

For information
on 18 December 2003

LegCo Panel on Manpower

Tackling Wage Offences under the Employment Ordinance

PURPOSE

This paper briefs Members on the Administration's efforts to step up enforcement against wage offences.

LEGISLATIVE PROVISIONS

2. Employers have a statutory responsibility to pay wages. Sections 23, 24 and 25 of the Employment Ordinance (EO) (Cap.57) stipulate that wages should be paid not later than seven days after the end of the wage period, the day of completion of contract and the day of termination of employment respectively. An employer who fails to pay wages on time wilfully and without reasonable excuse commits an offence and is liable on conviction to a maximum fine of \$200,000 and imprisonment for one year.

ENFORCEMENT MEASURES

3. The Labour Department (LD) takes a serious view on non-payment or underpayment of wages by employers. Tackling wage offences is one of its prime tasks. To speed up investigation, we set up a new Employment Claims Investigation Unit (ECIU) in September 2002 and deployed more manpower to investigate cases of default payments of sums awarded by the Labour Tribunal (LT) and the Minor Employment Claims Adjudication Board (MECAB). Furthermore, Labour Inspectors and Occupational Safety Officers of the department proactively conduct targeted inspections to detect wage offences in trades such as the construction, catering, and retail industries, which tend to have more cases of unpaid wages. LD has also reinforced the number of its prosecuting officers by internal redeployment.

INVESTIGATION AND INSPECTION

Employment Claims Investigation Unit (ECIU)

4. The ECIU conducts in-depth investigation into suspected wage offences under the EO with a view to pursuing prosecution promptly and effectively in appropriate cases. Officers receive intensive training in investigation work including that provided by the Police, Department of Justice, and professionals in the legal and accounting fields.

5. As at end-October 2003, the Unit completed investigation of 410 cases, amongst which 340 cases involved late payment, non-payment or underpayment of wages. So far, the Unit has secured 170 convicted summonses on wage offences and 73 summonses are to be heard. More summonses will be issued in the coming months. Our enforcement effort has led some employers concerned to clear the outstanding amount of wages owed. Specifically, 50 employers (or 30% of the 165 investigated cases involving non-payment or underpayment of wages) paid the employees after ECIU commenced investigation. About 360 cases are still under investigation.

Workplace Inspections and Targeted Campaigns

6. Since March 2003, Labour Inspectors have been actively interviewing employees to detect wage offences in territory-wide routine inspections, which also cover employers' compliance with various statutory provisions, such as preventing illegal employment etc. Occupational Safety Officers also look out for non-payment of wages when inspecting construction sites on safety matters.

7. Since mid-2002, Occupational Safety Officers have launched two special campaigns to detect wage offences in construction sites. So far, 79 employees in 30 sites have reported that employers owed them wages.

8. At the same time, Labour Inspectors conducted two inspection campaigns targeted at the catering and retail trades to uncover wage offences. The wage campaign to 3 016 eating places detected suspected wage offences in 53 establishments and resulted in the conviction of 45 summonses. A total of 33 employees in six establishments got back their wages and other statutory benefits subsequent to our investigation. The

campaign to 6 288 retail shops revealed wage offences in 26 establishments and the cases are under further investigation.

Investigation of LT/MECAB Defaulted Payments

9. Labour Inspectors assist in investigating cases in which the employer defaulted payment of LT or MECAB awards. In the first ten months of 2003, the department recommended 128 cases for prosecution of wage offences in which the employer defaulted payment of such awards. Of these cases, 116 summonses were heard and 97 summonses were convicted. Furthermore, 43 employees got back their wages and other statutory benefits during our investigation and subsequently declined to serve as prosecution witnesses.

Underpayment of Wages to Foreign Domestic Helpers (FDHs)

10. In January 2003, a special task force comprising representatives of LD, Immigration Department and Police was set up to map out strategies for combating underpayment of wages to FDHs by employers and malpractices of employment agencies (EAs) such as aiding and abetting employers to underpay FDHs. The task force has enhanced exchange of intelligence on suspected offence cases of underpayment, planned enforcement actions against EAs and stepped up publicity to educate employers and EAs not to breach the law.

11. If there is sufficient evidence of wage underpayment and the FDHs concerned are willing to act as prosecution witnesses, LD will prosecute the employers concerned.

12. LD has spared no efforts in publicizing the Minimum Allowance Wage and encouraging FDHs to approach us for assistance in case of wage underpayment and to act as prosecution witnesses. We have organized briefings for FDHs and distributed pamphlets on employment rights in their native languages through multiple channels. We also keep close contact with the consulates and migrant worker groups to solicit their assistance in encouraging FDHs to lodge complaint on underpayment of wages. Since early 2003, we have put in place an intelligence system with migrant worker groups and non-government organizations to facilitate FDHs to report wage underpayment cases. So far, we have received eight referrals involving 11 FDHs.

LD'S PROSECUTION EFFORTS AND OUTCOME

13. LD will consider to take out prosecution whenever there is sufficient evidence to establish a wage offence. We will also apply to the Magistrate under section 65 of the EO to order payment of wages owed. For non-payment of any sums ordered by the court, the Magistrate may issue a summons or warrant under sections 101 and 101A of the Magistrates Ordinance, hear the explanation of the offender for non-payment (if any), extend the grace period if the offender is of insufficient means, or imprison the offender in accordance with the scale provided under section 68 of the same Ordinance. Enforcement of the court order is undertaken by the Judiciary.

