

立法會

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Bills Committee on Education (Amendment) Bill 2013

Background brief

Purpose

This paper provides background information on the Education (Amendment) Bill 2013 ("the Bill") and highlights the views expressed by members of the Panel on Education ("the Panel") when being consulted on the proposed legislative amendments.

Background

The Grant Schools Provident Fund and the Subsidized Schools Provident Fund

2. The Grant Schools Provident Fund ("GSPF") and the Subsidized Schools Provident Fund ("SSPF") are statutory provident fund schemes established to provide, subject to the provisions of the Grant Schools Provident Fund Rules (Cap. 279 sub. leg. C) ("GSPF Rules") and the Subsidized Schools Provident Fund Rules (Cap. 279 sub. leg. D) ("SSPF Rules"), for payments to teachers upon the cessation of their employment as teachers in grant/subsidized schools or direct subsidy scheme schools, or to their estates in case of death. Similar to Mandatory Provident Fund ("MPF") schemes, GSPF and SSPF operate as a form of retirement savings schemes where the contributions by the employees are matched by the Government/schools, such that the contributors will receive a lump sum payment when they cease to be employed as teachers. GSPF and SSPF are exempted from the provisions of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) ("MPFSO")¹.

The Court case

3. In 2008, in a bankruptcy case concerning a subsidized school teacher (Re. Ng Shiu Fan [2008] 4 HKLRD 813), the Court of First Instance ruled that

¹ See section 4(1) of MPFSO and Part 1 of Schedule 1 to MPFSO.

section 85(3) of the Education Ordinance (Cap. 279) ("EO")² did not prevent the benefits under SSPF from vesting in the trustee-in-bankruptcy by virtue of section 58(1) of the Bankruptcy Ordinance (Cap.6)("BO")³. The judge further recommended that serious consideration be given to amending the relevant legislation to extend the protection to retirement benefits generally in the event of bankruptcy. On appeal, the case was heard in the Court of Appeal in 2009 ([2009] 4 HKLRD 774) and it was held that the bankrupt is only entitled to the proportion of the benefits attributable to his service and contribution after his discharge from bankruptcy. On 13 April 2010, the Court of Appeal granted leave to the applicant to appeal against the judgment of the Court of Appeal. Nevertheless, according to the Administration, the present status of the court case is unclear⁴.

Current practice in case of bankruptcy

4. Before the Court of Appeal judgment in Re. Ng Shiu Fan, the Education Bureau ("EDB") had released GSPF and SSPF benefits of a bankrupt (or former bankrupt) teacher to the trustee-in-bankruptcy as required by the trustee-in-bankruptcy when the benefits were payable to the teacher-contributor. Since the aforesaid Court of Appeal judgment, payment of benefits attributable to post-discharge services are paid to the contributors who have since been discharged from bankruptcy and the pre-discharge benefits are paid to the trustee-in-bankruptcy.

5. Noting that the retirement benefits of teachers in government schools under the Pensions Ordinance (Cap. 89) ("PO") or Pension Benefits Ordinance (Cap. 99) ("PBO") and that of the majority of the workforce under MPFSO are under protection in the event of bankruptcy, EDB has reviewed the relevant arrangements under GSPF and SSPF and considers that legislative amendments are necessary to effect similar protection to the benefits of GSPF and SSPF members in the event of bankruptcy, notwithstanding that there is still the possibility of appeal in Ng's case.

The Bill

6. The Bill seeks to amend EO and its subsidiary legislation to provide that –

² Section 85(3) of EO stipulates that "Subject to any rules made under subsection (1), no contribution or donation to or dividend or interest on a dividend from a provident fund shall be assignable or transferable or liable to be attached, sequestered or levied upon, for or in respect of any debt or claim whatsoever."

³ Section 58(1) of BO stipulates that "On the making of a bankruptcy order, the property of the bankrupt shall vest in the Official Receiver."

⁴ According to the LegCo Brief, Ng Shiu Fan's two applications for legal aid were refused on 16 August 2010 and 11 January 2011 respectively. Towards the end of August 2012, the Official Receiver's Office informed the Education Bureau that the Director of Legal Aid had granted legal aid to Ng to appeal against the judgement. As at the date of the LegCo Brief, appeal in Ng's case is still possible.

