

立法會
Legislative Council

LC Paper No. CB(2)2265/99-00
(These minutes have been seen
by the Administration)

Ref : CB2/BC/21/98

**Bills Committee on
Protection of Wages on Insolvency (Amendment) Bill 1999**

**Minutes of Meeting
held on Thursday, 4 November 1999 at 10:45 am
in Conference Room A of the Legislative Council Building**

- Members Present** : Hon Eric LI Ka-cheung, JP (Chairman)
Hon James TIEN Pei-chun, JP
Hon LEE Cheuk-yan
Hon LEE Kai-ming, SBS, JP
Hon CHAN Yuen-han
Hon LAU Chin-shek, JP
Hon Andrew CHENG Kar-foo
- Members Absent** : Hon Kenneth TING Woo-shou, JP
Hon HO Sai-chu, SBS, JP
Hon Cyd HO Sau-lan
Hon Albert HO Chun-yan
Hon CHAN Kwok-keung
Hon CHOY So-yuk
- Public Officers Attending** : Mr Ivan K B LEE
Principal Assistant Secretary for Education and Manpower
- Mr TSANG Kin-woo
Assistant Commissioner for Labour (Labour Relations)
- Mr Alan WONG
Senior Labour Officer (Wage Security), Labour Department

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Clerk in Attendance : Mrs Constance LI
Chief Assistant Secretary (2) 2

Staff in Attendance : Mr Arthur CHEUNG
Assistant Legal Adviser 5

Mr Stanley MA
Senior Assistant Secretary (2) 6

I. Confirmation of minutes
[LC Paper No. CB(2)253/99-00]

The minutes of meeting held on 20 September 1999 were confirmed.

II. Administration's response and proposed Committee stage amendments
[Paper Nos. CB(2)260/99-00(01) and (02)]

2. At the request of the Chairman, Principal Assistant Secretary for Education and Manpower (PAS/EM) briefed members on the Administration's response and proposed Committee stage amendments (CSAs). He said that having consulted the Labour Advisory Board (LAB) and the Protection of Wages on Insolvency Fund (PWIF) Board, the Administration had accepted the Bills Committee's suggestions and would propose CSAs on the following -

- (a) verbal undertakings given by employers would be recognized for ex-gratia severance payment under the Protection of Wages on Insolvency Fund (the Fund); and
- (b) where wage adjustment occurred more than once during the 12 months preceding termination of employment, the highest wages as specified in any written or verbal undertakings given by employers during the 12-month period should be used to calculate the amount of ex-gratia severance payment under the Fund.

3. PAS/EM added that the word "the" should be added in between "is" and "most" in clause 2(b)(i) of the Administration's proposed CSAs.

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4. Mr James TIEN sought clarification on the meaning of "valid verbal undertakings" in the proposed CSAs. Assistant Commissioner for Labour (Labour Relations) (AC for L) explained that applicants for ex-gratia payments under the Fund would have the onus to prove that their employers had actually given such undertakings.

5. Mr James TIEN also asked about the way the Administration had consulted the LAB on the proposal of recognizing verbal undertakings for ex-gratia payments from the Fund. ACL(IR) said that the LAB secretariat had circulated the proposal to the 12 LAB members and requested their response in writing. The six employee representatives unanimously agreed that verbal undertakings should be recognized, while one employer representative expressed agreement and five indicated no objection in writing. Mr TIEN said that the Liberal Party would need to clarify with the employer representatives on their stand and meanwhile he would reserve his position on the proposal.

6. Assistant Legal Adviser 5 (ALA5) confirmed that the drafting of the proposed CSAs was in order. He pointed out that according to the proposed clause 2(b)(ii), the highest wage level in the employer's undertaking during the 12-month period before termination of employment should not exceed the original pre-reduced wage level.

*Submission of the Democratic Party
[Paper No. CB(2)285/99-00(01)]*

7. The Chairman informed members that the Democratic Party (DP) had tabled a submission proposing amendments to the Bill. At the request of the Chairman, Mr Andrew CHENG briefed members on DP's proposal. He said that during the recent economic downturn, many employees were forced to accept wage reduction more than once, and their employers seldom gave any written or verbal undertakings in respect of their future severance payment. To protect the benefits of these employees, he would propose that an employee who suffered a wage reduction in the 24 months before termination of employment should be entitled to ex-gratia severance payment from the Fund based on his average income in the 12 months immediately before wage reduction. For employees whose wages had been reduced several times during the period, they should be given the choice to claim ex-gratia severance payment based on the highest wages before any wage reduction, irrespective of whether the employer had given an undertaking to that effect. He explained that the proposal was modelled on his previous private member's bill and he hoped members could re-consider his proposal in the context of the Bill which was proposed by the Administration.

