

EMPLOYMENT (AMENDMENT) BILL 2006**CONTENTS**

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A BILL

To

Amend the Employment Ordinance to revise the modes of calculating payment in lieu of notice, damages for wrongful termination of contract, end of year payment, maternity leave pay, damages for wrongful termination of an employee's contract during her pregnancy, sickness allowance, damages for wrongful termination of an employee's contract on a sickness day taken by him, holiday pay and annual leave pay so as to provide that these payments are to be calculated on the basis of the average of the wages earned by the employee during the period of 12 months immediately before the specified dates; to clarify that where a sum of money is paid to an employee in respect of a period of maternity leave, a sickness day, a holiday or a day of annual leave, the related maternity leave pay, sickness allowance, holiday pay or annual leave pay payable is to be reduced by that sum; and for related purposes.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Employment (Amendment) Ordinance 2006.

2. Commencement

This Ordinance shall come into operation on a day to be appointed by the Secretary for Economic Development and Labour by notice published in the Gazette.

3. Termination of contract by payment in lieu of notice

(1) Section 7(1) of the Employment Ordinance (Cap. 57) is repealed and the following substituted—

“(1) Subject to sections 15 and 33, either party to a contract of employment may at any time terminate the contract without notice by agreeing to pay to the other party—

(a) where the length of notice required to terminate the contract under section 6 is a period expressed in days or 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—

(i) 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”); or

(ii) if the employee has been employed by the employer concerned for a period shorter than 12 months immediately before the date of notification, the shorter period; or

(b) where the length of notice required to terminate the contract under section 6 is a period expressed in months, a sum calculated by multiplying the number of months required by the monthly average of the wages earned by the employee during—

(i) the period of 12 months immediately before the date of notification; or

(ii) if the employee has been employed by the employer concerned for a period shorter than 12 months immediately before the date of notification, the shorter period.

(1A) In calculating the daily average or monthly average of the wages earned by an employee under subsection (1)—

(a) 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 provisions of this Ordinance or the Employees’ Compensation Ordinance (Cap. 282) 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

(b) any wages or other sum paid to him for that period, are to be disregarded.

(1B) Despite subsection (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 that subsection, 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.”.

(2) Section 7(3) is repealed.

4. Damages for wrongful termination of contract

(1) Section 8A(1) is amended by repealing “which would have accrued to the employee during the period of notice required by section 6” and substituting “that would have been payable had the contract been terminated in accordance with section 7”.

(2) Section 8A(2) is amended by repealing “equal to the amount of wages which would have accrued to the employee during the period of notice” and substituting “referred to in subsection (1)”.

(3) Section 8A is amended by adding—

“(3) For the purpose of calculating the sum referred to in subsection (1), where the party terminating the contract has not given notice of the termination to the other party, 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 to the date of notification is to be construed as a reference to the date of termination of the contract.”.

5. Interpretation

(1) Section 11A is amended by renumbering it as section 11A(1).

(2) Section 11A(1) is amended by repealing the definition of “full month’s wages”.

(3) Section 11A is amended by adding—

“(2) In this Part, a reference to the full month’s wages of an employee is to be construed as a reference to the monthly average of the wages earned by the employee during—

(a) the period of 12 months immediately before the day on which the end of year payment becomes due to the employee under section 11E(1) or (2) or the day on which the proportion thereof becomes due to the employee under section 11F(3) or (4) (as appropriate) (“due day”); or

- (a) any period in the period of 12 months or shorter period for which the employee was not paid her wages or full wages by reason of any leave taken by her in accordance with the provisions of this Ordinance or the Employees' Compensation Ordinance (Cap. 282) or with the agreement of her employer, or by reason of her not being provided by her employer with work on any normal working day; and
- (b) any wages or other sum paid to her for that period, are to be disregarded.

(3B) Despite subsection (3), if for any reason it is impracticable to calculate the daily average of the wages earned by a female employee in the manner provided in that subsection, the amount may be calculated by reference to the wages earned by a female 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 commencement of the employee's maternity leave.”.

- (2) Section 14 is amended by adding—

“(7) If, pursuant to the terms of her contract of employment or any other agreement or for any other reason, a female employee is paid a sum of money in respect of any period of her maternity leave, the maternity leave pay payable to the employee in respect of that period is to be reduced by that sum.”.

