

立法會
Legislative Council

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LC Paper No. CB(2) 2739/05-06

(These minutes have been seen by the
Administration)

Panel on Manpower

**Minutes of meeting
held on Tuesday, 30 May 2006 at 10:45 am
in Conference Room A of the Legislative Council Building**

Members present	:	Hon LAU Chin-shek, JP (Chairman) Hon KWONG Chi-kin (Deputy Chairman) Hon LEE Cheuk-yan Hon CHAN Yuen-han, JP Hon LEUNG Yiu-chung Hon Andrew CHENG Kar-foo Hon LI Fung-ying, BBS, JP Hon Tommy CHEUNG Yu-yan, JP Hon Frederick FUNG Kin-kee, JP Hon WONG Kwok-hing, MH Hon Andrew LEUNG Kwan-yuen, SBS, JP Hon LEUNG Kwok-hung
Member attending	:	Hon Alan LEONG Kah-kit, SC
Member absent	:	Hon Jasper TSANG Yok-sing, GBS, JP
Public Officers attending	:	<u>Item III</u> Mr Matthew CHEUNG Kin-chung, JP Permanent Secretary for Economic Development and Labour (Labour) Mr Alan WONG Kwok-lun Assistant Commissioner for Labour (Labour Relations)

Mr NG Ka-kwong, Stanley
Chief Labour Officer (Labour Relations)
Labour Department

Mr KOO Chiu-shing
Senior Labour Officer (Labour Relations) 1
Labour Department

Item IV

Mrs Betty FUNG CHING Suk-yee, JP
Deputy Secretary for Education and Manpower (1)

Mr Byron LAM
Principal Assistant Secretary for Education and Manpower
(Manpower Planning and Training)

Clerk in attendance : Mrs Sharon TONG
Chief Council Secretary (2) 1

Staff in attendance : Miss Josephine SO
Council Secretary (2) 1

Miss Helen DIN
Legislative Assistant (2) 1

Action

I. Confirmation of minutes of previous meeting
(LC Paper No. CB(2)2136/05-06)

The minutes of the meeting held on 28 April 2006 were confirmed.

II. Date of next meeting and items for discussion
(LC Paper Nos. CB(2)2119/05-06(01) and (02))

Meeting in June 2006

2. Members agreed that the following items be discussed at the next meeting to be held on 15 June 2006 at 2:30 pm –

(a) Draft report of the Panel for submission to the Legislative Council;

Action

- (b) A review of occupational diseases in Hong Kong in 2005; and
- (c) Occupational Safety Performance of Hong Kong in 2005.

Meeting in July 2006

3. Members also agreed to discuss the following items at the meeting to be held on 20 July 2006 at 2:30 pm –

- (a) Issues relating to the Mandatory Provident Fund schemes;
- (b) Implications of government procurement of goods and services under the World Trade Organization Agreement on Government Procurement on local employment; and
- (c) Age discrimination in employment.

(Post-meeting note : On the advice of the Chairman, the meeting in July would be extended by one hour, from 2:30 pm to 5:30 pm, to allow sufficient time for discussion of all items.)

4. Members agreed that members of the Panel on Financial Affairs and members of the Panel on Home Affairs should be invited to attend items referred to in paragraph 3 (a) and (c) respectively. Representatives from relevant government bureaux/departments, including the Commerce, Industry and Technology Bureau, the Environment, Transport and Works Bureau, the Financial Services and the Treasury Bureau and the Housing, Planning and Lands Bureau should be invited to attend the discussion on items (a) and (b), as and where appropriate.

III. Proposed amendment to the Employment Ordinance to ensure that commission is included in the calculation of statutory entitlements

(LC Paper Nos. CB(2)2119/05-06(03), CB(2)2223/05-06(01),
CB(2)2196/05-06(01), CB(2)2150/05-06(01) and CB(2)1510/05-06(01))

5. Permanent Secretary for Economic Development and Labour (Labour) (PSL) briefed members on the Administration's paper, which was tabled at the meeting, on the progress of a legislative proposal to amend the Employment Ordinance (EO) to ensure that all components of wages, including commission of a contractual nature and regardless of the system and mode of payment, should form part of an employee's wages for the purpose of calculating the relevant statutory entitlements. PSL informed members that the Labour Advisory Board (LAB) had held three meetings to discuss the proposal since 24 April 2006. The employee members on LAB were supportive of the proposal. While the employer members also concurred that the legislation should be improved, they hoped to have more time to examine the issue more fully as the business sector had expressed considerable concerns and worries. PSL advised that the Labour

Action

Department (LD) would continue to facilitate the discussions and endeavour to bring both the employer and employee sides of LAB together with a view to formulating an amendment proposal for discussion by the Panel as early as possible.

