



香港證券經紀業協會有限公司

HONG KONG STOCKBROKERS ASSOCIATION LTD.

(非牟利團體 Limited by Guarantee)

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尊敬的詹培忠議員台鑒：

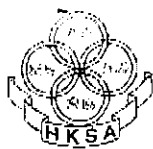
本協會茲就業界對修改勞工法例建議將佣金包括於計算休假的權益事件向 台端提出業界的憂慮並尋求協助。

據本協會理解，勞工處將於立法會人力事務委員會9月25日的特別會議中，諮詢委員會對修改立法建議的意見。

本協會曾分別於5月19日及7月6日與勞工處會晤討論協會的關注，並將協會的立場列述於7月19日提交的信件。其後協會從傳媒中得悉勞工顧問委員會已達成共識並將協議遞交人力事務委員會，因此本協會便於8月31日再次致函勞工處表示關注。

正如本協會之信件所表達，將佣金包括於計算休假的權益將令業界面對很多困難。若按建議用12個月的平均數計算並不能解決業界的憂慮，因為僱員收入的拆賬分配可能高佔70%；此外，有些公司是以分組共事的形式為基本，故組員休假亦同樣可獲分配佣金收入。明顯地，勞僱會的簡約共識做法將有機會導致僱員休假時獲得雙重權益。茲附上本協會致勞工處函件及其9月7日回覆之副本，以供參考。

本協會希望 台端可以在人力事務委員會9月25日開會之前有機會與其成員表達業界的關注。而本協會獲悉其他



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界別的代表團體亦會就事件聯絡其所屬功能界別之立法會議員。

將佣金包括於計算休假的權益將會對證券經紀業造成不可預計的影響,可能導致重新商議佣金收入的分配或最終損害了僱員的利益。本協會特此先行向人力事務委員會提出事件所牽涉的問題,希望得以阻止預見的事情發生。

本協會希望能盡量與更多立法會議員商討今次事件,以建立廣泛的支持基礎,並正準備致函向他們表達業界對建議的憂慮。當然最重要是能夠得到台端的協助聯絡其他認同業界關注的立法會議員,謹此敬候台端的回覆和指示。

肅此,並頌
勛祺!

主席 艾秉禮 謹啟

二〇〇六年九月二十日



COPY

Labour Department (Headquarters)

勞工處 (總處)

Your reference 來函編號 :

Our reference 本處檔案編號 : LD LRD 12-1/2-46

Tel. number 電話號碼 : 2852 3457

Fax number 傳真機號碼 : 2545 2959

By Fax and By Post

7 September 2006

Mr Anthony Espina
Chairman
Hong Kong Stockbrokers Association Ltd.
Flat C, 6/F., Shing Lee Commercial Building
6-12 Wing Kut Street
Central
Hong Kong

Dear Mr Espina,

**Calculation of Statutory Entitlements
under the Employment Ordinance**

Thank you for your letter of 31 August 2006 which, among other things, reiterated the concerns of your industry with respect to the proposed legislative amendments on the calculation of statutory entitlements under the Employment Ordinance (EO).

We have taken note of your views on the subject expressed at the two meetings held on 16 May 2006 and 6 July 2006 and your subsequent letter of 19 July 2006. Taking into account your views as well as those of other business/professional organisations and labour groups/trade unions, we have formulated a proposal to amend the EO, as follows:

- (a) to put beyond doubt that all components of "wages", including commission of a contractual nature, however designated or calculated, are to be reckoned for the purpose of calculating holiday pay, annual leave pay, maternity leave pay, sickness allowance, wages in lieu of notice for termination and end-of-year payment under the EO; and

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- (b) to modify the existing mode of calculation of the above statutory entitlements by making reference to the average daily wages earned by an employee during the 12-month period, or such lesser period when the employee is under the employment of the concerned employer, immediately preceding the statutory holiday, first day of the annual leave, or other relevant dates.