7. Prohibition against termination of employment

- (1) Section 15(2)(b) is repealed and the following substituted—

“(b) a further sum equivalent to the monthly average of the wages earned by the employee during—

- (i) the period of 12 months immediately before the date of termination of the contract of employment; or
- (ii) if the employee has been employed by the employer for a period shorter than 12 months immediately before the date of termination of the contract, the shorter period; and”.

- (2) Section 15 is amended by adding—

“(2A) In calculating the monthly average of the wages earned by a female employee under subsection (2)(b)—

- (a) any period in the period of 12 months or shorter period for which the employee was not paid her wages or full wages by reason of any leave taken by her in accordance with the provisions of this Ordinance or the Employees' Compensation Ordinance (Cap. 282) or with the agreement of her employer, or by reason of her not being provided by her employer with work on any normal working day; and
 - (b) any wages or other sum paid to her for that period,
- are to be disregarded.

(2B) Despite subsection (2)(b), if for any reason it is impracticable to calculate the monthly average of the wages earned by a female employee in the manner provided in that subsection, the amount may be calculated by reference to the wages earned by a female 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 termination of the employee's contract of employment.”.

- (3) Section 15(3) is repealed.

8. Prohibition of assignment of heavy, hazardous or harmful work

Section 15AA(8) is repealed and the following substituted—

“(8) Despite any change in the earnings of the employee as a result of her transfer from heavy, hazardous or harmful work in accordance with this section, payment for maternity leave under section 14(3) or payment for termination of employment under section 15(2)(a), (b) or (c) is to be calculated on the basis of the daily average of the wages earned by the employee during—

- (a) the period of 12 months immediately before her transfer from heavy, hazardous or harmful work in accordance with this section; or
- (b) if the employee has been employed by the employer concerned for a period shorter than 12 months immediately before her transfer from heavy, hazardous or harmful work in accordance with this section, the shorter period,

and those sections are to be construed accordingly.

(9) Where—

- (a) an employee is transferred from heavy, hazardous or harmful work in accordance with this section; and

(b) section 7(1B), 14(3B) or 15(2B) is applicable in calculating the maternity leave pay or any payment for termination of employment under section 15 payable to the employee, for the purpose of the calculation, the reference in section 7(1B), 14(3B) or 15(2B) to a person who was employed at the same work is to be construed as a reference to a person who was employed at the work performed by the employee immediately before her transfer.”.

9. Sickness allowance

(1) Section 33(4BA)(b) is repealed and the following substituted—

“(b) a further sum equivalent to 7 times the daily average of the wages earned by the employee during—

- (i) the period of 12 months immediately before the date of termination of the contract of employment; or
- (ii) if the employee has been employed by the employer for a period shorter than 12 months immediately before the date of termination of the contract, the shorter period.”.

(2) Section 33 is amended by adding immediately after subsection (4BA)—

“(4BAAA) In calculating the daily average of the wages earned by an employee under subsection (4BA)(b)—

- (a) 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 provisions of this Ordinance or the Employees’ Compensation Ordinance (Cap. 282) 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
- (b) any wages or other sum paid to him for that period, are to be disregarded.

(4BAAB) Despite subsection (4BA)(b), if for any reason it is impracticable to calculate the daily average of the wages earned by an employee in the manner provided in that subsection, 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 termination of the employee’s contract of employment.”.

10. Rate of sickness allowance

(1) Section 35(1) and (2) is repealed and the following substituted—

“(1) The daily rate of sickness allowance is a sum equivalent to four-fifths of the daily average of the wages earned by the employee during—

- (a) the period of 12 months immediately before the sickness day or first sickness day (as appropriate); or
- (b) if the employee has been employed by the employer concerned for a period shorter than 12 months immediately before the sickness day or first sickness day (as appropriate), the shorter period.

(2) In calculating the daily average of the wages earned by an employee under subsection (1)—

- (a) 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 provisions of this Ordinance or the Employees' Compensation Ordinance (Cap. 282) 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
- (b) any wages or other sum paid to him for that period, are to be disregarded.

(2A) Despite subsection (1), if for any reason it is impracticable to calculate the daily average of the wages earned by an employee in the manner provided in that subsection, 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 employee's sickness day or first sickness day (as appropriate).”.

(2) Section 35(3) is amended by repealing everything after “in accordance with” and substituting “this section.”.

