

# 立法會

## *Legislative Council*

LC Paper No. LS61/08-09

### **Paper for the Bills Committee on Disciplined Services Legislation (Miscellaneous Amendments) Bill 2009**

#### **Effect of the Disciplined Services Legislation (Miscellaneous Amendments) Bill 2009 on the contract of employment of CSPF civil servants**

#### **Background**

At the meeting of the Bills Committee held on 26 March 2009, members requested for advice on whether the implementation of the proposal with regard to punishments which impinge on retirement benefits under the Disciplined Services Legislation (Miscellaneous Amendments) Bill 2009 (the Bill) would constitute variation of the employment contract of the civil servants (CSPF civil servants) whose retirement benefits are provided under the Civil Service Provident Fund (CSPF) Scheme (CSPF Scheme).

#### **Contract of Employment**

2. As pointed out in paragraph 5 of the Administration's paper (LC Paper No. CB(1)1124/08-09(02)), it is clear that both the letter of appointment and the Memorandum on Conditions of Service (MOCS) which accompanies the letter of appointment, form part of the contract of employment between the Government and a CSPF civil servant. It is expressly provided in the letter of appointment and MOCS that accrued benefits derived from (or attributable to) the voluntary contributions made by the Government (GVC) might be withheld, forfeited, reduced or recovered on disciplinary grounds. The letter of appointment expressly refers to an attached CSB Circular No. 9/2003 for details of the CSPF arrangements, whereas the MOCS specifically states that "Details regarding whether and how the accrued benefits attributable to the GVC may be withheld, forfeited, reduced or recovered on disciplinary grounds are set out in the "Terms and Conditions of the CSPF Scheme"...", which is contained in CSB Circular No. 9/2003. Therefore, it is also clear that CSB Circular No. 9/2003 should also form part of the contract of employment.

3. For the purpose of this advice, it would be sufficient to consider the terms and conditions set out in the said documents, particularly the latter.

### Forfeiture and Reduction

4. Paragraph 5.1 of the Terms and Conditions of the CSPF Scheme provides that -

"Where an officer is found guilty of a disciplinary or criminal offence and is given a punishment upon conclusion of disciplinary proceedings, his accrued benefits attributable to the GVC (and the SDSC if applicable) may be forfeited, either wholly or in part, having regard to the findings and the decision on punishment."

5. It is not clear from paragraph 5.1 by whom the GVC (and the SDSC if applicable) may be forfeited. Upon enquiry, we have been advised that the GVC (and the SDSC if applicable) may be forfeited by the relevant disciplinary authorities who give the punishment upon conclusion of disciplinary proceedings under paragraph 5.1. If the punishment which is given to the subject officer involves forfeiture, then the GVC (and the SDSC if applicable) of that officer may be forfeited under paragraph 5.1. It therefore appears that under the employment contract of a CSPF civil servant, his accrued benefits attributable to the GVC (and the SDSC if applicable) may be forfeited, either wholly or in part, if the following conditions are satisfied -

- (a) the CSPF civil servant is found guilty of a disciplinary or criminal offence; and
- (b) the CSPF civil servant is to be given a punishment upon conclusion of disciplinary proceedings (as forfeiture of the GVC seems to be part of the punishment that may be given, the words "is given a punishment" in paragraph 5.1 should more logically be read as "is to be given a punishment" in the context of the paragraph and in the light of the Administration's explanation).

### Vesting and Payment of Special Disciplined Services Contribution (SDSC<sup>1</sup>) by the Government

6. Paragraph 4.4.1 of the Terms and Conditions of the CSPF Scheme provides that -

"...accrued benefits attributable to the SDSC made by the Government...will be fully vested and payable if the member

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<sup>1</sup> For an eligible member of the CSPF scheme who is a disciplined service grade officer, the Government will, in addition to the mandatory and voluntary contributions made by the Government, make a monthly contribution of 2.5% of his basic salary as Special Disciplined Services Contribution (SDSC) for him. See paragraph 3.1.7 of the Terms and Conditions of the CSPF Scheme and footnote 7 of the LegCo Brief.

is a disciplined services officer immediately before retirement/leaving the civil service and satisfies one of the following conditions -

- (a) upon his retirement from the civil service on or after reaching the prescribed retirement age as set out at Appendix I (irrespective of the length of service);
- (b) upon his death while a member (irrespective of the length of service); or
- (c) upon his retirement on permanent incapacity (irrespective of the length of service) with medical evidence provided to the satisfaction of the Government that he is incapable by reason of any infirmity of mind or body of discharging the duties of his office and that such infirmity is likely to be permanent.

If a disciplined services officer leaves the civil service in any circumstance other than as set out above, he will not be entitled to any benefits attributable to the SDSC made by the Government."

#### Withholding and Recovery

- 7. Paragraph 5.2 of the Terms and Conditions of the CSPF Scheme provides for the withholding of the GVC (and the SDSC if applicable).
- 8. Paragraph 5.5 of the Terms and Conditions of the CSPF Scheme provides for the recovery of the GVC (and the SDSC if applicable).