You may wish to note in particular that we have proposed the use of average daily wages calculated in the form of a 12-month moving average as the basis of calculation of the above statutory entitlements. This would provide a more stable and predictable basis for calculation which would be conducive to business planning and cost budgeting on the part of employers. The above-mentioned proposal, which we believe has struck a reasonable balance between the interests of employers and employees, was endorsed by the Labour Advisory Board on 24 August 2006. We will proceed to consult the Legislative Council Panel on Manpower on the proposed legislative amendments at its special meeting to be held on 25 September 2006.

If you have any questions in the meantime, please feel free to contact me for further discussion.

Yours sincerely,



(Stanley Ng)

for Permanent Secretary for
Economic Development and Labour (Labour) /
Commissioner for Labour



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31 August 2006

Mr. Matthew Cheung Kin-chung
Permanent Secretary for Economic Development and
Labour (Labour) & Commissioner for Labour
12/F Harbour Building
38 Pier Road, Central
Hong Kong

Dear Mr. Cheung,

Concerning the Calculation of Statutory Entitlements

We have read in the press that the Labour Advisory Board has reached an agreement on how to calculate leave entitlements for employees whose income is derived mainly from commissions.

Unfortunately, it would appear that the concerns raised in our letter to you dated 19 July 2006, may not have been addressed during those discussions.

In the abovementioned letter, we pointed out the many difficulties faced by our industry in implementing the proposed model. In particular, we explained that the revenue sharing could be as high as 70% in favour of the employee, and therefore any further liability for leave entitlements may result in wholesale re-negotiation of revenue sharing agreements which may be to the detriment of the employees.

We await a reply from you regarding the issues raised in our letter, and hope to have an opportunity to meet with you and explain our concerns.

Very truly yours,

A. Espina

Anthony Espina
Chairman

cc: Mr. Stanley Ng
Chief Labour Officer (Labour Relations)/Registrar of Trade Unions
Mr. Kelvin Ho
Permanent Secretary for Financial Services and the Treasury (Financial Services)



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19 July 2006

Mr. Matthew Cheung Kin-chung
Permanent Secretary for Economic Development and
Labour (Labour) & Commissioner for Labour
12/F Harbour Building
38 Pier Road
Central
Hong Kong

Dear Mr. Cheung,

A proposal to amend the Employment Ordinance
to adequately express the Government's policy intention
concerning the calculation of statutory entitlements

We would like to take this opportunity to express our appreciation to your Mr. Stanley Ng and Mr. Koo Chiu-shing for meeting with the Association on 19 May 2006, and conducting a briefing for our members at the forum on the above subject on 6 July 2006. During our meeting and the subsequent forum, we and our members had expressed numerous concerns regarding the proposed amendment.

As suggested, we have prepared the following submission to summarise the views expressed. We believe that adequate consideration needs to be given to the established practices in different industries before an amendment bill is put to LegCo.

The Issue

On 28 February 2006, the Court of Final Appeal set aside rulings by lower courts that commissions should be included in calculation of leave entitlement. We understand that the Labour Department will propose administrative amendment to "clarify the original legislative intent" of the 1996 Amendment to the Employment Ordinance to have commissions included in the calculation of leave entitlement.

Impact on the Stock Brokerage Industry

1. Employment Ordinance protects the interests of lower level workers by setting standards for employment terms such as remuneration, leave etc. Therefore we believe that employees earning more than a certain level should be free to negotiate their own terms and conditions within the framework of the Ordinance.

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2. As HK evolved from a manufacturer into a service economy, the method of remuneration for service workers also evolved. The current model for most service industries is divided into front-line sales & service and back-office administration. Front line sales and back-office workers are both remunerated for performance. However since the measurements are different, the method of compensation also differs. Front-line personnel are compensated for production of sales while back office personal are compensated for efficiency of processing.

3. This difference in compensation model is particularly marked in the financial services industry. In the stockbroking industry, Account Executives (AE's) are compensated by means of revenue sharing. There are a number of different models but they usually revolve around a basic fixed advance (which may be as low as zero) plus a percentage of commissions generated (which may be as high as 70% of commissions generated).

4. Details differ, for example some firms require that only commissions over a certain minimum e.g. \$100 per contract note will be counted, or that the advance be first repaid out of commissions earned. The many combinations too numerous to list here. The central concept is that the AE is a "partner" of the firm where the AE produces revenue while the firm provides the platform for execution (work space, quotation and order handling, and transaction processing).