6. Mr Andrew LEUNG noted that the issue had become a matter of considerable concern to the public. From the perspective of an employer, he supported the Government's intention to improve the legislation, but opposed making amendments in a rush before thorough deliberation was made. Mr LEUNG said that many employers had grave concern whether justice was seen to be done in the Administration's proposal to amend EO, since the proposed amendments were put forward after the Labour Tribunal (LT) and the Court of Final Appeal (CFA) had all ruled that commission accrued and calculated on a monthly basis was not to be included in the calculation of holiday pay (HP) and annual leave pay (ALP). Mr LEUNG cautioned that there was a possibility that the implementation of the proposed amendments would give rise to more employees being forced to become self-employed, particularly for those who were engaged in trades where commission formed a major component of wages, e.g. the sale of estate properties, vehicles or insurance plans. Given the above concerns and worries expressed by employers, Mr LEUNG considered that it was necessary to allow sufficient time for employers to fully examine the issue. He hoped that the employer and employee representatives on LAB could continue the dialogue, and listen to the views of the other side with patience and an open mind.

(As the Chairman needed to attend urgent business, the Deputy Chairman took over the chair at this juncture.)

7. Mr Andrew CHENG said that the Administration had expressly stated in its paper that the proposed amendments did not seek to introduce any new rights and benefits for employees, or create new obligations for employers. He could not understand why the employer representatives on LAB had strong views on the proposed amendments, even though such amendments were merely made to ensure that the original policy intent behind the calculation of statutory entitlements of employees under EO was adequately reflected. Mr CHENG further queried whether the employer representatives were employing a delaying tactic. In his view, the breakdown of discussion between the employer and employee representatives on LAB had reflected that the Board could no longer perform its intended role and functions effectively. He urged the Administration to review whether LAB should continue to be the platform for discussion of labour issues and policies, or alternatively, whether the Legislative Council (LegCo) should take over the work of LAB. Mr CHENG also urged the Administration to expedite the formulation of the legislative proposal and provide members with a timetable for introducing the amendment bill.

8. Mr LEE Cheuk-yan echoed Mr CHENG's views. He said that the business sector had no reason to reject the proposed amendments, as they did not give rise to any new rights and benefits for employees, or new obligations for employers. He wondered whether the employer representatives were manipulating the situation so as to deprive employees further of their rights under the existing law, or preventing the Administration from putting forward other legislative proposals for improvement of

Action

labour rights. Mr LEE requested that the Administration should introduce the amendment bill within the current legislative session.

9. PSL responded that the fact that the deliberations at the meeting of LAB on 29 May 2006 could not result in a consensus should not have any adverse impact on the role and functions of LAB. After all, it was an isolated incident. He pointed out that LAB was a tripartite consultative body, which had been very effective to allow all sides, i.e. the employers, the employees and the Government, to discuss labour policies and issues, and resolve differences through deliberation and negotiation. Indeed, LAB had all along been providing a platform for thorough exchange of views, rational discussions and consensus building. LegCo might not be able to produce these effects if it took over LAB's work. The Administration had taken note of the concerns of employers about the proposed amendments, and their request for more time to study the proposal. LD would continue the discussions with relevant employer groups in an effort to allay their worries and address their concerns.

10. Ms LI Fung-ying said that the request of the business sector for more time to discuss the issue had caused strong reaction in the labour sector. Employees were dissatisfied with employers procrastinating the implementation of the amendments. She considered the proposal straightforward and simple, as it sought to clarify that commission was to be included in the calculation of statutory entitlements, including HP and ALP, and commission had all along been agreed as part of wages under the law. She questioned why so much time had to be spent on a proposal which would not involve any new rights for employees or new liabilities on employers. Ms LI recalled that the Administration originally intended to brief members at the last Panel meeting on 28 April 2006 on the progress of the legislative exercise. It seemed that not much progress had been made in the last few months, even after LAB had conducted three meetings, and the Panel had deferred the discussion of the issue at the request of the Administration. She urged the Government to speed up the consultation process and proceed with the drafting of the amendment bill in order to introduce it into LegCo by July this year.