- (a) if a GSPF or SSPF member is an undischarged bankrupt of a bankruptcy adjudicated on or after the date when the proposed amendments come into operation, his right or entitlement to any benefits in the Fund are excluded from his property upon bankruptcy; and
- (b) in relation to a bankruptcy adjudicated on or after the date when the proposed amendments come into operation, in working out the period of three years from the date on which a GSPF or SSPF contributor's account is closed under rule 14(2) of GSPF Rules and SSPF rules, any time when the contributor is an undischarged bankrupt must be disregarded.

7. According to the Administration, the objective of the proposed amendments is to protect the benefits of GSPF and SSPF members such that in the event of bankruptcy of a GSPF/SSPF contributor, the right or entitlement of the contributor to any benefits in GSPF and SSPF would not be made available to the creditors and can be preserved for retirement purpose. The intended scope of protection under EO is consistent with that provided under MPFSO.

Consultation with the Panel

8. The Panel was briefed on the legislative proposal at the meeting on 11 December 2012. Members expressed support in principle and urged for early enactment of the Bill. Their major views are summarized below.

Introduction of the Bill

9. Members considered that teachers in grant schools and subsidized schools should be entitled to the same level of protection as their counterpart in government schools and the majority of the workforce in Hong Kong. In this connection, they noted that following the ruling of the Court of First Instance in the case Re. Ng Shiu Fan, the Administration had taken steps to amend MPFSO to put beyond doubt that the right or entitlement of a scheme member to any accrued benefits in a registered MPF Scheme derived from mandatory contributions would be excluded from the member's property for the purposes of BO. Hence, the accrued benefits would not vest in a trustee-in-bankruptcy in case of bankruptcy of the scheme member. As the relevant amendments to MPFSO had come into operation as early as 13 May 2011⁵, some members found it inconceivable that over 18 months had lapsed before EDB introduced similar amendments to EO and its subsidiary legislation to remove the disparity

⁵ See the Mandatory Provident Fund Schemes (Amendment) Ordinance 2011.

in protection. Members in general considered the proposed amendments long overdue.

10. As explained by EDB, it had been monitoring the progress of the court case Re. Ng Shiu Fan. In April 2010, leave was granted for the bankrupt teacher to appeal against the judgment of the Court of Appeal. It was noted that the bankrupt teacher had applied for legal aid twice in August 2010 and January 2011 which were refused. However, in August 2012, EDB was informed that legal aid had been granted to the applicant. EDB had taken steps to expedite the legislative exercise by commencing the drafting of the Bill despite the possibility of further appeal.

Retrospective effect (if any)

11. On the question of whether the proposed amendments, if enacted, would have any retrospective effect, the Administration advised that as a matter of principle, newly enacted legislation would not normally take retrospective effect. If a teacher-contributor of GSPF/SSPF was adjudicated bankrupt on a date after the commencement of the amendments under the Bill, his GSPF/SSPF benefits would not be vested in the trustee-in-bankruptcy in case of bankruptcy. However, if the bankruptcy order was issued on a date before the legislative amendments came into operation, the existing provisions in EO and GSPF/SSPF Rules would continue to apply.

Other concerns

12. Some members were of the view that the Administration should take the opportunity to also review holistically the legislation governing provident fund schemes of publicly-funded bodies, and where similar amendments were required, to introduce the amendments in a single exercise. According to EDB, apart from the GSPF/SSPF Rules, PO and PBO, employees of the education sector may also be enrolled in the registered MPF Schemes under MPFSO or defined schemes regulated under the Occupational Retirement Schemes Ordinance (Cap. 426) (“ORSO”). ORSO schemes are retirement schemes offered by employers for their employees on a voluntary basis. The rules of individual schemes define the detailed operation, and generally speaking, the forfeiture clause of scheme rules addresses the issue of protection in case of bankruptcy of scheme members.

13. At members' request, the Administration has provided information⁶ on the amount of SSPF benefits of teacher-contributors that were vested in the trustee-in-bankruptcy and the amount of employers' contributions forfeited in cases where the subsidized school teachers ceased to be employed on account of

⁶ See LC Paper No. CB(4)527/12-13(01).

professional misconduct or on being convicted of an offence.

Relevant papers

14. A list of relevant papers is at the **Appendix**.

Council Business Division 4
Legislative Council Secretariat
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List of relevant papers

Meeting	Date of meeting	Paper
Panel on Education	11.12.2012	CB(4)207/12-13(01) Minutes CB(4)527/12-13(01)
Legislative Council Brief	--	Legislative Council Brief issued by the Education Bureau

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