

For discussion on
18 June 2009

Legislative Council Panel on Manpower

Proposal to expand the scope of the Protection of Wages on Insolvency Fund to cover untaken annual leave pay under the Employment Ordinance

Purpose

This paper seeks Members' views on a proposal to expand the scope of the Protection of Wages on Insolvency Fund (the Fund) to cover untaken annual leave pay under the Employment Ordinance (EO).

Background

2. The Fund, established under the Protection of Wages on Insolvency Ordinance (PWIO), provides timely relief in the form of ex gratia payment to employees of insolvent employers. It is administered by the Protection of Wages on Insolvency Fund Board (Fund Board) which consists of employer and employee representatives as well as public officers. The Labour Department (LD) is responsible for processing applications and the operation of the Fund.

3. When the Fund was set up in 1985, its ex gratia payment only covered arrears of wages of the last four months subject to the payment ceiling of \$8,000. With gradual improvement over the years, the maximum payment that an employee can now receive from the Fund is \$278,500, comprising four months' wages up to \$36,000, one month's wages in lieu of notice up to \$22,500, and severance payment up to \$50,000 plus 50% of the remainder of the entitlement.

Existing Provisions on Annual Leave Pay

4. Under the EO, an employee is entitled to annual leave with pay after having been employed under a continuous contract¹ for every 12 months. An employee's entitlement to paid annual leave increases progressively according

¹ An employee employed under a continuous contract is defined as one who has been employed under a contract of employment by the same employer for four weeks or more and has worked for 18 hours or more in each week.

to his length of service. He is entitled to seven days' paid annual leave in his first and second years of employment respectively, which then increases at the rate of one day per year up to a maximum of 14 days.

5. An employee shall take the entitled annual leave with pay within the following leave year.² If an employee has been employed for a leave year and his employment contract is terminated, irrespective of the reasons of termination, he should be entitled to payment in lieu of any annual leave not yet taken. An employee with at least three months' employment in a leave year but less than the full 12 months' employment in that period would be entitled to pro rata annual leave pay if his employment contract is terminated other than for the reason of summary dismissal due to his serious misconduct.

Claims on Annual Leave Pay

6. The LD has studied the employees' claims on annual leave pay with reference to cases received by the Fund in the third quarter of 2007. During the period, the Fund received 232 cases which accounted for 24% of the total 961 cases in 2007. There were 1 078 applicants involved, amounting to 22% of the total 4 836 applicants received in 2007.

7. The findings of the study are as follows –

- (a) A total of 332 applicants claimed annual leave pay for annual leave accumulated and not yet taken at the LD, the Labour Tribunal or the Minor Employment Claims Adjudication Board. This represented 31% of the total of 1 078 applicants in the cases received during the third quarter of 2007.
- (b) The total claim on annual leave pay of the 332 applicants was \$2,142,392, with an average of \$6,453 per applicant. Of the 332 applicants, 284 (86%) claimed annual leave pay of not exceeding \$10,500.
- (c) Of the 332 applicants with claims on annual leave pay, 242 (73%) claimed up to 14 days' annual leave pay, 43 (13%) claimed more than 14 days and up to 30 days' annual leave pay, and the remaining 47 (14%) claimed over 30 days' annual leave pay.

² A leave year means any period of 12 months commencing on the day on which his employment commenced and an anniversary of such day.

- (d) As for the number of leave years involved in the claims of the 332 applicants, 203 (61%) claimed annual leave pay of not more than one leave year, 63 (19%) claimed annual leave pay of one to two leave years, and the other 66 (20%) claimed annual leave pay of exceeding two leave years.

Proposal

8. At present, arrears of wages of the last four months payable by the Fund already include annual leave pay owed to an employee for his annual leave taken in the period. The LD and the Fund Board have examined the suggestion of expanding the scope of the Fund. At its meeting on 30 April 2008, the Fund Board agreed that the Fund should be extended to cover annual leave pay under the EO for annual leave accumulated and not yet taken by employees of insolvent cases, subject to the limit of one leave year with a maximum of seven to 14 days' annual leave pay as per an employee's length of employment. In the light of the maximum of \$22,500 for one month's wages in lieu of notice payable by the Fund, it is the consensus of the Fund Board that the payment ceiling for annual leave pay should be \$10,500.

9. It is pertinent to note that according to the findings of the study in paragraph 7, the average claim on annual leave pay was \$6,453. Among the applicants with claims on annual leave pay in the study, 86% claimed sums not exceeding \$10,500, 73% claimed not more than 14 days' annual leave pay, and 61% claimed annual leave pay of not more than one leave year. On the basis of these findings, the above proposal can meet the annual leave pay claims for the majority of the applicants of the Fund.

Financial Impact on the Fund

10. We have gauged the impact of the proposal on the ex gratia payment expenditure of the Fund with reference to the number of applicants and the total payout in 2002 and 2007 respectively. For 2002, both the number of applicants and the total payout were all-time high figures. As for 2007, the number of applicants was a record low since 1990 while the total payout was the lowest since 1995.

11. As the findings in paragraph 7 indicate that 31% of the applicants of the Fund would have annual leave pay claims, the impact on the ex gratia payment expenditure is analysed as follows –

- (a) In 2002, the Fund received 23 023 applicants and made ex gratia payment totalling \$513.8 million. Assuming that 7 137 applicants (31% of 23 023 applicants) claimed annual leave pay and all of them were granted the proposed payment ceiling of \$10,500, the Fund's payout for annual leave pay would be \$74.9 million at most, or 14.6% increase over the original payout of \$513.8 million.
- (b) As for 2007, the Fund received 4 836 applicants and made ex gratia payment totalling \$95 million. Assuming that 1 499 applicants (31% of 4 836 applicants) claimed annual leave pay and all of them were granted the proposed payment ceiling of \$10,500, the Fund's payout for annual leave pay would be \$15.7 million at most, or 16.6% increase over the original payout of \$95 million.

