Labour Department (Headquarters) **勞工處（總處）**

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Dear Ms Cheng,

Employment (Amendment) Bill 2006

Thank you for your letter of 9 February 2007. Our reply to your questions regarding the proposed amendments to the Employment Ordinance (EO) is provided below.

Clause 3 of the Bill (Termination of contract by payment in lieu of notice)

Proposed section 7(1)

2. First of all, we wish to stress that apart from providing a new mode of calculation on the basis of a 12-month moving average, the Bill does not seek to vary in any way the substance of the existing sections 7 and 8A of the EO on lawful termination of contract by payment in lieu of notice and damages for wrongful termination of contract respectively.

3. Paragraph (a)(i) of the proposed section 7(1) provides that either party to a contract of employment may at any time terminate the contract without notice by agreeing to pay to the other party, where the length of notice required to terminate the contract under section 6 (termination of contract by notice) is a period expressed in days/weeks, a sum calculated by multiplying the number of days in the period for which wages would normally be payable to the employee by the daily average of the wages earned by the employee during the period of 12 months immediately before the date on which *the party terminating the contract gives notice of the termination to the other party* ("date of notification").

4. The phrase *"the party terminating the contract gives notice of the termination to the other party"* refers to the situation where the party terminating the contract notifies the other party that he is to terminate the contract but not serving the notice period under section 6 of the EO. The date of notification means the date on which the party terminating the contract notifies the other party of his intention to terminate the contract.

5. The same concept is embedded in the existing section 7(3) of the EO in its reference to "the giving of the notice" as the relevant date for the calculation of payment in lieu of notice :

> *"In the case of an employee whose remuneration is calculated by the piece or task the amount of wages which would have accrued to such employee during the period of notice referred to in subsection (1) shall be deemed to be the amount of wages earned by the employee during the equivalent period immediately prior to the giving of the notice ....."*

6. Section 8A of the EO provides for damages for wrongful termination of contract, i.e. termination without serving the notice period as required under section 6 or paying the wages in lieu of notice as required under section 7. To cater for the situation where a party to the contract terminates the contract without giving any notice or notification, the proposed section 8A(3) provides that in calculating the daily average or monthly average of the wages earned by the employee in accordance with section 7, the reference in that section to the date on which the party terminating the contract gives notice of the

termination to the other party or the date of notification is to be construed as a reference to the date of termination of the contract.

7. The phrase "date of notification" is a shorthand for the phrase "the date on which the party terminating the contract gives notice of the termination to the other party". It only appears in the proposed sections 7 and 8A(3) but not in other parts of the Bill. The shorthand is only applicable to section 7 and the reference to "date of notification" in section 8A is only a cross-reference.

Proposed section 7(1A)

8. New section 7(1A) provides that in calculating the daily or monthly average of the wages earned by an employee for the purpose of calculating payment in lieu of notice, any period in the period of 12 months or shorter period for which the employee was not paid his wages or full wages by reason of any leave taken by him in accordance with the EO or the Employees' Compensation Ordinance (ECO) or with the agreement of his employer, or by reason of his not being provided by his employer with work on any normal working day; and any wages or other sum paid to him for that period, are to be disregarded. The purpose is to ensure that an employee's statutory entitlements would not be reduced as a result of his taking any permitted or agreed leave, or being provided with no work or insufficient work for which he was not paid his wages or full wages.

9. Section 2(2) of the EO provides that no account of overtime pay shall be taken in calculating the wages of an employee for the purpose of various statutory entitlements, including end of year payment, maternity leave pay, sickness allowance, holiday pay and annual leave pay, unless the overtime pay is of a constant character or the monthly average of the overtime pay over a period of 12 months (or if not applicable, such shorter period of employment) immediately preceding the respective dates specified in subsections (2A) and (2B) is equivalent to or exceeds 20% of his average monthly wages during the same period. There is also a similar provision in section 7(4) for the calculation of payment in lieu of notice. The Bill does not change the reckoning of overtime pay, i.e. where the overtime pay does not meet either one of the above two conditions, such payment would not form part of the wages for calculating the said statutory entitlements.