14. In the first ten months of 2003, a total of 496 summonses for wage offences were heard as compared to 156 in the same period last year. The total number of successful convictions, at 386, amounted to a significant 261% increase over the same period last year, and far exceeded the full-year figure of 139 in 2002. The highest fine recorded in a case was \$50,000 and the employer was ordered to clear outstanding wages of \$95,604. This significant increase in successful convictions came in the wake of LD's decision to step up prosecution of wage offences and set up the ECIU.

15. We also recorded the first case in which a company director of a limited company was convicted for failure to pay wages before the statutory time limit. Section 64B(1) of the EO stipulates that where any wage payment offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officers of the body corporate, the director, manager, secretary or other similar officer shall be guilty of the like offence. The director concerned was fined \$10,000 and the two companies involved were fined \$10,000 in total.

16. In the first ten months of 2003, we secured convictions of 24 summonses involving three employers for underpaying their FDHs as compared to no conviction in 2002. The highest fine against one employer was \$22,000.

17. In June 2003, the Immigration Department prosecuted an employer for conspiring with an employment agency to defraud the

Department by paying his FDH wages below the Minimum Allowable Wage. The employer was convicted and sentenced to four months' imprisonment and ordered to compensate his FDH. The Immigration Department later arrested the operator/licensee of the employment agency who was the broker of the illicit acts. She was convicted of the same conspiracy offence in October 2003 and sentenced to three months' imprisonment. The Administration will continue its efforts to combat underpayment of wages of FDHs.

CONSTRAINTS IN PROSECUTING WAGE OFFENCES

18. There are practical difficulties and factors that are beyond LD's control in prosecuting wage offences under the EO.

19. First, for wage offences, the prosecution has to prove the employer-employee relationship and the wages due to the employee. Given that such cases often involve a one-to-one situation, the employee will have to serve as a witness to testify in court the employment relationship and the wages owed. Where the employee refuses or changes his mind to serve as a witness for the prosecution, the case cannot proceed. Indeed, we have to abort a number of prosecutions at the last minute for this reason.

20. Second, in a criminal prosecution, the standard of proof is very high: the prosecution has to prove every element of an offence beyond reasonable doubt. If the court accepts that the employer has a reasonable excuse or his wilfulness cannot be established, or the credibility of the evidence given by the prosecution witness is in doubt, the wage offence cannot then be established to be beyond reasonable doubt. In such an event, the court will dismiss the summons(es).

21. Third, under section 186 of the Companies Ordinance, no prosecution action should be proceeded with against the company once the court has made a winding-up order. Hence, there are incidences in which LD has to offer no evidence after a court has ordered the winding up of the company concerned.

22. Finally, there are cases in which the summons(es) could not be served on the employer both by mail and by personal service as arranged by the court. In such cases, while we have attempted the address provided by the employee, the information as recorded in the Companies Registry

and any other lawful source that is relevant to the case, some of these attempts proved futile in the end.

EDUCATION AND PROMOTIONAL ACTIVITIES

23. LD has strengthened its educational and promotional efforts to remind employers of their statutory obligation to pay wages on time and to alert them of the penalty clauses and successful conviction cases. We also educate employees on their right to lodge claims and the importance of serving as prosecution witnesses.

24. Our publicity and promotional efforts are continuous and include :

- distributing leaflets and posters to employers and employees during inspection visits to workplaces, at various LD offices and the LT;
- disseminating relevant messages to employers, employees, trade unions and employers' associations at seminars, through LD's nine industry-based tripartite committees and 18 human resources management clubs, and the media;
- appealing to trade unions and labour groups for their assistance in encouraging employees to be prosecution witnesses;
- establishing special reporting systems with trade unions in the construction industry and migrant worker groups/non-governmental organizations to facilitate them in referring complaints on wages underpayment or non-payment promptly to LD for follow-up action;
- publicizing conviction results through the media; and
- promoting the keeping of wage and employment records to help minimize disputes on wages and facilitate settlement of such disputes through seminars and the media. To this end, a new booklet would be produced in December 2003 to drive home the messages.

CONCLUSION

25. Tackling wage offences, especially blatant ones, ranks high on LD's agenda. We have made clear to the community our determination to stem out wage offences. More employees are now aware of their rights. They are more willing to seek help from LD and come forward as prosecution witnesses. Our strenuous efforts to step up prosecution and publicity have also created a deterrent effect on employers who attempt to evade liabilities to pay wages. The high level of prosecutions taken and summonses convicted for the first ten months of 2003 on wage offences was unprecedented and demonstrated our resolve to protect employees' statutory rights.

26. We will continue to rigorously enforce the wage provisions under the EO through inspections, targeted campaigns, investigations and prosecutions and to educate members of the public. We believe that the problem of wage offences would improve over time as a result of our all-out efforts and as the economy improves.

Labour Department
Economic Development and Labour Bureau
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