### **The Bill vis-à-vis the Contract of Employment**

#### Forfeiture of SDSC

- 9. Apart from the general voluntary contribution made by the Government (generally referred to as "GVC"), the Government will, in addition, make a special voluntary contribution for civil servants who is a disciplined service grade officer, namely the Special Disciplined Services Contribution (SDSC). Although the letter of appointment and MOCS only refer to GVC, the Terms and Conditions of the CSPF Scheme make it clear that the SDSC is subject to the same arrangement where it is applicable (see for example paragraph 4 above).
- 10. It is not explicit from the LegCo Brief and the Bill whether the "voluntary contributions made by the Government" mentioned in the proposed definitions of "retirement benefits" or "provident fund benefits" (as the case may be) to be included in various disciplined services legislation under the Bill includes the

SDSC. Upon enquiry, we have been advised by the Administration that the SDSC is intended to be covered by the expression "voluntary contributions made by the Government".

11. The forfeiture clause (paragraph 5.1) in the Terms and Conditions of the CSPF Scheme expressly provides that the SDSC, if applicable, may be forfeited. Hence, in relation to the forfeiture of the SDSC, both the Bill and the contract of employment apply to the SDSC as they apply to the GVC.

12. It is, however, noted that according to paragraph 4.4.1 of the Terms and Conditions of the CSPF Scheme, accrued benefits attributable to the SDSC, unlike the GVC (which may also be vested upon a CSPF civil servant leaving the service after completing at least ten years of continuous employment under paragraph 4.3.1 of the Terms and Conditions of the CSPF Scheme) will only be vested and payable under three specified circumstances, namely, retirement on or after reaching the prescribed retirement age, death or retirement on permanent incapacity. It would appear that the practical effect is that there will be SDSC liable to be forfeited if one of the three specified circumstances occurs before the conclusion of the disciplinary or criminal proceedings because the SDSC will be vested and payable by then to the officer in question, but not if such proceedings including punishment are concluded before the occurrence of the specified circumstances.

#### Withholding and Recovery of GVC or SDSC

13. There is no provision in any of the disciplined services legislation mentioned in the Bill which provides for the withholding and recovery of the GVC or the SDSC.

#### Any variation of the Contract of Employment

14. Upon review, all the disciplinary services legislation referred to in the Bill in so far as it relates to punishments which impinge on retirement benefits, subject to the comments made in paragraphs 15 to 18 below, appear to reflect and implement paragraph 5.1 of the Terms and Conditions of the CSPF Scheme. No material deviation from the Terms and Conditions of the CSPF Scheme is evident.

15. The proposed amendment to section 31(2) of Cap. 232 empowers the Chief Executive to declare that the provident fund benefits (i.e. the GVC and the SDSC) of a police officer who is summarily dismissed are to be vested in that officer. The policy intent appears to equalise CSPF police officers with pensionable police officers in that pensionable police officers who are summarily dismissed may in exceptional circumstances retain their pension benefits if the Chief Executive thinks fit and so CSPF police officers should likewise be so entitled to retention of their GVC (and the SDSC) in exceptional circumstances. However, the precise practical effect of the proposed section 31(2)(b) is not clear, i.e. how the vesting by the Chief

Executive can be effected in the case of a summarily dismissed CSPF police officer whose benefits have already been vested or have been forfeited or whether it is intended to add an additional circumstance under which the benefits can be vested to those specified in paragraph 4.3.1 of the Terms and Conditions of the CSPF Scheme. The effect of the proposed section 31(2)(b) on the contract of employment is therefore unclear.

16. Section 31(1) of the Police Force Ordinance (Cap. 232) empowers the Commissioner of Police or a deputy commissioner to summarily dismiss a police officer whom he is satisfied is guilty of contravening police regulations, or any police orders whether given verbally or in writing. This subsection is not proposed to be amended under the Bill and it is not clear from its plain meaning that any disciplinary proceedings would be involved. If no such proceedings are actually involved, the GVC (and the SDSC) may not be liable to forfeiture in accordance with paragraph 5.1 of the Terms and Conditions of the CSPF Scheme. Upon enquiry, we have been advised by the Administration that GVC and SDSC will be forfeited upon summary dismissal of the CSPF civil servants under section 31(1) of Cap. 232 and similarly under the relevant summary dismissal provisions in other disciplinary services legislation according to paragraph 5.1 of the Terms and Conditions of the CSPF Scheme.

17. In the light of the existing provision of section 31(1) of Cap. 232, it may be problematic whether summary dismissal under that subsection entitles the Government to forfeit the GVC (and the SDSC) of the police officer concerned. The issue appears to be whether the summary dismissal could be regarded as disciplinary proceedings within the meaning of paragraph 5.1 of the Terms and Conditions of the CSPF Scheme. Members may wish to ask the Administration to explain whether and, if so, how the summary dismissal could be regarded as disciplinary proceedings within the contemplation of paragraph 5.1 of the Terms and Conditions of the CSPF Scheme.

18. Similarly, section 13A of the Fire Services Ordinance (Cap. 95), Rule 255AA of the Prison Rules (Cap. 234 sub. leg. A), section 14 of the Government Flying Service Ordinance (Cap. 322) and Rule 18A of the Customs and Excise Service (Discipline) Rules (Cap. 342 sub. leg. B) provide for summary dismissal. The problem with regard to section 31(1) of Cap. 232 may exist to a certain extent.

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