(3) Section 35 is amended by adding—

“(4) If, pursuant to the terms of his contract of employment or any other agreement or for any other reason, an employee is paid a sum of money in respect of a paid sickness day taken by him, the sickness allowance payable to the employee in respect of that sickness day is to be reduced by the sum.”.

11. Restriction on pay in lieu of holiday

Section 40A(2) is amended by repealing “section 41(1) or (2) whichever is applicable to the employee” and substituting “section 41”.

12. Section substituted

Section 41 is repealed and the following substituted—

“41. Rate of holiday pay

(1) The daily rate of holiday pay is a sum equivalent to the daily average of the wages earned by the employee during—

- (a) the period of 12 months immediately before the holiday or first day of the holidays (as appropriate); or
- (b) if the employee has been employed by the employer concerned for a period shorter than 12 months immediately before the holiday or first day of the holidays (as appropriate), the shorter period.

(2) In calculating the daily average of the wages earned by an employee under subsection (1)—

- (a) 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 provisions of this Ordinance or the Employees' Compensation Ordinance (Cap. 282) 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
 - (b) any wages or other sum paid to him for that period,
- are to be disregarded.

(3) Despite subsection (1), if for any reason it is impracticable to calculate the daily average of the wages earned by an employee in the manner provided in that subsection, 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 employee's holiday or first day of the holidays (as appropriate).

(4) If, pursuant to the terms of his contract of employment or any other agreement or for any other reason, an employee is paid a sum of money in respect of a holiday taken by him, the holiday pay payable to the employee in respect of that holiday is to be reduced by the sum.”.

13. Definitions (Part VIIIA)

Section 41A is amended in the definition of “notional leave pay” by repealing “by reference to the wages at the time of the actual termination” and substituting “in accordance with section 41C”.

14. Section substituted

Section 41C is repealed and the following substituted—

“41C. Rate of annual leave pay

(1) The daily rate of annual leave pay is a sum equivalent to the daily average of the wages earned by the employee during—

- (a) the period of 12 months immediately before the day of annual leave, the first day of the annual leave or the date of termination of the contract of employment (as appropriate); or
- (b) if the employee has been employed by the employer concerned for a period shorter than 12 months immediately before the day of annual leave, the first day of the annual leave or the date of termination of the contract (as appropriate), the shorter period.

(2) In calculating the daily average of the wages earned by an employee under subsection (1)—

- (a) 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 provisions of this Ordinance or the Employees' Compensation Ordinance (Cap. 282) 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
 - (b) any wages or other sum paid to him for that period,
- are to be disregarded.

(3) Despite subsection (1), if for any reason it is impracticable to calculate the daily average of the wages earned by an employee in the manner provided in that subsection, 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 employee's day of annual leave, the first day of his annual leave or the date of termination of his contract of employment (as appropriate).

(4) If, pursuant to the terms of his contract of employment or any other agreement or for any other reason, an employee is paid a sum of money in respect of a day of annual leave taken by him, the annual leave pay payable to the employee in respect of that day of annual leave is to be reduced by the sum.”.

15. Ordinary wages instead of holiday pay, annual leave pay, maternity leave pay or sickness allowance

Section 42 is repealed.

16. Section added

The following is added—

**“75. Application of this Ordinance as amended
by the Employment (Amendment)
Ordinance 2006**

(1) This Ordinance as amended by the Employment (Amendment) Ordinance 2006 (of 2006) (“amending Ordinance”) applies to contracts of employment entered into on or after the date of commencement of the amending Ordinance (“commencement date”).

(2) Where an employee’s contract of employment was entered into before the commencement date and the date of termination of the contract falls on or after the commencement date, this Ordinance as amended by the amending Ordinance applies to the calculation of the following payments—

- (a) any payment in lieu of notice or sum payable by or to the employee under Part II;
- (b) any sum payable to the employee under section 15(2);
- (c) any sum payable to the employee under section 33(4BA);
- (d) any sum payable to the employee under section 41D.

(3) Where an employee’s contract of employment was entered into before the commencement date and any end of year payment or proportion thereof payable to the employee under Part IIA becomes due on or after the commencement date, this Ordinance as amended by the amending Ordinance applies to the calculation of the end of year payment or proportion thereof.

