

立法會
Legislative Council

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LC Paper No. CB(2)528/06-07
(These minutes have been seen by
the Administration)

Panel on Manpower

**Minutes of Special meeting
held on Monday, 25 September 2006, at 2:30 pm
in the Chamber 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 Jasper TSANG Yok-sing, GBS, JP
 - Hon Andrew CHENG Kar-foo
 - Hon LI Fung-ying, BBS, JP
 - Hon Tommy CHEUNG Yu-yan, JP
 - Hon Frederick FUNG Kin-kee, SBS, JP
 - Hon WONG Kwok-hing, MH
 - Hon Andrew LEUNG Kwan-yuen, SBS, JP
 - Hon LEUNG Kwok-hung
- Members attending** :
- Hon James TIEN Pei-chun, GBS, JP
 - Hon Mrs Selina CHOW LIANG Shuk-ye, GBS, JP
 - Hon Howard YOUNG, SBS, JP
 - Hon Jeffrey LAM Kin-fung, SBS, JP
 - Hon Alan LEONG Kah-kit, SC
 - Hon CHIM Pui-chung
- Public Officers attending** :
- Item I
 - Mr Matthew CHEUNG Kin-chung, JP
Permanent Secretary for Economic Development and
Labour (Labour)
 - Mr Alan WONG Kwok-lun, JP
Assistant Commissioner for Labour (Labour Relations)

Mr NG Ka-kwong, Stanley
Assistant Commissioner for Labour (Employees' Rights
& Benefits)

Ms FONG Yuk-sim, Teresa
Senior Labour Officer (Labour Relations) 1
Labour Department

Mr KOO Chiu-shing
Senior Labour Officer (Labour Relations) 3
Labour Department

Clerk in attendance : Mr Raymond LAM
Senior Council Secretary (2) 5

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

Miss Helen DIN
Legislative Assistant (2) 1

Action

- I. Proposed amendment to the Employment Ordinance to ensure that commission is included in the calculation of statutory entitlements**
(LC Paper Nos. CB(2)3060/05-06(01), CB(2)2998/05-06(01),
CB(2)2969/05-06(01) and CB(2)2801/05-06(01))

Members noted the submissions from the following organisations -

- (a) the Federation of Hong Kong & Kowloon Labour Unions, dated 22 September 2006;
- (b) the Hong Kong Federation of Trade Unions, dated 25 September 2006;
and
- (c) the Hong Kong Business Community Joint Conference, dated 25 September 2006.

(Post-meeting note : The above submissions, tabled at the meeting, were issued to members vide LC Paper No. CB(2)3099/05-06 on 26 September 2006.)

2. Permanent Secretary for Economic Development and Labour (Labour) (PSL) briefed members on the progress and development regarding the proposal to amend the Employment Ordinance (EO) to clearly reflect the Government's policy intent that all

components of "wages", including commission of a contractual nature, however designated or calculated, were to be reckoned for the purpose of calculating statutory entitlements. He highlighted the following points -

- (a) according to an earlier ruling of the Court of Final Appeal (CFA), commission earned by certain employees was not reckoned in the calculation of holiday pay and annual leave pay because EO did not provide for a "workable mode of calculation". This necessitated an amendment to EO to ensure that a "workable mode of calculation" was available for the calculation of statutory entitlements in all cases involving commission of a contractual nature. This amendment proposal sought to put beyond doubt that all components of "wages", including commission, were to be reckoned for calculating the following statutory entitlements under EO :
 - (i) holiday pay;
 - (ii) annual leave pay;
 - (iii) maternity leave pay;
 - (iv) sickness allowance;
 - (v) wages in lieu of notice for termination; and
 - (vi) end-of-year payment; and
- (b) apart from amending EO to reflect the policy intent, the Administration considered it necessary, in the light of the views received during the consultation over the past few months, to also amend EO such that the average daily wages during the past 12 months instead of the last month were to be used for the purpose of calculating the above statutory entitlements. This would address the concerns of business and professional organisations as the adoption of a longer reference period of 12 months would even out seasonal fluctuations and would thus be conducive to business planning and cost budgeting; and
- (c) the Labour Advisory Board (LAB) had convened four meetings to discuss the issue since April 2006. At its meeting on 22 August 2006, the proposal to amend EO in the manner mentioned in (a) and (b) above received majority support of the members present at the meeting.

