

For information on
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Legislative Council Panel on Manpower

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

Purpose

This paper briefs Members on the latest progress on a proposal to amend the Employment Ordinance ("EO") 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 statutory entitlements under the EO.

Background

2. The EO sets out the statutory entitlements of employees and specifies the related calculation methods. These statutory entitlements include, inter alia, wages in lieu of notice ("WILON") to terminate employment, end-of-year payment ("EYP"), maternity leave pay ("MLP"), sickness allowance ("SA"), holiday pay ("HP"), and annual leave pay ("ALP").

3. The calculation methods for individual entitlements are provided under the respective sections of the EO. Although there are some variations to the construction of these provisions, they generally make reference to "wages"¹ as defined under section 2 of the EO which expressly include **commission of a contractual nature**.

4. In a recent case before the Court of Final Appeal (CFA), i.e. *Lisbeth Enterprises Limited vs Mandy LUK* ("the Lisbeth case"), it was ruled that commission accrued and calculated on a monthly basis was not to be included in the calculation of HP and ALP on the ground that sections 41 and 41C of the EO did not provide for a workable mode of calculation. In the Lisbeth case, the employee concerned received a monthly basic salary of \$5,600 per month. She

¹ Under section 2 of the EO, "wages" means all remuneration, earnings, allowances including travelling allowances and attendance allowances, attendance bonus, commission, overtime pay, tips and service charges, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done under his contract of employment, with a few exceptions, one of which is commission which is of a gratuitous nature or which is payable only at the discretion of the employer.

was also contractually entitled to commission on a sliding scale dependent on the value of her gross monthly sales volume. The amount of commission varied from month to month and was payable to the employee after it was ascertained at the end of each month.

5. The CFA's ruling on the Lisbeth case on 28 February 2006 has raised the question as to whether the relevant provisions under the EO could adequately express the original policy intention. This has also become an issue of considerable public concern.

Government's Policy Intention

6. The policy intention behind the calculation of statutory entitlements of employees under the EO is that "wages" inclusive of **commission of a contractual nature** should be used as the basis for all calculations. This is to ensure that an employee's take-home pay would not be affected if he/she enjoys a statutory entitlement such as taking a statutory holiday or a period of annual leave.

7. In March 1996, the Labour Advisory Board endorsed a proposal to amend the definition of "wages" to expressly include **commission of a contractual nature**, attendance bonus/allowance, travelling allowance, and overtime pay if they constitute a regular or substantial part of an employee's wages. The Employment (Amendment)(No.2) Ordinance 1997 was subsequently enacted in June 1997. This amendment exercise aimed at removing any ambiguities or inadequacies in the definition of "wages", and putting beyond doubt that commission and some other payments to an employee are part and parcel of the employee's wages for the purpose of calculating statutory entitlements under the EO. This policy intention was clearly spelt out in paragraph 20 of the relevant Legislative Council brief, which is reproduced as follows:

"These proposed amendments [to include commission and other payments in the definition of "wages"] will not create a new liability on employers to pay commission, attendance bonus, attendance allowance, travelling allowance and overtime pay. Rather, they seek to clarify the nature of these payments when they are already provided under the contract of employment to the effect that they should be reckoned as part of an employee's wages when calculating the amounts of statutory entitlements under the Employment Ordinance. Those statutory entitlements which are calculated on the basis of an employee's wages include wages in lieu of notice to terminate employment, severance payment, long service payment, maternity leave pay and sickness

allowance (plus penal damages for wrongful termination), holiday pay, annual leave pay and end-of-year payment.”

Conciliation and Adjudication of Claims

8. Since the enactment of the Employment (Amendment)(No.2) Ordinance 1997 in June 1997, the Labour Relations Division (LRD) of the Labour Department (LD) has been assisting aggrieved employees to pursue claims for statutory entitlements calculated on the basis of “wages” as defined under section 2 of the EO. Regardless of the system and mode of payment, **commission of a contractual nature** has always been included as part of wages in the calculation of the statutory entitlements when the LRD helps to resolve such claims and disputes. Any claims that cannot be satisfactorily resolved by conciliation are referred to the Labour Tribunal (LT) or Minor Employment Claims Adjudication Board (MECAB) for adjudication in accordance with the amount of claim and number of claimants involved. Despite the CFA ruling on 28 February 2006, we have continued with this referral arrangement to LT and MECAB on unresolved claims and disputes. It is for the Court to determine whether the CFA’s ruling would apply, having regard to the particular facts of the case.

Amendment Proposal

9. The recent *Lisbeth case* has shown that the Government’s policy intention has not been fully reflected. We therefore need to amend the provisions for HP and ALP such that **commission of a contractual nature**, regardless of the system and mode of payment, should form part of an employee’s wages for the purpose of calculating HP and ALP. This is to ensure certainty of the law for the purposes of compliance and enforcement.

10. We are aware of the fact that the CFA’s ruling may have read-across implications on other provisions of the EO. Given that the provisions for WILON, EYP, MLP or SA have a construction similar to that of HP and ALP, for the avoidance of doubt and ambiguity, we propose to make similar clarifications to the mode of calculation of these statutory benefits.

11. Accordingly, legislative amendments would be required in respect of the calculation methods for the following statutory entitlements under the EO:

- (i) Sections 7 and 8A on WILON;
- (ii) Sections 11A, 11D and 11F(2) on EYP;
- (iii) Sections 14(3), 15(2) and 15(3) on MLP;
- (iv) Sections 33(4BA) and 35 on SA;

- (v) Section 41 on HP; and
- (vi) Section 41C on ALP.

12. These sections would need to be amended to ensure that all components of wages inclusive of **commission of a contractual nature** would be netted in the calculation of the relevant statutory entitlements. As regards the mode of calculation, it is proposed that the existing and well-tried mode, which makes reference to the average daily wages of an employee during the latest month (i.e. the average of the daily wages earned by an employee on each day on which he worked during every complete wage period, comprising not less than 28 days and not more than 31 days, immediately preceding or expiring on the statutory holiday, first day of the annual leave, or other relevant dates), should be maintained as the basis for the calculation of statutory entitlements.

13. It must be emphasized that the proposed amendments do not seek to introduce any new rights and benefits for employees, or create new obligations for employers. Nor do they seek to make any fundamental change to the mode of calculation of the existing statutory entitlements. They are designed solely to adequately express the original policy intention as highlighted at paragraphs 6 and 7 above, no more nor less.

Consultation

14. The Labour Advisory Board has been consulted on the proposal. Employee Members were supportive of the proposal. Employer Members accepted the need to address the problem. However, in view of the concern and worries of the business sector, they hoped to have more time to examine the issue more fully.

Way Forward

15. The LD will spare no effort in bringing the employer and employee sides of the Labour Advisory Board together with a view to formulating an amendment proposal for Members' discussion as soon as possible. At the same time, we will continue to discuss with the relevant employer groups in an effort to allay their worries and address their concerns.

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