8. Mr LAU Chin-shek and Mr James TIEN requested Mr Andrew CHENG

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to explain the calculation of the 24-month period and the average income in the 12 months before wage reduction. Mr Andrew CHENG explained that under the DP's proposal, an employee who had a wage reduction in the 24 months preceding the employer's insolvency (or termination of employment) would automatically be entitled to ex-gratia severance payment based on the employee's average income in the 12 months preceding the wage reduction. If the employee had several wage reductions during the period, he could choose a wage level during such period for calculation of ex-gratia severance payment. In the latter case, it was possible that a wage level in a period up to 36 months preceding termination of employment might be chosen for calculation of the ex-gratia severance payment. The purpose was to protect those long service employees who had several wage adjustments within the 24 months preceding termination of employment. He stressed that the DP's proposal would have two important improvements over the Administration's CSAs. Firstly, the proposal would not even require a verbal undertaking of the employer. Secondly, the employee could have an option to choose the highest wage level before any wage reduction within the prescribed period for the purpose of calculating ex-gratia severance payment under the Fund.

9. ACL(LR) responded that the Administration could not support DP's proposal as it was in contradiction with the legislative intent of the Bill. He stressed that for the purpose of the Bill, it would require an employer's undertaking for severance payment to be calculated on the basis of the wage level before wage reduction within the 12-month period. He pointed out that the proposal could create a situation where employees of an insolvent employer would receive a higher amount of severance payment under the Fund than they would have from an employer (who had not become insolvent) in accordance with the provisions of the Employment Ordinance.

10. To facilitate members to consider DP's detailed proposal, the Chairman requested Mr CHENG to circulate his proposed CSAs to members as soon as practicable. Mr CHENG agreed.

(Post-meeting note : Mr Andrew CHENG's proposed CSAs were subsequently forwarded to members vide LC Paper No. CB(2)341/99-00 on 9 November 1999.)

Compatibility of the Bill with the Employment Ordinance

11. Members noted that the Bill would enable employees to claim ex-gratia severance payment from the Fund based on the wage level before wage reduction, while the Employment Ordinance only set out the minimum severance payment which was based on the last month salary of the employee before termination of employment. They therefore sought clarification as to whether the Bill would contradict the Employment Ordinance in this respect.

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12. PAS/EM responded that payments from the Fund was based on the provisions in the Protection of Wages on Insolvency Ordinance (the Ordinance) (Cap.380) which provided that ex-gratia severance payment under the Fund should not be more favourable than the level of severance payment provided under the Employment Ordinance (Cap.57). ACL(LR) pointed out that an undertaking given by an employer on severance payment was a form of contract within the meaning of the Employment Ordinance. Nevertheless, the amount of ex-gratia severance payment from the Fund was subject to a limit as stipulated in the Ordinance.

13. The Chairman clarified that the PWIF Board was not a party to the employment contract between employers and employees, and ex-gratia payments under the Fund were governed by the Ordinance instead of the Employment Ordinance. In other words, the PWIF was delinked from the Employment Ordinance to some extent.

14. ALA5 further explained that the Employment Ordinance only set out the minimum statutory entitlements for eligible employees in case their employment was terminated by employers. If an employer had undertaken to provide better severance payment but subsequently only paid the minimum as stipulated under the Employment Ordinance, the employee concerned could initiate civil proceedings against the employer to claim the difference in payments. He pointed out that under the existing Ordinance, calculation of ex-gratia payments for an employee whose employer had become insolvent could only be based on the employee's last month wages before termination of employment. However, the Bill sought to improve the protection of the employee by enabling calculation of ex-gratia severance payments under the Fund based on pre-reduced wages as undertaken by the employer. He stressed that the ex-gratia severance payment under the Fund would still be subject to a ceiling and the provisions in the Ordinance.

15. Mr LEE Cheuk-yan noted that if the Bill was enacted, the Ordinance would allow ex-gratia severance payment above the minimum statutory entitlements under the Employment Ordinance. However, as DP's proposal would provide even more benefits to employees, he would consider supporting DP's proposal.

16. Mr LEE Kai-ming said that the Administration's acceptance of employer's verbal undertakings and the highest wage level preceding wage reduction during the 12-month period for calculation on ex-gratia severance payment under the Fund was already a great improvement over existing arrangements and the Bill. He therefore considered the Administration's proposed CSAs worthy of support and urged for early passage of the Bill as amended. He said that any further delays would adversely affect the benefits

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of employees because the existing Ordinance only allowed ex-gratia severance payment to be based on employees' last-month wages (or the average of the 12-month wages before termination of employment). He considered that the Panel on Manpower could follow up other improvements required of the labour legislation. Miss CHAN Yuen-han expressed similar views.

III. Any other business

17. The Chairman summarized the discussion of the proposed CSAs and said that members did not have consensus over DP's proposal. As some other members were generally in support of early enactment of the Bill subject to the Administration's amendments, the Chairman suggested reporting the deliberations of the Bills Committee to the House Committee on 12 November 1999. Members agreed.

18. There being no other business, the meeting ended at 11:45 am.

Legislative Council Secretariat

8 June 2000