Bills Committee on
Employment (Amendment) Bill 2006

Administration's Response to the Submission by
the Employment Law Committee of the Law Society of Hong Kong

Introduction

This paper provides the Administration's response to the views expressed by the Employment Law Committee of the Law Society of Hong Kong ("the Law Society") on the Employment (Amendment) Bill 2006 ("the Bill") in its submission of 18 January 2007 to the Bills Committee.

Submission from the Society

2. We note that the Law Society understands and welcomes 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. In its submission, the Law Society states that the current law, as interpreted by the Court of Final appeal in the 2006 case of Lisbeth Enterprises Limited vs Mandy Luk FACV 17/2005, is clearly unsatisfactory and agrees that the Employment Ordinance ("EO") needs to be amended to ensure that all items of pay, whether variable or fixed, should be taken into account for the calculation of the above-mentioned items. The Law Society also considers that the revised wording proposed to be adopted for the various types of payment is an improvement on the existing wording in the EO.

3. We also note that the Law Society is of the view that in some respects the proposed revisions to the EO are not sufficiently precise and will not be easy to apply in practice and that it has made some specific comments in this regard.

Response from the Administration

4. We welcome the general support expressed by the Law Society to the Bill. With regard to its specific comments, our response is as follows.

Employees without variable elements of pay

5. In the Law Society's view, the revised mode of calculation on the basis of a 12-month moving average would (a) unnecessarily complicate the

calculation of statutory entitlements for those employees who are remunerated on fixed wages and (b) would also result in reduced payments of statutory entitlements for those employees who received pay rises during the past 12 months as lower salaries would be taken into account in the calculation.

6. With regard to (a), it should be noted that the use of a 12-month moving average for the purpose of calculating statutory entitlements is to address the concerns expressed by both employers and employees. Indeed, as explained in paragraph 6 of the Legislative Council Brief on the Bill, the adoption of a longer reference period of 12 months has many practical advantages.

7. We would like to point out that it would be very difficult if not impossible to provide a simple definition of "fixed" wages as suggested, given the way the term "wages" is defined in the EO. In terms of a 12-month time frame, wages that may be fixed in a month may vary in another month. The proposed approach adopted in the Bill is that a workable mode of calculation is provided for all categories of employees. Given the evolving and increasingly complex nature of the remuneration systems in Hong Kong, what we need is a simple, predictable and consistent mode of calculation for all statutory entitlements. Differential treatment for different categories of employees would unnecessarily complicate the mode of calculation and may create more problems than it solves.

8. We would also like to point out that with the keeping of proper wage and leave records which is a good human resources management practice, the adoption of a rolling 12-month average should not create much additional administrative work as it might appear. This is because if relevant records for the first 11 months are on hand, calculating the 12-month rolling average would mean no more than entering the 12^{th} month data into the equation.

9. With regard to (b), while employees who have received pay rises during the past 12 months would be somewhat worse off under the "moving 12-month average" formula, those who have received pay cuts would be somewhat better off. In any case, the effect of any pay rise on the average wages calculated on the basis of a 12-month period is unlikely to be significant in practice. It should also be noted that the same would happen with the current "would have earned" formula, though employees who received a pay rise would now be better off and employees who received a pay cut would be worse off.

Formula not sufficiently detailed

10. We note that the Law Society considers the approach of the Bill in using a "rolling 12-month average" formula for all the payments affected and for all employees a welcome change from the various previous formulae used

(i.e., the "wages the employee would have earned" approach and the "piece rate/task" approach").

11. As to the suggestion that a single definition of 'daily average' or 'monthly average' be used, together with a detailed formula, the Bill has already spelt out the general principle of calculating statutory entitlements with reference to the daily average wages or monthly average wages. Under the proposed mode of calculation, the average of the daily or monthly wages is to be calculated on the basis of wages earned by an employee during a 12-month period, or such lesser period when the employee is under the employment of the concerned employer, immediately preceding the statutory holiday, first day of the annual leave, or other relevant dates. The rationale for taking this general approach instead of providing a detailed calculation formula is that given the wide-ranging and ever-changing remuneration systems in the labour market, it is impossible to have one detailed formula that could cater for all possible scenarios. Indeed, a one-size-fits-all approach to cover all wage reckoning methods would be impracticable.

12. Moreover, instead of specifying a simple calendar or working day divider approach as suggested, the Bill provides that in calculating the daily or monthly average of the wages earned by an employee for the purpose of calculating the statutory entitlements, 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 EO or the Employees' Compensation Ordinance (ECO) 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 any wages or other sum paid to him for that period, are to be disregarded. The underlying principle adopted is to ensure that the amount of statutory entitlements would not be unduly reduced by any leave taken for which the employee was not paid his full wages.

Periods of reduced or no pay

13. The Law Society raises concern about the meaning of "full wages" and "leave" and about the absence of minimum threshold of duration or number of occasions of "leave".

14. We are of the view that the term "full wages" is clear enough in the relevant contexts and needs not be given a statutory definition. Again, given the evolving and increasingly complex nature of the remuneration systems in Hong Kong, detailed statutory definitions could easily become unclear and may be subject to different interpretations. In the example given in the submission, an employee who has worked part-time for a limited period at reduced wages should have his part-time wages disregarded since such wages are clearly not full wages given the fact that he is employed on a full-time basis.

15. By its very nature, statutory holidays are clearly a kind of leave. Also, both statutory leave and contractual leave are covered in the Bill. This is set out clearly in, for example, Clause 12 of the Bill that the period to be disregarded in the calculation of the daily average wages includes any leave taken by an employee in accordance with the EO or ECO or with the agreement of his employer.

16. We have no intention of setting a minimum threshold of duration or occasions of leave as suggested. Firstly, it would be difficult to determine the right level at which the threshold should be set. More importantly, to do so would serve to depress the average wages for calculating statutory benefits, the effects of which would, of course, depend on which level the threshold is set.

The "impractical" provision

17. On the provision of making reference to a comparable person for the calculation of the daily average or monthly average of wages where it is impracticable to calculate the amount earned by an employee, the Law Society queries the rationale behind this provision and the practicability of its application.

18. We wish to point out that the use of the "comparable person" provision does not represent a fundamental change as similar provisions already exist in the EO and the ECO. The provision, though rarely used, does provide a useful fall-back in case the calculation of the average wage is impracticable for any reason. Examples of such cases include when an employee is dismissed on the first day of employment or has been on prolonged no-pay leave (for 12 months, say) before the holiday.

19. In practice, it should not be difficult for the employer or the employee to identify if such a comparable person exists. Even in cases where this is not feasible, reference could be made to relevant wage statistics published by the Census and Statistics Department. In case of disputes, the employers and employees concerned could approach the Labour Relations Division of the Labour Department for provision of free conciliation service. Unresolved disputes would be determined by the court. While noting that the use of this provision may be rare, on balance we consider that there is a need to retain it in the Bill.

Economic Development and Labour Bureau
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