

立法會
Legislative Council

LC Paper No. LS20/06-07

**Paper for the House Committee Meeting
on 5 January 2007**

**Legal Service Division Report on
Employment (Amendment) Bill 2006**

I. SUMMARY

- 1. Objects of the Bill** To take the average of an employee's wages during the past 12 months for the purpose of calculating certain statutory entitlements under the Employment Ordinance ("EO").
- 2. Comments** In *Lisbeth Enterprises Limited v. Mandy Luk* ([2006] 1 HKLRD 1005), the Court of Final Appeal allowed an employer's appeal and held that commission accrued and calculated on a monthly basis was not to be reckoned in the calculation of holiday pay and annual leave because the interpretation of the existing provisions of EO did not provide a workable mode of calculation for such purpose. The Bill seeks to reflect the policy intention behind the calculation of employees' entitlements under EO in that "wages" including commission of a contractual nature, however designated or calculated, should be used as the basis for all calculations.
- 3. Public Consultation** The proposal received majority support of the members present at the meeting of the Labour Advisory Board on 22 August 2006. The Administration had canvassed the views of other business groups, professional organizations and trade unions. Some members of the business community proposed introducing a wage ceiling for calculating statutory entitlements to contain staff costs.
- 4. Consultation with LegCo Panel** At its meeting on 25 September 2006, the Panel on Manpower was consulted on the Administration's proposal in the Bill. Some members expressed support for the proposal and requested for early introduction of the Bill whilst some other members expressed the concern that the proposal would affect employers of various sectors, such as the financial services sector. They relayed the suggestion of employer side that a ceiling be set on the commission for the purpose of calculating statutory entitlements and urged the Administration to address the issue before introducing the Bill. The Panel had also received submissions from eight organisations and a member of the public.
- 5. Conclusion** The Bill involves issues of concern to various sectors of the public. Members may wish to form a Bills Committee to consider the Bill in detail.

II. REPORT

Objects of the Bill

To revise the modes of calculation to take the average of the wages earned by an employee during the past 12 months (which include commission payable to an employee under section 2 of the Employment Ordinance (Cap. 57) (“EO”)), instead of an employee’s last month’s wages, in the following payments under EO –

- (a) payment in lieu of notice;
- (b) damages for wrongful termination of contract;
- (c) end of year payment;
- (d) maternity leave pay;
- (e) damages for wrongful termination of an employee’s contract during pregnancy;
- (f) sickness allowance;
- (g) damages for wrongful termination of an employee’s contract on a sickness day taken by him;
- (h) holiday pay; and
- (i) annual leave pay.

LegCo Brief Reference

2. LD LRD 12-1/2-46(C) issued by the Economic and Labour Bureau in December 2006.

Date of First Reading

3. 20 December 2006.

Comments

4. EO provides the statutory entitlements of employees to certain payments, including wages in lieu of notice for termination of employment, end of year payment,

maternity leave pay, sickness allowance, holiday pay and annual leave pay. The method of calculation for these payments generally makes reference to “wages”. As defined in section 2(1) of EO, “wages” means all remuneration, earnings, allowances, attendance bonus, commission, overtime pay, tips and service charges, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done under his contract of employment.

5. On 28 February 2006, the Court of Final Appeal held in *Lisbeth Enterprises Limited v. Mandy Luk* ([2006] 1 HKLRD 1005) that commission accrued and calculated on a monthly basis was not to be reckoned in the calculation of holiday pay and annual leave because the interpretation of the existing provisions of EO did not provide a workable mode of calculation for such purpose.

6. The Administration considers that the ruling results in an anomaly to the detriment of employees with commission accrued and calculated on a monthly basis, and that the policy intent has not been fully reflected. The Administration has reviewed the related provisions under EO and now seeks to amend it to provide a “workable mode of calculation” with respect to cases involving commission of a contractual nature, including the provisions relating to maternity leave pay, sickness allowance, wages in lieu of notice and end of year payment.

7. The Bill seeks to reflect the policy intention behind the calculation of employees’ entitlements under EO that “wages” including commission of a contractual nature, however designated or calculated, should be used as the basis for all calculations. The proposed modes of calculation in the Bill provide that the average of the wages earned by an employee during the past 12 months instead of an employee’s last month’s wages is to be used as the basis of calculation.

Public Consultation

8. According to the Administration, the proposal received majority support of the members present at the meeting of the Labour Advisory Board on 22 August 2006. The Administration had canvassed the views of other business groups, professional organizations and trade unions. Some members of the business community proposed introducing a wage ceiling for calculating statutory entitlements to contain staff costs. The Administration considers that setting a ceiling involves highly complex and controversial issues which should be thoroughly examined and deliberated and dealt with separately (paragraph 11 of LegCo Brief).

Consultation with LegCo Panel

9. At its meeting on 25 September 2006, the Panel on Manpower was consulted on the Administration's proposal to amend EO to clearly reflect its policy intention that all components of “wages”, including commission of a contractual

nature, should be reckoned for the purpose of calculating statutory entitlements under EO, and to improve the mode of calculation of such entitlements.

10. Some members expressed support for the Administration's proposal, and requested for early introduction of the amendment bill whilst some other members expressed concern that the Administration's proposal, if implemented, would affect employers of various sectors, such as the financial services sector. They relayed the suggestion of employer side that a ceiling be set on the commission in the calculation of statutory entitlements, and urged the Administration to address the issue before introducing the Bill. The Panel had also received submissions from eight organisations and a member of the public.

Conclusion

11. The Bill involves issues of concern to various sectors of the public. Members may wish to form a Bills Committee to consider the Bill in detail.

Prepared by

Kitty Cheng
Assistant Legal Adviser
Legislative Council Secretariat
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