3. PSL stressed that the Administration had struck a reasonable balance between employers' and employees' interests in drawing up the amendment proposal.

4. Mr Andrew LEUNG said that from the perspective of an employer, he supported the proposal to amend the law to clarify the calculation method of statutory entitlements so as to increase the protection for employees, particularly workers in elementary occupations. He however questioned whether employers' views had been fully considered before LAB supported the amendment proposal, or else it would not have aroused the strong reaction of a number of employers to jointly place advertisements in newspapers to oppose the proposal. Mr LEUNG further said that to his knowledge, many employers considered it unfair for the Administration to propose amendments to EO after CFA had ruled in their favour. Mr LEUNG cautioned that the Administration might jeopardise the relationship between employers and employees if amendments to the legislation were done in haste, and 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 industries where employees could earn large amount of commission by sale of products, e.g. estate properties, vehicles or cosmetic products. He hoped that the Administration could have more and wider discussions with the employers and employees with a view to formulating a proposal acceptable to both sides, before introducing an amendment bill into the Legislative Council (LegCo).

5. PSL responded that the Administration had made considerable efforts in the past few months to gauge the views of employers and employees. For example, a total of seven meetings had been held with business/professional organisations and another six with labour groups/trade unions, and all LAB members were invited to put forward their views on the proposal as well as those of the organisations which they represented and knew of. So far, the Administration had received eight submissions from employer/ professional organisations and 55 from labour groups/trade unions. PSL said that the business sector called for a cap on the commission to be counted as wages. However, it was a highly complex and controversial issue, and should be deliberated after the proposed amendments to ensure that commission of a contractual nature would be included in the calculation of statutory entitlements were passed.

6. Mr CHIM Pui-chung said that the financial services sector which he represented had strong opinion on the amendment proposal. He would oppose the amendment bill to be introduced into LegCo, unless a practicable solution was provided for the problem. Mr CHIM further said that to impose a LAB's decision was contrary to achieving a harmonious society in Hong Kong. Instead of forcing LegCo to accept the decision of LAB, the Administration should continue its effort to bring all parties concerned together for discussion with a view to resolving their differences. It was always important to ensure that the interests of all parties were not to be affected by the amendments.

7. PSL said that LAB was a consultative body enabling all sides, i.e. the employers, the employees and the Government, to discuss labour policies and issues and resolve differences through deliberation and negotiation. Over the years, LAB had been providing an effective platform for thorough exchange of views, rational discussions and consensus building on issues relating to the labour portfolio before they were

brought to LegCo. PSL added that the Administration attached great importance to developing a harmonious society. He cited as an example the proposed adoption of the average daily wages on the basis of a 12-month moving average under the amendment proposal in question. It was a consensus between the employer and employee sides of LAB and was considered a fair and reasonable arrangement that could address employers' concerns.

8. Mr WONG Kwok-hing welcomed the decision of LAB. As the decision came after lengthy discussions and consultation, he hoped that the Administration would stand firm on the issue, despite the opposition from the business sector. Mr WONG said that it was irrational and unreasonable for the employers to threaten that they would close down their businesses or turn their employees to become self-employed, if the legislation was amended. He stressed that the proposed amendments did not seek to introduce any new rights and benefits for employees, or create new obligations for employers. They were merely made to ensure that the original policy intent behind the calculation of statutory entitlements of employees under EO was adequately reflected. He urged the Administration to expedite the drafting of the amendment bill and provide members with a timetable for its introduction into LegCo.

9. PSL responded that the preparatory work on the amendment exercise was in progress, and the Administration planned to introduce the amendment bill into LegCo as early as possible during the 2006-2007 legislative session. The Administration would try its best to introduce the bill by the end of 2006.

10. Mr Tommy CHEUNG expressed dissatisfaction that the Administration planned to push through the amendments before the issue of setting a cap was addressed. He said that the amendment proposal, if implemented, would affect employers of various sectors, such as the financial services sector. To allay the worries of employers, the Administration should include a cap on commission in the amendment proposal and work out the implementation details in one go. Mr CHEUNG urged the Administration to make it clear whether it would introduce a cap so that the investors could assess whether the business environment of Hong Kong was favourable to them.

11. PSL responded that at present, amending EO to reflect the original policy intent had a higher priority since there was a need to clarify the grey area in the existing legislation. As the issue of setting a cap was controversial and complicated, and would have far-reaching impact on both employers and employees, it should be dealt with at a later stage outside the context of the current urgent amendment exercise. The proposal to fully reflect the policy intent to include commission in the calculation of statutory entitlements should be pursued without further delay.