Major statistics and financial position of the Fund over the past few years are tabulated at **Annex** for Members' reference.

Consultation with the Labour Advisory Board

12. The LAB discussed at its meeting on 25 May 2009 the proposal to expand the scope of the Fund to cover untaken annual leave pay and the impact on the ex gratia payment expenditure of the Fund as set out in paragraphs 8 to 11 above. LAB members endorsed the proposal at the meeting.

Advice Sought

13. Members are requested to advise on the proposal to expand the scope of the Fund to cover untaken annual leave pay under the EO as set out in paragraph 8 above.

Labour and Welfare Bureau
Labour Department
June 2009

Table A : Major Statistics of the Fund

	2005	2006	2007	2008	2008 January to May	2009 January to May
Applications received (number of employees)	9 967 (↓27%)	7 532 (↓24%)	4 836 (↓36%)	6 448 (↑33%)	2 738 (↑27%)	3 694 (↑35%)
Cases received (number of employers)	1 205 (↓33%)	1 182 (↓2%)	961 (↓19%)	818 (↓15%)	341 (↓21%)	481 (↑41%)
Amount of claims received	\$348m (↓33%)	\$318m (↓9%)	\$185m (↓42%)	\$409m (↑121%)	\$142m (↑71%)	\$244m (↑72%)
Total ex gratia payment released	\$205m (↓46%)	\$143m (↓30%)	\$95.0m (↓34%)	\$96.3m (↑1%)	\$38.0m (↓22%)	\$86.4m (↑127%)
Average ex gratia payment per approved application	\$19,647 (↓2%)	\$21,315 (↑8%)	\$19,334 (↓9%)	\$19,609 (↑1%)	\$19,865 (↓2%)	\$25,266 (↑27%)
Business Registration Certificate levy	\$468m (↑6%)	\$486m (↑4%)	\$515m (↑6%)	\$456m (↓11%)	\$208m (↓5%)	\$181m (↓13%)
Total accumulated surplus as at end of the year	\$305m	\$677m	\$1,119m	\$1,490m (↑33%)	\$1,292m (↑52%)	\$1,583m (↑23%)

(% : Comparison with figures of the same period last year)

Table B : Financial position of the Fund (according to financial year)

	1997-98 (\$m)	1998-99 (\$m)	1999-00 (\$m)	2000-01 (\$m)
Income	261.8	254.3	268.6	236.1
Expenditure	286.5	439.6	473.2	366.2
Surplus / (Deficit)	(24.7)	(185.3)	(204.6)	(130.1)
Reserve (Accumulated Surplus)	853.0	667.7	463.1	333.0

	2001-02 (\$m)	2002-03 (\$m)	2003-04 (\$m)	2004-05 (\$m)
Income	201.1	416.6	436.0	452.4
Expenditure	339.2	576.4	489.5	337.8
Surplus / (Deficit)	(138.1)	(159.8)	(53.5)	114.6
Reserve (Accumulated Surplus) / (Accumulated Deficit)	194.9	35.1	(18.4) ³	96.3

	2005-06 (\$m)	2006-07 (\$m)	2007-08 (\$m)	2008-09 (\$m)
Income	502.0	522.1	559.5	471.3
Expenditure	215.6	160.1	103.0	153.7
Surplus / (Deficit)	286.4	362.0	456.5	317.6
Reserve (Accumulated Surplus)	410.1	772.1	1,228.6	1,546.1

³ In November 2002, Finance Committee of the Legislative Council approved the Labour Department's proposal for a loan of \$695 million to the PWIF. In March 2004, the PWIF Board for the first time took out a total of \$22 million of the loan. All debts including interests (a total of \$22.63 million) were cleared in April 2005.

Table C : Financial position of the Fund (by month)

(in million dollars)	2008									2009				
	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May
Income	47.1 (+9%)	41.3 (-12%)	39.0 (-6%)	41.6 (+7%)	35.9 (-14%)	39.0 (+9%)	39.6 (+2%)	35.1 (-11%)	39.5 (+13%)	32.8 (-17%)	36.2 (+10%)	44.1 (+22%)	40.1 (-9%)	36.5 (-9%)
Expenditure	8.1 (-10%)	16.6 (+105%)	11.8 (-29%)	13.9 (+18%)	9.4 (-32%)	7.1 (-24%)	7.8 (+10%)	11.6 (+49%)	10.8 (-7%)	30.4 (+181%)	15.8 (-48%)	10.3 (-35%)	23.9 (+132%)	16.3 (-32%)
Surplus	39.0 (+14%)	24.7 (-37%)	27.2 (+10%)	27.7 (+2%)	26.5 (-4%)	31.9 (+20%)	31.8 (-0%)	23.5 (-26%)	28.7 (+22%)	2.4 (-92%)	20.4 (+750%)	33.8 (+66%)	16.2 (-52%)	20.2 (+25%)
Reserve (Accumulated surplus)	1,267.5 (+3%)	1,292.2 (+2%)	1,319.4 (+2%)	1,347.1 (+2%)	1,373.6 (+2%)	1,405.5 (+2%)	1,437.3 (+2%)	1,460.8 (+2%)	1,489.5 (+2%)	1,492.0 (+0%)	1,512.4 (+1%)	1,546.1 (+2%)	1,562.4 (+1%)	1,582.5 (+1%)

Remarks: : (%) - Comparison with last month