11. PSL said that the Administration would endeavour to allay the worries of employers, and put forward a proposal to LegCo as soon as possible. He also said that the Government had taken a clear stance on the proposal to amend EO. Indeed, it was LD that initiated the idea.

12. Mr WONG Kwok-hing shared the view that the matter had dragged on for a long time, and there was a pressing need to speed up the drafting of the amendment bill. Otherwise, claims and disputes concerning HP and ALP, which had been referred to LT for adjudication, could not be further processed. He requested the Administration to set out a timetable for implementing the amendments, after listening to the views of both the employer and employee sides. The amendment bill should be ready by July 2006 before the current legislative session was adjourned.

Action

13. PSL responded that the Administration needed to continue the discussions with all relevant parties and tried to secure a consensus. He undertook to submit the legislative proposal to the Panel in October 2006.

14. Mr WONG Kwok-hing sought clarification on how LT would handle the claims lodged by employees during this interim period, i.e. following the recent ruling on a case heard in CFA and before the completion of the legislative exercise.

15. PSL replied that the judgment on the case between Lisbeth Enterprises Limited and Mandy LUK (the Lisbeth case) only affected the calculation of statutory entitlements for employees who received basic salary and commission accrued and calculated on a monthly basis. Despite the ruling delivered by CFA on 28 February 2006, LD continued to refer labour claims which could not be resolved by conciliation to LT and the Minor Employment Claims Adjudication Board (MECAB). It would be for the Court to determine whether the CFA's ruling would apply, having regard to the particular facts of the case.

16. Miss CHAN Yuen-han expressed dissatisfaction with the tardiness of the Administration in taking forward the legislative exercise, apparently in face of employers' opposition. She said that the incident whereby the employee representatives walked out from the LAB meeting to express dissatisfaction with employers delaying the amendment proposal had reflected that LAB could no longer perform its role and functions effectively. She further said that the Government had failed to give people the impression that it was taking a very hard line on the issue of protecting employees' rights, as it backed down after the employer representatives refused to accept the amendment proposal. Miss CHAN urged the Administration to introduce the amendment proposal into LegCo without delay. She considered that further negotiation with employer representatives on LAB was unnecessary.

17. PSL stressed that the Government had no intention to delay and would make every effort to expedite the process. He reiterated that the Administration had not changed its position on the issue: it was firmly wedded to the view that the relevant provisions under EO should be suitably amended. He said that the employer representatives on LAB agreed with the need to deal with the problem, but hoped to have more time to study the proposal and conduct a more in-depth review before coming to a conclusion.

18. Mr LEUNG Yiu-chung expressed doubt about the position of employers. He said that if the employers agreed in principle to amend the law, they had no reason to delay the drafting of the amendments. In his view, the ensuing discussions should be related to how the amendments should be worded. He asked about the major concerns of the employers on the issue.

19. PSL replied that the business sector had concerns, among other things, about the mode of calculation, as one viable for a particular trade might not be applicable to the others. For example, there was a suggestion that the average daily wages of an

Action

employee during the preceding year, instead of during the latest month, should be used as the basis for the calculation of statutory entitlements.

20. Mr Tommy CHEUNG supported LAB to continue the discussions as consensus on the issue was essential before an amendment bill was introduced into LegCo. He expressed doubt whether there was a pressing need to expedite the legislative amendment exercise, given that LD continued to refer labour claims to LT and MECAB, and the Court could decide whether the CFA's ruling would apply. Regarding the impact of the CFA's ruling in the Lisbeth case on employees in Hong Kong, Mr CHEUNG asked about the number of employees who were contractually entitled to and did receive commission on a monthly basis.

21. PSL said that the Administration did not have statistics on the size of the working population who received contractual commission on a monthly basis. However, the number of employees covered could be considerable, as many in the service industries received commission based on sales volume.

22. Mr Frederick FUNG had reservations about the Administration's undertaking to submit the legislative proposal to the Panel in October 2006. He considered the consultation period too long. He cautioned that further delay would increase the number of labour claims and disputes. Mr FUNG strongly urged the Administration to set a time limit to conclude the discussions, and introduce the amendment bill by July this year.