12. Miss CHAN Yuen-han pointed out that the decision to include commission in the calculation of statutory entitlements was made following a consensus reached between the employer and employee representatives on LAB, a 12-member board comprising an equal number of employer and employee representatives. While supporting the Government's move to remove the existing grey area in the legislation,

Miss CHAN expressed concern whether the Administration would fulfill its pledge during a previous forum held by the Hong Kong Federation of Trade Unions to introduce the amendment bill by the end of 2006. She shared the view that the matter had dragged on for a long time, and the Administration should not falter in its resolve to protect employees' rights, even if some employers had made unjustifiable threat that they might consider relocating their investment elsewhere. With regard to the tense and deteriorating employer-employee relationship in recent years, Miss CHAN questioned how the Administration would solve the problem.

13. PSL said that the Administration would adhere to its plan to introduce the amendment bill by the end of 2006, if everything went smoothly. He added that the Government acknowledged the need to maintain a harmonious relationship between employers and employees. It would therefore, in accordance with its long-established policy of striking a balance between the interests of the two parties, create an environment which would protect workers' rights while being conducive to business operation.

14. Mr Andrew CHENG criticised that when the labour sector asked for a minimum wage, the industrial and business sector would raise objection by saying that a market-led economy was the golden rule for Hong Kong's success and must not be altered in any way. He said that if this rule had to be observed, there was no reason for the employers to ask for a cap just because some employees might receive higher commission. Mr CHENG held the view that capping commission was tantamount to setting a maximum wage, and there should not be such a policy. As the Hong Kong Business Community Joint Conference had, in its submission, claimed that LAB could not represent their views and opposed the amendment proposal, Mr CHENG questioned whether LAB could perform its intended role and functions effectively in the future. He urged the Administration to review whether LAB should continue to be the platform for discussion of labour issues and policies.

15. PSL stressed that the first and foremost task was to amend EO to clarify the grey area. He said that the Administration kept an open mind on the suggestion of setting a cap and would explore the issue at a later stage. PSL further said that it was not unusual for the employer and employee sides to hold different views over labour policies and issues. He did not consider that LAB had failed in its role as an advisory body or a platform for both sides to exchange views. As Chairman of LAB, he regarded both the employer and employee representatives on LAB as his working partners and would try his best to resolve their differences through deliberation and negotiation.

16. Mr LEUNG Yiu-chung shared the view that the Administration should stand firm on the issue and take a very hard line to protect employees' rights. He supported the early introduction of the amendment bill. Mr LEUNG recalled that when the Mandatory Provident Fund (MPF) Scheme was implemented, there were numerous problems where employers resorted to evade MPF contributions by forcing their employees to become self-employed persons. He asked about the measures to be taken by the Administration to prevent the recurrence of similar cases in future when the

relevant provisions in EO were amended to reflect the policy intent concerning the calculation of statutory entitlements.

17. In response, PSL made the following points -

- (a) if an employer, who had the intention of evading payment of statutory benefits, unilaterally changed the status of his employees to self-employed persons without the employees' consent, the unilateral move to alter the employment terms might constitute a constructive dismissal. The employees concerned might seek remedies from the employer under the employment agreement and EO;
- (b) according to previous verdicts made by the court, the determination of self-employment was not based solely on a title. In deciding whether an employer and employee relationship still existed, the court would consider the facts of the case, including who was in possession of production tools, who was responsible for the supply of production material and whether uniform was required in carrying out the duties;
- (c) the Administration very much hoped that employers, before altering the employment terms of their employees, would take into consideration the work performance and loyalty of their employees, and could handle the issue sensibly; and
- (d) regarding the legislative proposal in question, the Administration would have more communications with the employers so as to secure their understanding and support.

18. Mr LEUNG Yiu-chung expressed concern whether the self-employed persons were sufficiently protected under the existing legislative framework. He considered that the Administration should review and make improvements to the labour laws to enhance the protection for self-employed persons.

19. PSL noted the concern of Mr LEUNG. He said that in order not to complicate the issue, the problems relating to self-employment should be dealt with separately.

