

立法會

Legislative Council

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Report of the Bills Committee on Employment (Amendment) Bill 2006

Purpose

This paper reports on the deliberations of the Bills Committee on Employment (Amendment) Bill 2006 (the Bill).

Background

2. In *Lisbeth Enterprises Limited vs Mandy Luk* ([2006] 1 HKLRD 1005) (the Lisbeth case), the Court of Final Appeal (CFA) allowed an employer's appeal and held that commission accrued and calculated on a monthly basis was not to be reckoned in the calculation of holiday pay and annual leave pay because the interpretation of the existing provisions of the Employment Ordinance (Cap. 57) (EO) did not provide a workable mode of calculation for such purpose.

3. The ruling has resulted in different treatment for employees with commission accrued and calculated on a daily basis vis-à-vis employees with commission accrued and calculated on a monthly basis, as the Lisbeth case has no implication on the calculation of an employee's statutory benefits if the commission accrues and is calculated on a daily basis. This anomaly is to the detriment of the interest of employees with commission accrued and calculated on a monthly basis. The ruling has also shown that the policy intention behind the calculation of employees' statutory entitlements under EO that "wages" inclusive of commission of a contractual nature should be used as the basis for all calculations has not been fully reflected. The Administration considers it necessary to amend EO to ensure that a "workable mode of calculation" is available for the calculation of statutory entitlements in all cases involving commission of a contractual nature.

The Bill

4. The Bill seeks 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 used as the basis 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) to modify the existing mode of calculation of the above statutory entitlements by making reference to the average wages earned by an employee during the 12-month period, or such lesser period when the employee is under the employment of the concerned employer, immediately preceding the statutory holiday, first day of the annual leave, or other relevant dates.

The Bills Committee

5. At the House Committee meeting on 5 January 2007, Members formed a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix I**.

6. Under the chairmanship of Hon KWONG Chi-kin, the Bills Committee held six meetings. The Bills Committee received 18 written submissions and met with 14 organisations and one individual. A list of the organisations and individual which/who have given oral views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

Modes of calculating statutory entitlements for employees with fixed wages and variable wages

7. Organisations on the employer side are of the view that the use of a 12-month moving average would unnecessarily complicate the calculation of statutory entitlements for those employees who are remunerated on fixed wages. On the other hand, organisations on the employee side have expressed concern that such mode of calculation would result in reduced payments of statutory entitlements for those employees who received pay rises during the past 12 months as lower salaries would be taken into account in the calculation. Hon LEE Cheuk-yan shares the views and has requested the Administration to consider using the last month's wages instead of a 12-month moving average for employees with fixed wages. Hon LEUNG Yiu-chung has also suggested that the employee be given an option to use either his last month's wages or the average wages in the last 12

months for the calculation of statutory entitlements.

8. The Administration has advised that the relative merits of using an employee's last month's wages or a 12-month moving average were thoroughly deliberated by the Labour Advisory Board (LAB). The LAB's consensus is that the adoption of the latter mode of calculation, irrespective of whether the employee is remunerated on a daily, monthly or piece-rate basis, would provide a more stable, predictable and equitable basis for the calculation of statutory entitlements. Moreover, giving a choice to the employee to have his entitlement calculated either on the basis of the average wages earned over a 12-month period or on the basis of the last month's wages would be outside the scope of the Bill. The Long Title clearly states that the objective of the Bill is to provide that calculation of the amount of statutory entitlements is to be done on the basis of the average wages earned by the employee during a 12-month period.

9. The Administration has further advised that according to the advice of the Department of Justice (DoJ), it would be very difficult to define the term "fixed wages" when wages consist of different items under EO and, depending on one's terms of employment, may vary and hence not fixed. Apart from legal considerations, different treatment for employees with fixed wages and those with variable wages would not be desirable from the labour relations perspective as it may create unnecessary disputes between employers and employees as to whether the latter's wages are fixed or variable. Given the evolving and increasingly complex nature of the remuneration systems in Hong Kong, and in the light of CFA's ruling in the Lisbeth case, the Administration considers it imperative that the law should provide a workable, predictable and consistent mode of calculation for statutory entitlements.