23. PSL said that the Administration would make every effort to formulate, as early as possible, a concrete proposal for discussion by the Panel. However, taking into account the time required for continued discussions with all parties as well as for the legal drafting work, it would be more realistic if the Administration was allowed to make use of the summer recess to prepare the legislative amendments.

24. Mr LEUNG Kwok-hung called on the Government to introduce the amendment bill by July this year. In criticising the employer representatives on LAB for blocking the legislative exercise, Mr LEUNG said that the Government should act as a fair and just referee on this matter and take a very hard line on protecting employees' rights.

25. PSL emphasised that the policy stance of the Government on the matter had all along been clear and consistent: it had no intention of procrastinating on the legislative exercise.

26. The Deputy Chairman pointed out that in the Lisbeth case, the judge had interpreted the word "wages" as excluding commission, except possibly for commission accrued and calculated on a daily basis in amounts varying from day to day. One of the major reasons considered by the judge was that the mode of calculating HP or ALP based on commission was not found plainly in EO. Against this background, legislative amendments would only be required in respect of the calculation methods. The Deputy Chairman considered that the Administration had in fact acted swiftly in proposing the idea of introducing legislative amendments to EO,

Action

after the CFA's ruling had raised questions whether the relevant provisions under EO could adequately express the original policy intent behind the calculation of statutory entitlements. In his view, the deliberations should not take too long since the issue was not complicated. The Deputy Chairman suggested that LAB should focus its discussion on the mode of calculation with a view to coming up with a reasonable calculation method for trades where commission formed a component of wages, and preventing the employers from setting the basic salary of their employees to zero amount.

27. PSL said that the Administration would strive to clarify whether the calculation method was the major concern of employers. If no other issues were involved, it was envisaged that the amendment proposal could be formulated quickly.

28. Mr LEE Cheuk-yan suggested that the legislative amendments should apply with retrospective effect from the date that CFA ruled against the employee's claim in the Lisbeth case, i.e. from 28 February 2006. In doing so, protection for employees during the interim period before the passage of the legislative amendments could be ensured.

29. PSL said that the Department of Justice had initially advised that the proposed amendments to EO, if enacted, could not have retrospective effect owing to possible human rights implications and the uncertainty that it would create.

30. Miss CHAN Yuen-han said that the Government should, in parallel with the consultation, start drafting the amendment bill. She pointed out that a Bills Committee would be formed to study the proposed amendments. As views from the relevant sectors would be invited when the Bills Committee scrutinised the legislative proposal, the Administration could leave the consultation work with LegCo and concentrate on the drafting work in order to introduce the amendment bill into LegCo by July this year. Mr LEE Cheuk-yan and Mr WONG Kwok-hing echoed Miss CHAN's view.

(The Chairman resumed the chair at this juncture.)

31. PSL reiterated that the Administration would try its best to secure a consensus on LAB and introduce the amendment bill into LegCo as early as possible.

32. Mr LEUNG Kwok-hung moved the following motion –

“本委員會譴責勞顧會內資方代表出爾反爾，阻撓確保佣金可獲計算入法定權益之立法，並要求政府在今年七月立法會閉會前立即進行立法工作。”

(Translation)

“That this Panel condemns the employer representatives on the Labour Advisory Board for backtracking from their commitment and blocking the

Action

legislative amendments to include commission in the calculation of statutory entitlements, and requests the Government to proceed with the legislative work without delay before the current legislative session is adjourned in July this year.”

33. Mr Tommy Cheung said that he would have difficulty in supporting the motion as no representatives on LAB belonged to the Liberal Party, and he was not in full picture of the contention between the employer and employee sides.

34. The Chairman put the motion to vote. Seven members voted in favour of the motion and one member voted against the motion. The Chairman declared that the motion was carried.

IV. Creation of a supernumerary post for secondment as Executive Director, Employees Retraining Board
(LC Paper No. CB(2)2119/05-06(04))

35. Mr Tommy CHEUNG asked about the rationale and the period for creating a supernumerary post in the Education and Manpower Bureau (EMB).