5. Taking a common example where the commissions are split 70%/30% in favour of the AE, the amendment would mean that the AE would receive 70% of the revenue generated that month, and another 70% if he takes leave in the month following, making a total of commissions paid to the AE of 140% of the commissions he generated. This is clearly not a viable proposition for the employer.

6. Furthermore, in some cases AE's work as a team. Thus, team members are entitled to share in the revenue of the team even when they are away on leave. In other cases, even if the AE is working individually, the commissions generated by his clients while he is on leave is also credited and paid to him as part of his income.

7. The stockbrokerage industry, is faced with complications that limit our ability to "work around" the Employment Ordinance as some other commissions based industries have done. Other industries, such as insurance, can and do use "self employment" agreements to limit their liability under the Employment Ordinance e.g. insurance agents may be "self-employed" individuals who do not come under the Employment Ordinance.

8. Although, some brokerage firms do use "principal and agent" agreements, these are usually used to define the liability of the AE for the amounts owed by their clients. These "principal and agent" agreements usually spell out that the responsibility of the AE for the client settlement and provides that clients' bad debts are charged back to the AE.



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9. AE's are required to be registered with the SFC under the supervision of the brokerage firm to which he is registered. Indeed, brokerage firms are required under the Securities and Futures Ordinance to be responsible for the behavior of the AE, and if he leaves the employ of that brokerage firm, he is required to be re-registered under another firm within a certain period otherwise he loses his registered status. Thus, in the event of a dispute, the AE may still be considered an employee for the purposes of the Employment Ordinance.

10. The HKSA believes that the proposed amendments would result in greatly increased costs to the brokerage industry, and would add much unpredictably to the cost of doing business. In turn, this may result in many firms revising the revenue sharing structure in order to rebalance the total costs of acquiring the business (i.e. commissions paid to the AE) if commissions are to be included in calculation of leave entitlements. The end result is that the AE may actually be worst off as the brokerage firm errs on the side of prudence by overestimating the costs.

11. It has always been our industry's practice not to include commissions in calculating leave entitlements. There has never been any challenges to this practice, either before or after the 1996 amendments were passed --- not by the employees in this industry nor by the Labour Department. Therefore, we do not see any need to change a long established practice that has been accepted by all parties concerned.

12. We are not convinced by that the amendments are required to reflect the original "intent" and that there is no additional liability that would not have been accrued under the 1996 amendment. We understand that under the common law system, the courts are charged with the responsibility to interpret "legislative intent" with the final authority resting with the CFA. As the CFA has already ruled that the commissions which the employee "might have earned" (as opposed to "would have earned") is not to be included, the proposed amendments would in fact be setting aside the judgment of CFA. If new "policy" is to be introduced, then we believe this needs to be adequately debated within the community and not passed off as an administrative amendment.

Conclusion

The amendment will have an enormous impact on every industry where employee compensation is commissions based, and adequate consideration need to be given to the different practices in each industry. In the stockbrokerage industry, it has been industry practice not to include the revenue split as part of leave entitlements and we do not see any reasons for making any changes. Enquiries that we have made overseas indicate that in the major markets, AE's leave entitlements do not include commissions based on previous earnings. Therefore, we do not believe that there are valid arguments to justify the application of the amendment to our industry.



香港證券經紀業協會有限公司

HONG KONG STOCKBROKERS ASSOCIATION LTD.

(註冊有限公司 Limited by Guarantee)

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In the reference case (i.e. Lisbeth Enterprises Limited vs. Mandy LUK), the commissions paid to the employee only ranged from 2.5% to 5% of revenue generated, while the commissions paid in our industry can go as high as 70%. If after due consideration and debate, it is deemed necessary to go forward with the amendment, it should at least provide for "carve-outs" where the annual compensation of the AE exceeds a certain amount or where the revenue split exceeds a certain percentage, in order to reflect the established practices in different industries.

Very truly yours,

Anthony Espina
Chairman

cc : Mr Stanley Ng

Chief Labour Officer (Labour Relations)/Registrar of Trade Unions