of the total number of normal working days in any 26 consecutive weeks.

The days of lock-out, rest days, annual leave and statutory holidays shall not be counted as normal working days during the above periods. Under section 31B(1) of the Ordinance, the employer is required to pay severance payment if the employee has been employed under a continuous contract for not less than 24 months and is laid off.

Section 70 of the Employment Ordinance provides that any term of a contract of employment which purports to extinguish or reduce any right, benefit or protection conferred upon the employee by this Ordinance shall be void. Therefore, the protection to be accorded to an

employee under section 31E shall not be reduced by his contract of employment. If the number of days on which no work is provided and no wages is paid (including the no pay leave) exceeds the provisions of section 31E, an employee who has been employed for not less than 24 months under a continuous contract would still be entitled to severance payment notwithstanding that the employer has obtained his consent to the no pay leave arrangement.

The Employment Ordinance remains the sole authority for the interpretation of the above provisions. In case of dispute between an employer and an employee, it shall rest with the decision of the court according to the facts of individual cases.

Economic Development and Labour Bureau (Labour Branch)
May 2003