36. Deputy Secretary for Education and Manpower (1) (DSEM(1)) replied that the proposal to create a supernumerary post was to enable the secondment of a civil servant to the Employees Retraining Board (ERB) as its Executive Director (ED). If the proposal was supported by the Panel, it would be submitted to the Establishment Subcommittee and the Finance Committee for consideration and approval. The officer to be seconded as ED/ERB would be tasked to conduct a strategic review of ERB. Given the lead time required for completing the review in 12 to 18 months, consulting relevant stakeholders on the outcome of the review, which would take two to three months, and recruiting a suitable successor towards the end of the secondment, which would take another four to five months, it was necessary that the supernumerary post be created for a period of two years with effect from 1 August 2006.

37. While expressing support for conducting a strategic review of ERB, Mr Tommy CHEUNG sought clarification on the financial and establishment implications of the secondment on the Administration, and the deployment arrangement for the secondee on expiry of the secondment in 2008.

38. In reply, DSEM(1) explained that –

- (a) the annual average staff cost for an Administrative Officer Staff Grade B (AOSGB) post, including salaries and staff on-cost, would be about \$2.2 million. EMB would recover the full cost required for the secondment from ERB. As such, creation of the supernumerary post would be cost neutral to the Government; and

Action

- (b) the AOSGB post created for this specific purpose would be deleted by the time the two-year secondment expired, and the officer on secondment to ERB would return to the Government and take up a civil service posting, according to the usual posting policy adopted by the Civil Service Bureau (CSB).

39. Noting that the staffing proposal now put forward by the Administration was not included in the Administration's forecast of creation/deletion of directorate post in the 2005-06 legislative session, Mr Tommy CHEUNG said that the Liberal Party would state its stance on the creation of this AOSGB post when the proposal was considered by the Establishment Subcommittee at its meeting on 14 June 2006.

40. Mr LEE Cheuk-yan considered it a backward step to second a civil servant to ERB as its ED, even though it was an interim arrangement. He said that the ED/ERB vacancy should be filled by open recruitment, and hoped that the Administration could expedite the strategic review of ERB and resort to open recruitment as early as possible. He also expressed concern whether the secondment was cost-neutral to ERB.

41. DSEM(1) responded that it was the Administration's view that the ED/ERB post should be filled by open recruitment under normal circumstances. However, in view of the various reasons set out in the Administration's paper, it would be more appropriate if open recruitment was conducted after the completion of the strategic review as it would be difficult to specify the duties and requirements of the post at this stage when the ERB's future role and responsibilities were not yet decided. DSEM(1) further said that the proposed secondment period of two years was pragmatic, as this would allow sufficient time for the necessary processes, including the review, the consultation and the open recruitment to complete. She confirmed that in arranging the secondment, no extra cost would be incurred to ERB as the Board had determined since 1995 the remuneration package of its ED with reference to that of a D3 officer in the Government; and the proposed supernumerary post was pitched at the same level as that of the former ED/ERB.

42. Mr Frederick FUNG shared the view of Mr LEE Cheuk-yan that the new ED/ERB should be recruited from outside. He raised the following questions –

- (a) whether it was possible to shorten the two-year secondment, so that the supernumerary post could be deleted as early as possible, if the strategic review could be completed ahead of time;
- (b) whether the short notice of retirement given by the former ED/ERB involved any violation of service policy of ERB;
- (c) whether consideration would be given to requiring a longer notice period for ED/ERB with a view to preventing recurrence of similar incidents; and

Action

- (d) what the staffing arrangement was during the time gap between the departure of the former ED/ERB and the execution of the proposed secondment, i.e. from April to July 2006.

43. DSEM(1) responded that –

- (a) the Administration would make every effort to expedite the review. If the review could be completed earlier, the secondment could complete before the two-year period, and the officer on secondment to ERB could be posted back to the civil service earlier;
- (b) the requisite notice period for early termination of service as stipulated in the former ED/ERB's contract was three months. His tendering of notice to ERB in January 2006 to retire upon expiry of his contract in April 2006 did not involve any violation of his employment agreement with ERB;
- (c) the Administration would, in conjunction with ERB, consider whether a longer notice period should be introduced for its ED in future; and
- (d) under delegated authority, the Secretary for the Civil Service could arrange Administrative Officers (AOs) to meet temporary and urgent operational needs lasting not longer than six months. To ensure the continued smooth functioning of ERB subsequent to the departure of the former ED/ERB and to enable the strategic review to start without delay, the Administration had seconded an AO to ERB starting from 1 April 2006 as an interim arrangement, pending the creation of the supernumerary post.