The "disregarding" provisions

Meaning of "leave"

10. The Administration has advised that the underlying principle of disregarding any period in the period of 12 months or shorter period for which the employee is not paid his wages or full wages by reason of any leave taken by him is to ensure that the amount of statutory entitlements would not be unduly reduced by taking into account in the calculation lower wages the employee receives.

11. To address members' concern about the meaning of "leave" referred to in the "disregarding" provisions, the Administration has agreed to move amendments to expressly spell out that its intention is to refer to any period of day-off taken as permitted by EO (i.e. statutory leave including maternity leave, sick leave, statutory holiday, annual leave and rest day) or Employees' Compensation Ordinance (Cap. 282) (ECO) (i.e. work injury sick leave) or as agreed with the employer (i.e. contractual leave such as topped-up annual leave, no pay leave, study leave, extended maternity leave, etc.).

Meaning of "full wages"

12. The Law Society of Hong Kong is of the view that a definition should be given to the term "full wages" to differentiate it from the term "wages" provided under section 2(1) of EO.

13. The Administration considers that the term "full wages" is clear enough in the relevant context and needs not be given a statutory definition. Again, given the evolving and increasingly complex nature of the remuneration systems in Hong Kong, detailed statutory definitions could easily become unclear and may be subject to different interpretations. The Administration has also pointed out that the term "full wages" is not a new term introduced by the Bill. It already exists in section 2(3) of 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 EO. Under section 2(1) of 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.

14. To address the concern expressed by Hon LEUNG Yiu-chung and Hon CHAN Yuen-han that allowances should not be limited to those items referred to in section 2(1) of EO, the Administration has undertaken to step up publicity and education to raise the awareness of employers that any allowance, however designated or calculated, and 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 falls under the meaning of "wages" under section 2(1) of EO.

Additional administrative work in calculating the "disregarding" provisions

15. Concerns have also been raised about the additional administrative work generated in calculating statutory entitlements under the proposed mode of a 12-month moving average, particularly having regard to the fact that any period in the period of 12 months or shorter period for which the employee is not paid his wages or full wages by reason of any leave taken by him in accordance with EO or 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 are to be disregarded.

16. The Administration has pointed out that with the keeping of proper wage and leave records which is a good human resources management practice, the adoption of a moving 12-month average should not create too much additional administrative work as the relevant records for the first 11 months should already be available. Nevertheless, the Administration has agreed, on review, to move amendments to refine the proposed "disregarding" provisions to simplify the calculation of the average wages in that where an employee is paid wages in respect of one of the periods below, the wages and the period are to be disregarded if the

amount of the wages is less than the amount earned by that employee on a normal working day -

- (a) any maternity leave, rest day, sick leave, holiday or annual leave taken by the employee under EO;
- (b) any leave taken by the employee with the agreement of his employer;
- (c) any normal working day on which the employee is not provided by the employer with work; or
- (d) any period of absence from work of the employee due to temporary incapacity for which compensation is payable under section 10 of ECO.

17. Hon Audrey EU has asked whether, where an employee is paid wages in respect of any period described in paragraph 16 above, if the amount of the wages is equal to or exceeds the amount earned by that employee on a normal working day, the wages and the period should not be disregarded. The Administration has confirmed that this is the case.

Rationale for not including severance payment and long service payment in the Bill

18. Hon LI Fung-ying has asked why other statutory entitlements under EO, such as severance payment and long service payment, are not included in the Bill.

19. The Administration has explained that the proposed amendments embodied in the Bill have arisen from the CFA's ruling in the Lisbeth case, which has excluded commission from the calculation of holiday pay and annual leave pay for certain employees and that the Bill seeks to ensure that a workable mode of calculation is available for the calculation of such statutory benefits. The reason why maternity leave pay, sickness allowance, wages in lieu of notice and end of year payment are also covered in the Bill is that according to DoJ's advice, the construction of these provisions is similar to that of holiday pay and annual leave pay. On the other hand, the provisions for severance payment and long service payment do not give rise to a construction similar to that of holiday pay and annual leave pay and there is therefore no need to include them in the Bill.

