

For discussion on
24 April 2008

Legislative Council Panel on Manpower

Enforcement of Labour Tribunal Awards

PURPOSE

This paper sets out the views collected on some improvement measures put forward by various stakeholders to assist employees in enforcing Labour Tribunal (LT) awards and seeks members' views on the matter.

BACKGROUND

2. The LT was set up in 1973 under the Labour Tribunal Ordinance, Cap 25, to provide a fast, inexpensive, simple and user-friendly forum for adjudicating employment-related civil claims. The approach to and modes of execution of LT awards are nevertheless no different from civil remedies awarded by other parts of the Judiciary. As in the case of all civil actions, the litigating parties bear the responsibility of enforcing the judgment if it is not complied with. On modes of execution, the common choices are:

- (a) a Charging Order against the landed properties of the judgment debtor;
- (b) a Garnishee order so that monies held by a third party (such as a bank) for the judgment debtor can be applied to satisfy the award; and
- (c) a Writ of Fieri Facias to seize the goods and chattels on the premises of the judgment debtor (commonly referred to as use of bailiff service).

3. Like judgment creditors with little means, the employees have little leverage to ensure efficacy of the above modes. A Charging Order may not provide a genuine and timely relief especially if the judgment debtor does not have any property under his name or does not seek to sell his property. The prerequisite of resorting to a Garnishee Order will be knowledge of the whereabouts of the monies of the judgment debtor. An employee may have little access to such details, however. Bailiff service has not been very

effective as items seized, if any, are often of little value. On top of these is, of course, the cost involved (e.g. possible legal fees for Charging and Garnishee Orders and a deposit of \$5,200 for bailiff service, in addition to other administrative costs).

4. Like creditors of other civil debts, the employee may also choose to file a winding-up or bankruptcy petition against the defaulting employer, which exerts pressure on him to pay up to avoid being forced out of business. In doing so, an employee may apply for assistance from the Legal Aid Department, subject to his passing the means and the merits tests. Some unscrupulous employers, however, have effectively thwarted employees' attempt to proceed with such proceedings by paying off only those who are granted legal aid but not those who are not. Employees who are not eligible for legal aid will usually have to engage lawyers in private practice to assist in initiating the winding-up or bankruptcy proceedings, which typically costs around \$40,000 to \$50,000. The relatively high cost tends to discourage employees, particularly those with limited financial means or those whose awarded sum is small, from taking recovery action through this channel.

5. In respect of an insolvent employer who has defaulted LT awards, employees can seek relief by applying for ex gratia payment from the Protection of Wages on Insolvency Fund (PWIF). However, in respect of a defaulting employer who is solvent and whose business is still in operation, employees can only rely on the means of civil claim enforcement outlined in paragraphs 2 and 4 above.

6. Nevertheless, Labour Department (LD) believes that vigorous enforcement would help deter employers from committing wage offences and thereby helping to reduce the incidence of defaulted LT awards. Therefore, as an integral part of its law enforcement work, LD institutes criminal prosecutions vigorously against defaulting employers. For instance, 960 convicted summonses on wage offences were secured in 2007, an increase of 22% over 2006. If the employer is a limited company, we will, apart from prosecuting the company for wage offences, also prosecute the responsible persons of the company for a like offence. In 2007, we secured 126 convicted summonses against responsible persons of companies, up 83% over 2006. However, owing to the established principle of the separation of civil and criminal actions, successful prosecutions against the employer and the responsible persons do not imply recovery of outstanding LT awards by employees.

7. As an administrative measure, LD also suspends the provision of free recruitment service to employers who are known to us to have defaulted on LT awards until the payment is settled.

IMPROVEMENT MEASURES PUT FORWARD BY VARIOUS STAKEHOLDERS

8. LD has all along accorded priority attention to the enforcement of LT awards, as reflected by the enhanced enforcement and administrative actions outlined in paragraphs 6 and 7 above. The Labour Advisory Board (LAB), Members of the Legislative Council (LegCo) as well as different employee and employer groups have also expressed concern and exchanged views with LD. Listed below are options that labour groups and other concerned parties have put forward informally on how the enforcement of LT awards could be improved.

(A) Measures to deter non-compliance

Option I

- Making non-compliance of LT awards a criminal offence

Option II

- Imposing punitive surcharge on defaulting employers

Issues involved

- Both options seek to provide greater deterrence against those employers who are able but unwilling to pay up.
- LT awards would in effect be treated differently from awards made by other civil courts such as the Small Claims Tribunal. The point has been made that as failure to pay wages and other statutory entitlements amounts to a criminal offence as stipulated under the Employment Ordinance, this sets employment claims apart from other civil claims.

(B) Measures to facilitate employees in the enforcement process

Option III

- Relaxing/waiving the means test of legal aid for employees seeking to file winding-up/bankruptcy petition against the defaulting employer

OR Granting discretionary power to the Director of Legal Aid to waive the means test for such employees.

Option IV

- Waiving/reducing the execution cost for bailiff service for employees with defaulted LT awards

Option V

- Empowering the LT to make an order requiring the defaulting employer to reveal his financial details

Issues involved

- Option III would have across-the-board implications for other applicants for legal aid.
- Option V would entail amendment to the Labour Tribunal Ordinance and may also have personal data and privacy implications if the employer is an individual.

(C) Measures to provide financial relief to employees concerned

Option VI

- Extending the coverage of the PWIF to defaulted sums awarded by LT

Issues involved

- It is the employers' responsibility to pay wages and other entitlements to the employees. The PWIF is meant to provide a safety net in the event of the employer becoming insolvent. Invoking the PWIF in circumstances other than the insolvency of the employer would encourage unscrupulous employers to shirk their statutory obligation to pay wages and other entitlements while continuing in business. There is also the real risk of abuse and possible collusion between the employer and his employees.

(D) Other measures

Option VII

- Conducting an overall review of enforcement of court judgment in civil cases

Issues involved

- As the execution procedures of LT are in fact an application of those procedures generally applicable to the enforcement of all civil judgments and not just those made under the Labour Tribunal, some Members of the LegCo Panel on Administration of Justice and Legal Services and the Law Society of Hong Kong have requested the Administration to conduct an overall review on the enforcement of civil judgments.

CONSULTATION WITH LABOUR ADVISORY BOARD

9. The LAB discussed at its meeting on 16 April 2008 the improvement measures put forward by various stakeholders as set out in paragraph 8 above. Members noted the complexity and potential read-across implications of such measures. They felt strongly about the need to tackle the problem of non-compliance with LT awards and agreed that the Labour Department should further examine the measures in consultation with other Government bureaux and departments and relevant organizations, and revert to the LAB as soon as possible.

ADVICE SOUGHT

10. Members' views are invited on the improvement measures put forward by various stakeholders as set out in paragraph 8 above.

Labour and Welfare Bureau
Labour Department
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