20. Ms LI Fung-ying expressed full support for the Administration's proposal to amend EO to adequately express the policy intent concerning the calculation of statutory entitlements. She hoped that the Administration could, as it had pledged, speed up the drafting work and introduce the amendment bill into LegCo as early as possible in the next legislative session. Ms LI noted from the joint declaration of the Hong Kong Business Community Joint Conference that there were misunderstandings among the employer groups about the protection provided in the Employment (Amendment) (No. 2) Ordinance 1997. She considered that the Administration should make clarification with the business sector that the amendments presently proposed would not create any new rights for employees or new liabilities on employers. Ms LI

hoped that the employer groups could keep an open mind and study the proposal sensibly.

21. PSL said that the proposed amendments did not seek to create any new liabilities on employers, and they were merely made to clearly reflect the original policy intent behind the calculation of statutory entitlements of employees under EO. He assured members that the Administration had not changed its position and would stand firm on the issue.

22. Mr LEUNG Kwok-hung pointed out that the recent CFA's ruling on the case between Lisbeth Enterprises Limited and Mandy LUK (the Lisbeth case) had only raised a question as to whether the relevant provisions in EO could adequately express the original policy intent concerning the calculation of statutory entitlements, when the mode of calculation based on commission was not found plainly in EO. As such, he supported the proposal that the relevant provisions in EO should be suitably amended. Coupled with LAB's endorsement, the Administration should proceed to amend the legislation without further delay. Regarding the employers' proposal to set a cap on commission, Mr LEUNG considered it an unreasonable request and urged the Administration not to accept it.

23. Mr LEE Cheuk-yan agreed that the joint declaration of the Hong Kong Business Community Joint Conference had reflected that the employer groups had misunderstanding about the definition of "wages". He queried whether such misunderstanding was common and had led employers to violate the law. He asked whether the Labour Department (LD) had received complaints about non-inclusion of commission in the calculation of statutory entitlements in the past 10 years.

24. PSL responded that since the enactment of the Employment (Amendment) (No. 2) Ordinance 1997 in June 1997, the Labour Relations Division (LRD) of LD had been assisting aggrieved employees to pursue claims for statutory entitlements calculated on the basis of "wages" as defined under section 2 of EO. Commission of a contractual nature had all along been included as part of the wages in the calculation of statutory entitlements when LRD helped to resolve these claims and disputes. To his knowledge, many employers continued to include commission in the calculation despite the CFA ruling.

25. Mr LEE Cheuk-yan was of the view 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. He urged the Administration to expedite the law drafting work.

26. PSL replied that the proposed amendments to EO, if enacted, would not have retrospective effect owing to possible human rights implications and the uncertainty that it would create. The Administration would make every effort to expedite the process. It planned to introduce the amendment bill by the end of 2006.

27. Mr Howard YOUNG held the view that all proposed amendments should strike a balance between the interests of the business community and labour sector. He said that in the bill to be introduced, the Administration should address the issue of setting a cap on commission. To deal with this matter at a later stage after the enactment of the amendment bill was logically unsound. Mrs Selina CHOW echoed his view.

28. PSL reiterated that at present, the Administration's priority was to clarify the grey area in the existing legislation. The suggestion to set a cap was controversial and complicated, and would have far-reaching implications on both employers and employees. As such, the Administration had decided that it should be dealt with at a later stage so that in-depth studies and discussions could be carried out before any decision was made. He emphasised that the Administration maintained an open mind on the suggestion.

29. Mrs Selina CHOW expressed disappointment that the Administration had repeatedly declined to address the concerns of the employers, and failed to heed their views that if a cap was not imposed, there would be practical difficulties or problems.

30. Mr Frederick FUNG shared the view that the industrial and business sector had a lot of misunderstandings about the definition of "wages" and the whole legislative exercise. He said that in the joint declaration of the Hong Kong Business Community Joint Conference, the employer groups had indicated that if commission was to be included in the calculation of wages, some employers, when facing uncertainties with their obligations under EO, might change the employment terms of their employees and the commission system or even force their employees to become self-employed persons. In his view, such remarks were a menace, seeking to prevent the Administration from making amendments to the legislation. Mr FUNG further said that the business sector had no reason to reject the amendment proposal, as the CFA's ruling only raised question that EO did not provide for a "workable mode of calculation". He expressed concern how the Administration could ease the strong reaction of the employer groups.

31. PSL said that there was adequate communication and full consultation in the past few months, and a total of seven meetings had been held with business/professional organisations and another six with labour groups/trade unions. In addition, the Administration had invited all LAB members to put forward their views on the legislative proposal.