Setting up a wage ceiling for calculating statutory entitlements

20. While supporting the adoption of a 12-month moving average for calculating statutory entitlements, organisations on the employer side have expressed concern about the adverse economic implications, particularly on the small and medium-sized firms and those whose remuneration for employees is largely based on commission, due to the resultant increase in business operating costs. They are of the view that a wage ceiling on commission for calculating statutory entitlements should be introduced, lest many employers would be forced to turn their employees to become self-employed or close down their businesses. Hon Mrs Selina CHOW, Hon Jeffrey LAM and Hon Andrew LEUNG share the concern and have suggested

that, while the Bills Committee is in progress, the Administration should, in parallel, refer the proposal of setting a wage ceiling on commission for calculating statutory entitlements to LAB for consideration.

21. The Administration has advised that the proposal of introducing a wage ceiling for calculating statutory entitlements involves highly complex and controversial issues including among others, the component(s) of wages to be capped and the level of ceiling to be imposed. These would have far-reaching implications on employees' benefits. As such, the proposal would need to be thoroughly examined and deliberated outside the context of the current amendment exercise. Nevertheless, the Administration has undertaken to consult LAB on the proposal at an appropriate time.

22. The Administration has further advised that placing a ceiling on the amount of commission earned by an employee for the purpose of calculating his statutory entitlements would be contrary to the objective and outside the scope of the Bill.

23. Some organisations on the employer side have called upon the Administration to first conduct a comprehensive review of that part of EO concerning calculation of statutory entitlements before implementing the proposed amendments to EO, having regard to the increasingly complex nature of the remuneration systems in Hong Kong.

24. The Administration has pointed out that the proposed amendments to EO do not seek to introduce any new rights and benefits for employees, or create new obligations for employers. They are merely made to ensure that the original policy intent behind the calculation of statutory entitlements of employees under EO is adequately reflected.

Payment in lieu of notice for termination of contract

25. Hon LEE Cheuk-yan and Hon LEUNG Yiu-chung are of the view that the Bill should stipulate an exact number of days in a month, say, 28, 30 or 31 days, for the purpose of calculating payment in lieu of notice for those employees who are remunerated on a monthly basis to avoid disputes between employers and employees.

26. The Administration considers the proposal of fixing an exact number of days in a month for calculating payment in lieu of notice for those remunerated on a monthly basis not helpful in avoiding disputes between employers and employees, as the number of days in a month to be used may vary according to circumstances of individual cases like whether rest days are paid or not. Hon Andrew LEUNG and Hon LI Fung-ying share the Administration's view. At members' request, the Administration has undertaken to step up publicity and promotion to raise the awareness of employers on the need to adhere to the established practice or the terms of the employment contract on the number of days in a month for calculating payment in lieu of notice for their monthly-paid employees.

Practicality of the provision of making reference to a comparable person for the calculation of the daily average or monthly average of wages

27. The Bill provides that where the using of the moving 12-month average for calculating statutory entitlements is impractical, reference can be made to the wages earned by a person who is 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 relevant dates stipulated in the Bill. The Law Society of Hong Kong and organisations on the employee side have raised query about the rationale behind this provision and the practicality of its application.

28. The Administration has advised that the use of the "comparable person" provision does not represent a fundamental change as similar provisions already exist in EO and ECO. The provision, though rarely used, does provide a useful fall-back in case the calculation of the average wage is impracticable for any reason. Examples of such cases include when an employee is dismissed on the first day of employment or has been on prolonged no-pay leave, say, for 12 months, before the holiday. The Administration has however pointed out that in practice, it should not be difficult for the employer or employee to identify if such a comparable person exists. Even in cases where this is not feasible, reference could be made to relevant wage statistics published by the Census and Statistics Department. In case of disputes, the employers and employees concerned could approach the Labour Relations Division of the Labour Department for provision of free conciliation service. Unresolved disputes would be determined by the court. While noting that the use of this provision may be rare, there is, on balance, a need to retain it in the Bill.