44. Mr WONG Kwok-hing questioned whether there were precedents to second civil servants to public or statutory bodies. He also expressed concern that the secondment of a civil servant to ERB might give rise to the situation of the secondee overriding the decision of the Chairman of the Board.

45. DSEM(1) said that the first ED/ERB was a civil servant seconded from the Labour Department, and the existing Executive Director (ED) of the Vocational Training Council (VTC) was likewise seconded to VTC as its Deputy Executive Director to help steer the VTC's strategic review prior to her appointment as ED/VTC. DSEM(1) advised that in addition to the Chairman and the Vice-Chairman who were non-officials appointed by the Chief Executive, there were a total of not more than 15 representatives of employers, employees, government departments and training bodies on the Board. As the composition of ERB could offer a balanced representation, and the major roles of ED/ERB were to ensure that the Executive Office of ERB could provide quality administrative support to the Board and to execute the Board's decisions and policies which were fully deliberated by Board members, the situation of the secondee overriding the decision of the Board or its Chairman should not arise.

Action

46. Ms LI Fung-ying held the view that the ED/ERB post should be filled by open recruitment, and the secondment should be shortened as much as possible. Ms LI suggested that the interim arrangement to create a supernumerary post in EMB to cater for the secondment could last initially for one year. If the Administration envisaged that the review would take 12 to 18 months to complete, it should propose an extension in light of the progress of the review.

47. DSEM(1) stressed that the proposal of a two-year secondment was necessary and realistic, and the Administration had taken into account the lead time required for completing the following tasks –

- (a) conducting a comprehensive strategic review, which would involve detailed deliberations on a wide range of policy, legal and business issues;
- (b) undertaking thorough discussions within ERB and EMB, as well as consultations with various stakeholders, including the Legislative Council and the staff of ERB; and
- (c) recruiting a new ED through open recruitment.

48. Ms LI Fung-ying said that the paper provided by the Administration did not give sufficient details on the scope of the strategic review to be carried out. She opined that as the review carried much weight on ERB's future roles and responsibilities, and could affect the existing staff of ERB, the Administration should provide members with the details of its plan for the strategic review, including its scope and coverage. DSEM(1) said that the scope of the strategic review in board terms had been set out in the Administration's paper. She agreed to provide members with more information once available.

49. Mr LEUNG Kwok-hung asked whether the former ED/ERB had provided the Board with his views on the way forward for the strategic review before his departure. He said that to second a civil servant to ERB as its ED could be a problem as the secondee might take the position of the Government and be influenced by government policies in discharging the duties. Mr LEUNG questioned whether the objective of the strategic review would be undermined because of the secondment arrangement.

50. DSEM(1) said that to her knowledge, the former ED/ERB had provided the Board with recommendations for improvement from time to time during his service. She also said that the primary service target of ERB, since its establishment, was unemployed persons aged 30 and above with junior secondary education or below. Retraining was initially focused on displaced workers who experienced difficulties in finding alternative employment as a result of economic restructuring. It was thus difficult for the former ED/ERB to come up with innovative ideas for ERB given the rather narrow scope of its work. To address this problem, the Administration decided that the strategic review should cover, among other things, whether ERB should

Admin

Action

redefine its target group, expand or refocus its services, e.g. providing skills upgrading training, and identify new retraining opportunities in order to keep pace with the socio-economic changes and remain responsive to the requirements of both the industries and the labour force.

51. Miss CHAN Yuen-han said that given the reasons provided by the Administration, she had no strong view on the secondment of a civil servant to ERB as its ED. However, it should only be taken as an interim measure. She hoped that the Administration could complete the review and embark on open recruitment as early as possible. Miss CHAN considered that the secondee should have a good understanding of vocational training and retraining, apart from the attributes and qualifications suggested by the Administration.

52. To conclude, the Chairman said that the Administration should consider members' suggestions that the arrangement to second a civil servant to ERB should only be made on a short-term basis, and the strategic review should be completed as early as possible.

53. There being no other business, the meeting ended at 12:55 pm.

Council Business Division 2
Legislative Council Secretariat
17 July 2006