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Bills Committee on Employment (Amendment) Bill 2006

Background brief prepared by the Legislative Council Secretariat

Proposal to amend the Employment Ordinance to clearly reflect the policy intent concerning the calculation of statutory entitlements

Purpose

This paper summarises the discussion by the Panel on Manpower on the Administration's proposal to amend the Employment Ordinance (EO) (Cap. 57) to clearly reflect the policy intent concerning the calculation of statutory entitlements.

Background

2. 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 to terminate employment, end-of-year payment, maternity leave pay, sickness allowance, holiday pay (HP), and annual leave pay (ALP). The calculation methods for individual entitlements are provided under the respective sections of EO. Although there are some variations to the construction of these provisions, they generally make reference to "wages" as defined under section 2 of EO which expressly includes commission of a contractual nature.

3. In a case before the Court of Final Appeal (CFA) on 28 February 2006, i.e. *Lisbeth Enterprises Limited v. Mandy Luk* ("the Lisbeth case"), it was ruled that commission accrued and calculated on a monthly basis was not to be reckoned in the calculation of HP and ALP on the ground that the existing provisions of EO did not provide a "workable mode of calculation" for such purpose. The CFA's ruling on the Lisbeth case has raised the question whether the relevant provisions in EO could adequately reflect the original policy intent concerning the calculation of employees' entitlements.

The Administration's proposal

4. At its meeting on 25 September 2006, the Panel on Manpower was consulted on the Administration's proposal to amend EO to clearly reflect its policy intent concerning the calculation of statutory entitlements and to improve the mode of calculation of such entitlements. The Administration informed the Panel that it proposed to amend EO -

- (a) to put beyond doubt that all components of "wages", including commission of a contractual nature, however designated or calculated, should be reckoned for the purpose of calculating employees' statutory entitlements under EO; and
- (b) to modify the existing mode of calculation of the 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 was under the employment of the concerned employer, immediately preceding the statutory holiday, first day of the annual leave, or other relevant dates.

Discussion by the Panel

5. At the meeting on 25 September 2006, some members expressed support for the proposal and requested early introduction of the amendment bill. Some other members expressed concern that the proposal, if implemented, would affect employers of various sectors, such as the real estate and the financial services sectors. They relayed the suggestion of the employer side for a ceiling to be set on the commission in the calculation of statutory entitlements, and urged the Administration to address the issue before introducing the amendment bill. Some members, however, were of the view that capping commission was tantamount to setting a maximum wage and was unreasonable.

6. The Administration advised that its priority was to clarify the grey area in the existing legislation. The suggestion to set a cap on the commission was controversial and complicated, and would have far-reaching implications on both employers and employees. As such, it should be dealt with at a later stage to enable in-depth studies and discussions to be carried out before any decision was made. The Administration assured members that the proposed amendments did not seek to introduce any new rights and benefits for employees, or create new liabilities on 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.

7. The Administration also advised that the proposed adoption of the average daily wages on the basis of a 12-month moving average was meant to address the concerns of business and professional organisations over the difficulty in staff cost budgeting under the existing mode of calculation of statutory benefits.

Relevant papers

8. Members may wish to refer to the Administration's paper on "Proposal to amend the Employment Ordinance to adequately express the policy intention concerning the calculation of statutory entitlements and to improve the mode of calculation of such entitlements" (LC Paper No. CB(2)3060/05-06(01)) for the Panel meeting on 25 September 2006 and the minutes of the meeting (LC Paper No. CB(2)528/06-07). The documents are available on the website of the Council (<http://www.legco.gov.hk/yr05-06/english/panels/mp/general/mp0506.htm>).

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