29. To address the concern of employees that employers might make reference to the "comparable person" with below average wages, Hon LEE Cheuk-yan has suggested that reference be first made to the wages earned by another person employed by the same employer and at the same work during the past 12 months for the calculation of the daily average or monthly average of wages. The Administration has agreed to move amendments in this regard.

Keeping of wage and employment records

30. Members note that section 49A of EO provides that every employer shall at all times keep and maintain a record in which is set out the wage and employment history of employee covering the period of his employment during the preceding six months. The wage record shall also be kept by the employer for a period of another six months after the employee ceases to be employed.

31. At members' request, the Administration has agreed to take on board the proposal of introducing an amendment to section 49A of EO under the Bill to extend the record-keeping period from six months to 12 months in order to tie in with the proposal of calculating statutory entitlements on the basis of a 12-month moving average set out in the Bill. The Administration has also agreed to step up actions to promote the new requirement among employers as well as to educate

employees, particularly those remunerated on a daily or piece-rate basis, on the importance of keeping their own wage and employment records properly.

Committee Stage amendments

32. The Committee Stage amendments to be moved by the Administration have been agreed by the Bills Committee.

Follow-up action

33. At the request of the Bills Committee, the Administration has agreed that in his speech to be delivered during resumption of the Second Reading debate on the Bill, the Secretary for Economic Development and Labour will advise the time frame for the Amendment Ordinance to come into operation.

Consultation with the House Committee

34. The Bills Committee consulted the House Committee on 13 April 2007, and sought the latter's agreement that the Second Reading debate on the Bill be resumed at the Council meeting on 2 May 2007.

Council Business Division 2
Legislative Council Secretariat
19 April 2007

Bills Committee on Employment (Amendment) Bill 2006

Membership list

Chairman Hon KWONG Chi-kin

Members Hon LEE Cheuk-yan
Hon Martin LEE Chu-ming, SC, JP
Hon Margaret NG
Hon Mrs Selina CHOW LIANG Shuk-ye, GBS, JP
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 Audrey EU Yuet-mee, SC, JP
Hon Vincent FANG Kang, JP
Hon WONG Kwok-hing, MH
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung
Dr Hon Fernando CHEUNG Chiu-hung
Hon WONG Ting-kwong, BBS

(Total : 19 Members)

Clerk Miss Mary SO

Legal Adviser Miss Kitty CHENG

Date 1 February 2007

Bills Committee on Employment (Amendment) Bill 2006

A. Organisations and individual which/who have given oral representation to the Bills Committee

1. The Law Society of Hong Kong;
2. Hong Kong Business Community Joint Conference;
3. Federation of Hong Kong Industries;
4. Employers' Federation of Hong Kong;
5. Right Hand Drive Motors Association (HK) Ltd.;
6. Hong Kong Real Estate Agencies General Association, New Territories Estate Agency Association Ltd., Hong Kong Chamber of Professional Property Consultants Ltd., Property Agencies Association and Estate Agents Management Association;
7. Hong Kong Chamber of Small and Medium Business Ltd.;
8. Hong Kong Electronic Industries Association;
9. The Hong Kong Federation of Trade Unions;
10. Hong Kong Confederation of Trade Unions;
11. Neighbourhood and Worker's Service Centre;
12. The Federation of Hong Kong & Kowloon Labour Unions;
13. Hong Kong Services Industry Employees Association;
14. Union of Hong Kong Beauty and Health Care Employees; and
15. Mr SHIH Wing-ching.

B. Organisations which have provided written submissions only

1. A group of senior human resources practitioners from Citibank, Dah Sing Bank, DBS Bank, Hang Seng Bank, Hong Kong and Shanghai Banking Corporation Ltd. and Standard Chartered Bank (Hong Kong) Ltd.;
2. The Chinese Manufacturers' Association of Hong Kong; and
3. Hong Kong General Chamber of Commerce.