"Full Wages"

10. The term "full wages" is not a new term introduced by the Bill. It already exists in section 2(3) of the EO with no statutory definition. Whether an employee was paid his "full wages" would hinge on the terms of his employment contract and the definition of wages under the EO. It is a matter of fact to be decided based on the circumstances of individual cases. Under section 2(1) of the EO, "wages" is defined in an encompassing way to cover 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, subject to a few exceptions, including commission which is of a gratuitous nature or which is payable only at the discretion of the employer.

"Leave"

11. Our intention is to refer to any period of permitted/agreed absence from work, whether pursuant to the EO (e.g. maternity leave, sick leave, annual leave, rest day, etc), the ECO (e.g. work injury sick leave) or with the agreement of the employer (e.g. no pay leave, study leave, extended maternity leave). Any period in the period of 12 months or shorter period for which the employee was not paid his wages or full wages by reason of any such leave taken by him; and any wages or other sum paid to him for that period, are to be disregarded. In the light of Members' views, we will consider the need for providing a definition of "leave" in the Bill.

"Normal working day"

12. In determining a "normal working day", consideration would need to be given to the terms of the employment contract of the employee and his established work pattern. It is again a question of fact to be assessed having regard to the circumstances of the case. For an employee who is employed on a part-time basis, his normal working day would only entail part-time work with part-time pay.

13. As far as the situation of "not being provided by his employer with work on any normal working day" is concerned, the proposed section 7(1A) is intended to cover situations where an employee has not been provided with work or has been provided with insufficient work by this employer. In other words, it does not cover cases of reduction of working hours or variation of employment terms from a full-time basis to a part-time basis initiated by employees. Any such period of reduced working hours initiated by the employee and any wages paid to the employee for that period need not be disregarded for the purpose of this proposed section. As to your question on the situation where the employer and the employee *for their own reasons* agreed that the employee would not work on a full time basis intermittently during the preceding 12-month period and the employee was paid less than full time pay, whether the situation would be described as "not being provided by his employer with work on any normal working day" is a question of fact which depends on how the employer and the employee have come to the agreement.

Proposed section 7(1B)

14. The proposed section 7(1B) provides that despite section 7(1), if for any reason it is impracticable to calculate the daily average or monthly average of the wages earned by an employee in the manner provided in section 7(1), the amount **may** be calculated by reference to the wages earned by a person who was employed in the same trade or occupation and at the same work in the same district during the period of 12 months immediately before the date of notification. The word "may" denotes a permission in this context. In civil proceedings, the position is essentially that the party who raises an issue bears the burden of proving the facts in issue. Oral or documentary evidence can be produced as evidence. It is worth noting that the proposed section 7(1B) does not represent a fundamental change as similar provisions already exist in the EO. We wish to point out that the existing provisions are rarely used and we are not aware of any case law on their application. This proposed provision seeks to provide a useful fall-back in case the calculation of the average wage is impracticable for any reason, such as a prolonged period of no-pay leave before the holiday.

Clause 4 of the Bill (Wrongful termination of contract)

15. The existing section 8A(1) makes reference to the wages which "would have accrued to an employee" during the period of notice required by section 6 for the calculation of damages for wrongful termination of contract. Since the section provides no detailed method for ascertaining the future wages, it may give rise to uncertainty or impracticability in application, particularly in cases involving performance-linked remuneration systems. As reflected by the ruling of the Court of Final Appeal in the Lisbeth case, the existing EO provisions regarding the "would have earned/accrued approach" fail to provide a workable mode of calculation for statutory entitlements under the Ordinance for certain employees. It is therefore necessary to amend the relevant provisions to provide a workable mode of calculation for all cases by reference to past earnings. To address the concerns from both the employer and employee sides about the fluctuating nature of certain components of wages like commission, we further propose to adopt the average wages calculated on the basis of a longer reference period of 12 months to provide a stable, predictable and consistent mode of calculation for statutory entitlements under the EO.

16. Whether such new mode of calculation would give rise to any change in the amount of statutory entitlements, as compared with the existing mode of calculation, would depend on the circumstances of individual cases. For employees with stable wages, it is envisaged that any difference in the amounts of statutory entitlements calculated under the existing mode and the new mode would be very small. However, where the wages of an employee are subject to seasonal fluctuations, the statutory entitlements calculated under the two modes could be rather different.

Yours sincerely,

(Teresa Fong)
for Permanent Secretary for
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(Labour)/Commissioner for Labour

c.c. Law Draftsman (Attn.: Ms Monica Law)