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18th January 2007

The Clerk to the Bills Committee considering
the Employment (Amendment) Bill 2006,
Legislative Council Building,
8 Jackson Road, Central,
Hong Kong.

Dear Sir/Madam

Comments on the Employment (Amendment) Bill 2006

The Employment Law Committee of the Law Society of Hong Kong has considered the Employment (Amendment) Bill 2006 (the "Bill") which was gazetted in December 2006. We note that the Bill has passed its first reading at the Legislative Council, a second reading is expected early this year and the Bills Committee is reviewing.

We understand and welcome the introduction of the Bill to clarify the basis of calculating items of pay such as payment in lieu of notice, sickness allowance, maternity leave pay, holiday pay and annual leave pay. The current law, as interpreted by the Court of Final Appeal in the 2006 case of Laing v Lisbeth Enterprises FACV 17/2005, is clearly unsatisfactory: in particular, there is uncertainty as to its scope of application – for example, whether similar interpretation and reasoning can be adopted for elements of variable pay other than commission calculated on a monthly basis.

We understand that the intention of the Government is that all items of pay, whether variable or fixed, should be taken into account for the calculation of the abovementioned items. We agree that the Employment Ordinance ("EO") needs to be amended in this regard. Any amendments will of course need to adhere to the following principles:

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- Consistency
- Clarity
- Ease of use

The revised wording proposed to be adopted for the various types of payment is of course an improvement on the existing wording in the EO. The terminology adopted has been simplified, with the provisions dealing with each type of payment being broadly drafted along the same lines. The inconsistent concepts of: 'remuneration calculated by the 'piece or task' (EO section 7 – payment in lieu of notice); employment on 'piece rates' (EO section 35, 41 and 41C regarding sickness allowance, holiday pay and annual leave pay respectively); and 'rate of pay' (EO section 14(3) – maternity leave pay), have been eliminated. We welcome these highly necessary changes.

We are, however, of the view that in some respects the proposed revisions to the EO are not sufficiently precise, and will not, in practice, be easy to apply. Our specific comments are as follows.

Specific comments

1.1 Employees without variable elements of pay

The new approach proposed would unnecessarily complicate the calculation of the payments concerned for employees on fixed wages. Where an employee earns, for example, HK$30,000 every month, there is no need to adopt the 'rolling 12 month average' formula. Furthermore, the adoption of such formula may be detrimental to any employee who has received pay rises during the year; such an employee would therefore be entitled to less than the amount to which he is currently entitled for the statutory payments concerned. Is this the intention?

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1.2 Formula not sufficiently detailed

The approach of the Bill is to use a 'rolling 12 month average' formula for all the payments affected, and for all employees (whether or not they have fixed or variable pay). While this is a welcome change from the various previous formulae used (ie the 'wages the employee would have earned' approach, and the 'piece rate/task' approach), we consider that the formula needs to go further to specify a method of calculation of the daily average. For example, surely it is necessary to specify whether a calendar or working day divider is adopted?

We suggest that a single definition of 'daily average' or 'monthly average' be used, together with a detailed formula. This will also (obviously) remove the need to repeat a formula in each of the sections of the EO concerned.

1.3 Periods of reduced or no pay

The 'rolling 12 month average' provisions provide that periods during which the employee was not paid his 'wages or full wages' may in certain circumstances be ignored. There is, however, no guidance as to what 'full wages' means. For example, how should employers deal with employees whom they have allowed, for a limited period, to work part-time at a reduced wage? Should that period of part-time work be included in the 12 months?

Also, the part of this provision which refers to 'leave' taken by the employee is imprecise – it is not entirely clear what items this includes e.g., will all employers need to deduct days taken as statutory holidays? We assume that, due to the reference to leave taken 'in accordance with the provisions of the [Employment] Ordinance', 'leave' does not include contractual, top-up annual leave (as opposed to statutory minimum) annual leave – this should however be clarified.

There is also no minimum threshold of duration or number of occasions of leave – if for whatever reason an employee has taken no pay leave on a few sporadic occasions, the employer will be unsure how to proceed.

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1.4 The 'impractical' provision

The Bill provides that where the 'rolling 12 month average calculation is 'impracticable', the calculation should then be made 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'.

We do not understand what this provision is aimed at. Whilst we note that similar wording currently appears in the EO, e.g. section 7(3) (payment in lieu of notice), this is a very specific provision which, so far as we are aware, is rarely used. The insertion of a similar provision in the various sections of the EO is a fundamental change which will, in our view, result in confusion.

Who is to determine the correct 'comparator' to apply? When is it impracticable to apply the 'rolling 12 month average' formula? We are not aware of any relevant case law that assist in the interpretation of such wording.

Given the comprehensive amendments being made by the Bill to the EO, we consider that it is an opportune time to remove this unworkable concept from the EO and replace it with wording that can be applied easily in practice.

Yours sincerely,

P.R. Moss

Patrick Moss
Secretary General

PM/ff