32. Mr Alan LEONG said that according to the CFA's ruling on the Lisbeth case, commission accrued and calculated on a monthly basis was not to be reckoned in the calculation of holiday pay and annual leave pay because EO did not provide for a "workable mode of calculation". He asked about the solutions to address this problem to ensure that a "workable mode of calculation" was available for the calculation of statutory entitlements in all cases involving commission of a contractual nature. Mr LEONG further said that the Administration should, in proposing solutions to the

problem, make reference to the mechanism currently adopted by the real estate industry or the financial services sector.

33. PSL responded that the Administration had carefully considered all the views received in the course of the consultation exercise. In the light of the merits set out in paragraph 4 of the Administration's paper, it proposed to amend EO such that the average daily wages calculated on the basis of a 12-month moving average was used for the purpose of calculating statutory entitlements. The proposed amendments, as set out in paragraph 6 of the Administration's paper, could address the concerns of various parties.

34. Mr James TIEN held the view that the amendment bill should contain provisions for setting a cap on commission to be included in the calculation of statutory entitlements. He said that there were precedents in which the Administration would impose a ceiling, e.g. MPF contributions and long service payment, to protect employees' rights. He considered the proposal straightforward and simple. As such, it would take the Administration about six months to get the preparatory work done for this legislative amendment.

35. PSL reiterated that the Administration would not rule out the possibility of setting a cap. He said that unlike the ceiling on MPF contribution or long service payment, a cap on commission as part of wages for calculation of statutory entitlements might have human rights implications and might prompt some affected employees to seek judicial review. Specifically, MPF was a completely new scheme. As such, there was no question of any employee feeling aggrieved by the ceiling. Therefore, the Administration would need to handle the issue with care.

36. The Deputy Chairman pointed out that section 2 of EO had provided a definition of "wages" and the legislation set out clearly the statutory entitlements of employees. The calculation methods for individual entitlements were also provided under the respective sections of EO. The CFA's ruling on the Lisbeth case had revealed that a "workable mode of calculation" was not available for the calculation of statutory entitlements in all cases involving commission of a contractual nature. Legislative amendments would, therefore, be required to ensure that a "workable mode of calculation" was available. The Deputy Chairman said that placing a cap on commission to be included for calculation of statutory entitlements could be interpreted as discriminating against high-salaried persons. The Administration should make it clear to the employer groups that it would forgo the suggestion of setting a cap. Echoing this view of the Deputy Chairman, Mr LEE Cheuk-yan said that setting a cap on commission would probably imply that a maximum wage requirement was applied to all employees, which, in his view, was unreasonable.

37. Mr Jeffrey LAM said that the employer groups, in principle, did not oppose the proposal to amend EO to clearly reflect the policy intent behind the calculation of statutory entitlements. They nevertheless hoped that the Administration could address their concerns, including the suggestion to set a cap, before the amendment bill was

introduced into LegCo. In his view, it would not be opportune to introduce legislation before consultation was adequately conducted and uncertainties continued to exist. PSL reiterated that the Administration would keep an open mind on the suggestion.

38. Mr LEE Cheuk-yan enquired whether the Economic Development and Labour Bureau had issued instruction to the Department of Justice for law drafting. PSL replied that the Bureau would prepare the relevant drafting instruction and issue the document as soon as possible.

39. Ms LI Fung-ying did not consider the arguments put forward by the employer groups convincing enough. She urged the Administration to start drafting the amendment bill without further delay. 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 bill, the Administration should leave the consultation work with LegCo and concentrate on the drafting work in order to introduce the amendment bill into LegCo as early as possible. Echoing her view, Mr WONG Kwok-hing said that the Administration should take a very hard line on the issue.

40. Mr WONG Kwok-hing moved the following motion -

"本委員會促請政府盡快提交《僱傭條例》修訂的立法建議，以早日實施有關工資計算法定權益的政策原意及清晰該等權益的計算方法。"

(Translation)

"That this Panel urges the Administration to expeditiously introduce the legislative proposal to amend the Employment Ordinance in order to implement as early as possible the policy intent concerning the calculation of statutory entitlements on the basis of wages and clarify the calculation method for these entitlements."

41. The Chairman put the motion to vote. Four members voted in favour of the motion, and no member voted against it. The Chairman declared that the motion was carried.

42. There being no other business, the meeting ended at 4:10 pm.