

LegCo Panel on Public Service

Follow-up to Meeting on 19 April 2004

Review of Civil Service Allowances

1. At the meeting of the LegCo Panel on Public Service held on 19 April 2004, the Administration briefed members on the progress of the comprehensive review of allowances for civil servants. Hon. Chan Yuen-han raised the question of whether the Administration had the authority to make changes to duty-related allowances when there was a change in circumstances and to make changes to fringe benefit type of allowances which were part of the terms of employment of the civil servants concerned. The Legal Service Division was asked to advise on these matters.

2. For the purpose of discussion in the Panel, the Administration has broadly divided civil service allowances into 2 categories, namely, duty-related allowances and fringe benefit type of allowances. According to the Administration, it is its established policy to keep civil service management system under review and to ensure that the continued provision of various allowances is justified and in line with present day circumstances. The Civil Service Bureau has been undertaking a comprehensive review of civil service allowances including those related to the performance of duties and those provided as fringe benefits (ref: para 2, LC Paper No. CB(1)1505/03-04(03)).

3. The relationship of the government and civil servants is contractual in nature (ref: *Choi Sum v. Attorney General* [1976] HKLR 609, and *Lam Yuk Ming v. Attorney General* [1980] HKLR 815). According to the evidence referred to in the Court of First Instance decision in *Lau Kwok Fai v. Secretary for Justice* (HCAL 177/2002, 10 June 2003), two standard clauses have for decades appeared in the memoranda on conditions of service of civil servants which provide to the effect that the government reserves the right to alter any of the terms of appointment and/or conditions of service of civil servants should the government at any time consider this to be necessary (para. 39 of the judgment).

4. With respect to the contractual obligations of the HKSAR government, Article 160 of the Basic Law provides that "... contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the Hong Kong Special Administrative Region,

provided that they do not contravene this Law".

5. Section 6 of Chapter IV (Articles 99 to 104) of the Basic Law contains specific provisions governing civil servants. In particular, Articles 100 and 103 provide that -

"Article 100

Public servants serving in all Hong Kong government departments, including the police department, before the establishment of the Hong Kong Special Administrative Region, may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before.

Article 103

The appointment and promotion of public servants shall be on the basis of their qualifications, experience and ability. Hong Kong's previous system of recruitment, employment, assessment, discipline, training and management for the public service, including special bodies for their appointment, pay and conditions of service, shall be maintained, except for any provisions for privileged treatment of foreign nationals."

6. It should be noted in the absence of any direct ruling made by the court on the question that whether allowances, be they duty-related or of fringe benefit type, may be unilaterally altered by the Administration, no definitive conclusion in law can be made with regard this particular question. Allowances, like pay, are generally regarded as terms of employment, therefore we may perhaps draw analogy from *Lau Kwok Fai's case*, a case which ruled on the lawfulness of Public Officers Pay Adjustments Ordinance 2002 (Cap. 574) and hinged on the Administration's authority to unilaterally reduce the pay of public officers.

7. From the information provided by the Administration to the Panel (LC Paper No. CB(1)1788/03-04(01)), various types of allowances have been reviewed and/or changed in the past, dating back to the early 1990s. For example,

(a) Fringe Benefit Type Allowances

- Overseas Education Allowances (1993/94 school year and 1996) (p.

6 of the attachment to LC Paper No. CB(1)1788/03-04(01));

- Housing and housing-related allowances (1990) (p. 7 of the attachment to LC Paper No. CB(1)1788/03-04(01)).

(b) Duty-related Allowances

- On-call duty allowance (1995) (p. 1 of the attachment to LC Paper No. CB(1)1788/03-04(01)).

8. It seems that reviews leading to increase or reduction of allowances of various natures have been part of the "system" of civil service in Hong Kong and arguably a condition of civil service employment before July 1997.

9. In *Lau Kwok Fai's case*, Hartman J.'s view was that the critical word in Article 103 was "system" (of recruitment, employment, assessment, discipline, training and management for the public service, including special bodies for their appointment, pay and conditions of service). He further held that -

"A system is defined by the fact that it consists of parts, those separate parts co-ordinating to make the whole. Some of those separate parts may change, they may be modified or replaced, but the system, seen as such, may continue as before. Whether it does continue or is materially changed so that it becomes another system is, of course, determined by the degree of internal change."
(para. 70 of the judgment)

10. It was held in *Lau Kwok's Fai's case* that the possibility of a reduction of civil service pay was inherent in both the mechanism and the principles relevant to that mechanism (para. 59 of the judgment). If this approach is taken, it seems that the Administration's efforts to rationalise the various types of allowances, like pay, as terms of employment, are also part of the "system" which the Basic Law seeks to protect. Hence, it seems that the Administration has the authority to make changes to duty-related and fringe benefit type of allowances which are part of the terms of employment of civil servants.

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