(4) Where an employee’s contract of employment was entered into before the commencement date and any maternity leave pay, sickness allowance, holiday pay or annual leave pay is payable by the employer to the employee in respect of a wage period the last day of which falls on or after the commencement date, this Ordinance as amended by the amending Ordinance applies to the calculation of the maternity leave pay, sickness allowance, holiday pay or annual leave pay.”.

Explanatory Memorandum

The main object of this Bill is to revise the modes of calculating several kinds of payments under the Employment Ordinance (Cap. 57) (“the Ordinance”). These payments are payment in lieu of notice, damages for wrongful termination of contract, end of year payment, maternity leave pay, damages for wrongful termination of an employee’s contract during her pregnancy, sickness allowance, damages for wrongful termination of an employee’s contract on a sickness day taken by him, holiday pay and annual leave pay. Currently, these payments are calculated on the basis of an employee’s last month’s wages. After the revision, the average of the wages (defined in section 2(1) of the Ordinance to include commission payable to an employee) earned by an employee during the past 12 months is to be used in the calculation.

2. Clauses 1 and 2 provide for the short title and commencement of the Bill when enacted.
3. Clause 3 amends section 7 of the Ordinance to provide a new mode of calculating the payment to be made when a contract of employment is terminated by an agreement to pay wages in lieu of notice.
4. Clause 4 amends section 8A of the Ordinance to provide that damages for wrongful termination of a contract of employment are to be calculated as if the contract had been terminated in accordance with section 7 of the Ordinance.
5. Clause 5 amends section 11A of the Ordinance to provide a new mode of calculating an employee’s full month’s wages. An employee’s full month’s wages is used in calculating the end of year payment or proportion thereof to which he is entitled.
6. Clause 6 amends section 14 of the Ordinance to provide a new mode of calculating maternity leave pay. It also adds a new subsection to that section to clarify that where an employee is paid a sum of money in respect of a period of maternity leave, the maternity leave pay payable in respect of that period is to be reduced by that sum.
7. Section 15(2)(b) of the Ordinance requires an employer to pay one month’s wages to his employee if he wrongfully terminates the employee’s contract of employment during her pregnancy. Clause 7 amends that section to provide a new mode of calculating that sum.
8. Clause 8 amends section 15AA(8) of the Ordinance to provide that despite any change in the earnings of an employee as a result of her transfer from heavy, hazardous or harmful work, maternity leave pay and payments for termination of employment under section 15(2) of the Ordinance are to be

calculated on the basis of her earnings in the 12-month period before the transfer. It also adds a new subsection to section 15AA of the Ordinance to clarify that where, in calculating maternity leave pay, it is necessary to refer to the wages of another person who was employed at the same work as the employer concerned, the same work means the work performed by the employee before her transfer.

9. Section 33(4BA)(b) of the Ordinance requires an employer to pay 7 days' wages to his employee if he wrongfully terminates the employee's contract of employment on a sickness day taken by the employee. Clause 9 amends that section to provide a new mode of calculating that sum.

10. Clause 10 amends section 35 of the Ordinance to provide a new mode of calculating the daily rate of sickness allowance. It also adds a new subsection to that section to clarify that where an employee is paid a sum of money in respect of a paid sickness day, the sickness allowance payable in respect of that day is to be reduced by that sum.

11. Clause 11 makes a consequential amendment to section 40A(2) of the Ordinance.

12. Clause 12 amends section 41 of the Ordinance to provide a new mode of calculating the daily rate of holiday pay. It also adds a new subsection to that section to clarify that where an employee is paid a sum of money in respect of a holiday, the holiday pay payable in respect of that holiday is to be reduced by that sum.

13. Clause 13 amends the definition of "notional leave pay" in section 41A of the Ordinance to provide that the pay is to be calculated in accordance with the amended section 41C.

14. Clause 14 amends section 41C of the Ordinance to provide a new mode of calculating the daily rate of annual leave pay. It also adds a new subsection to that section to clarify that where an employee is paid a sum of money in respect of a day of annual leave, the annual leave pay payable in respect of that day is to be reduced by that sum.

15. Clause 15 repeals section 42 of the Ordinance which deals with an employee's entitlement to holiday pay, annual leave pay, maternity leave pay and sickness allowance where he is paid his ordinary wages. A similar provision has been added to the respective sections dealing with holiday pay, annual leave pay, maternity leave pay and sickness allowance.

16. Clause 16 deals with the application of the Ordinance as amended by the Bill.