

For information on
8 July 2008

Legislative Council Panel on Manpower
Enhancement Measures on
Enforcement of Labour Tribunal Awards

PURPOSE

This paper briefs Members on the progress in identifying measures to enhance the enforcement of Labour Tribunal (LT) awards with particular focus on employers who are financially able but unwilling to pay.

BACKGROUND

2. Set up in 1973, LT has exclusive jurisdiction on employment-related civil claims. Being civil in nature, LT judgments in employees' favour would need to be enforced by the employees themselves. With little means, some employees have great difficulties to ensure payment by defaulting employers.

3. The Labour Department (LD) has adopted a multi-pronged approach to assist employees aggrieved by defaulted LT awards. If the employer is insolvent, LD will refer them to the Legal Aid Department (LAD) to initiate a winding-up or bankruptcy petition against the employer and to apply for ex-gratia payment from the Protection of Wages on Insolvency Fund (PWIF). To speed up the processing of application for PWIF, LD has also streamlined application procedures.

4. As an integral part of its law enforcement work, LD carries out vigorous enforcement to deter employers from committing wage offences, thereby helping to reduce the incidence of defaulted LT awards. In 2007, a total of 960 summonses on wage offences were convicted, representing 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.

5. As an administrative measure, LD has also suspended the provision of free recruitment service to those employers who are known to us to have defaulted LT awards until the payment is settled. In addition, noting that some of the employees aggrieved by LT defaults may not be fully aware of the different avenues for enforcing civil award and seeking assistance, LD is putting in place an arrangement whereby an officer in each of its Labour Relations Division branch offices will, in addition to his existing duties, assume the role of 'Award Enforcement Support Officer' to provide necessary information and appropriate assistance to employees with defaulted payment of LT award. The officer will provide relevant information on various modes of executing the LT award, assist in the application procedures of the PWIF and make appropriate referrals to other government departments, including the LAD and the Social Welfare Department, for assistance.

6. To further enhance the enforcement of LT awards, the Labour Advisory Board and the LegCo Manpower Panel discussed and exchanged views on the various proposals informally floated by various stakeholders in April 2008. Arising from the discussion of the Manpower Panel on 24 April 2008, the Labour and Welfare Bureau (LWB) and LD have explored the matter thoroughly with relevant bureaux and departments and have now come up with the way forward.

BROAD THRUST OF THE WAY FORWARD

7. We consider it important to distinguish between two types of LT defaults – cases in respect of which employers are financially unable to pay, and cases in respect of which employers are financially able but unwilling to pay. For the former, recourse to the PWIF is the key. For the latter, insolvency is not the crux; instead, the focus should be on the identification of measures that would help deter employers from acting irresponsibly.

8. After thorough deliberation, the Administration has identified the following three measures as viable, effective and thus merit adoption:

- (a) Making non-compliance with LT awards a criminal offence;
- (b) Empowering LT to order defaulting employers to pay additional sums to the employees; and
- (c) Empowering LT to order disclosure of the financial details of defaulting employers.

9. The following paragraphs set out our rationale behind the proposals.

(A) Making non-compliance with LT awards a criminal offence

10. Under the Employment Ordinance (EO), default of wages and other statutory entitlements is criminal in nature. This already distinguishes LT defaults from other civil debts. We consider it not inconsistent with the tenor of the EO to make default of LT award an offence. We believe that this would go a long way towards deterring employers from disregarding LT judgments.

11. Nevertheless, we also note that, even under the EO, the mere existence of *actus reus* (i.e. guilty act) by failure to observe statutory obligations is primarily a necessary but not sufficient condition for finding an employer criminally liable. For Hong Kong to continue to thrive as a business centre, we must uphold certain important principles such as proof of *mens rea* (i.e. guilty intent) as a cardinal requirement for conviction and that possible unintended harm would not be done to innocent businessmen.

12. In other words, our aim is to make wilful non-compliance of LT award an offence. To go a step further, we intend also to hold directors and other persons responsible for the management of the company criminally liable if they are also proven to have contributed to the breaches in question. We shall hold further discussion with the Department of Justice (DoJ) with a view to thrashing out the legislative and implementation details.

(B) Empowering LT to order defaulting employers to pay additional sums to the employees concerned

13. Currently, employees aggrieved by defaults in payment of LT awards involving short payment of wages and relevant statutory benefits can apply for ex-gratia payment from the PWIF. The PWIF is funded by a levy imposed upon company registration and payment from it can only be triggered upon the filing of bankruptcy/winding-up petitions. Under the Companies Ordinance, Cap. 32 and the Bankruptcy Ordinance, Cap. 6, the petition can only be filed where the amount owed is at least \$10,000. Employees owed less than this are thus barred from filing petitions. This is unfortunate because frequently they belong to the low-income group that has little savings.

14. Under the Labour Tribunal Ordinance, Cap. 25, an interest¹ can be incurred to whole or part of the sum awarded by LT if it is not paid on time. However, experience suggests that the amount of such interest may not be sufficient to deter irresponsible employers from delaying payment. As an additional financial disincentive against defaulting employers delaying payment of awards and in compensation to the victims, the Administration will explore making legislative amendments to allow LT to order an additional sum to the employee from the date of order up to the date of full and final payment by the employer. This measure would be particularly helpful to an employee with a relatively small awarded sum so as to enable him, over time and should the default situation be protracted, to reach the threshold of \$10,000 for filing a winding-up or bankruptcy petition.

(C) Empowering LT to order disclosure of the financial details of defaulting employers

15. The current modes of executing civil remedies, including LT awards, 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).

16. The efficacy of the execution modes outlined in paragraph 14 greatly hinges on the knowledge of the availability and whereabouts of the assets and properties of the judgment debtor. For instance, a Charging Order may not provide genuine relief if the judgment debtor does not have any property under his name or does not seek to sell his property. The prerequisite of a Garnishee Order is knowledge of the whereabouts of the monies of the judgment debtor. Resorting to bailiff service may not be a very effective means in recovering the debt if the assets of the judgment debtor are of little value. However, an employee often has little access to such financial details. Moreover, an employee seeking to have LT judgment in his favour by whichever of the above modes would have to incur expenses.

¹ Under s.39 of the LTO, an award shall carry interest on the aggregate amount thereof, or on such part thereof as for the time being remains unsatisfied, from the date of the award until satisfaction. The rate of interest shall be the rate fixed by the Chief Justice by notice in the Gazette under s.50 of the District Court Ordinance, Cap. 336. The interest rate is 8.353% per annum with effect from 1.7.2008.

17. The Administration therefore proposes to confer LT the power to require a defaulting party to disclose his financial details. It would enable an employee to make an informed decision as to whether to proceed with the recovery action; and if so, which execution mode (e.g. Charging Order, Garnishee Order or Writ of Fieri Facias) would best suit his situation. Not only would the employee be able to save unnecessary expenses, his chances of successful recovery of the debt should also be enhanced.

NEXT STEPS

18. The above represents the outcome of the Administration's collective deliberation on the possible way forward. All three proposals involve legislative changes and possibly changes to some established procedures. The Administration attaches great importance to clamping down on the irresponsible employers who are *financially able but unwilling* to honour LT awards. LWB and LD will continue to work in earnest with relevant bureaux and departments with a view to introducing the above measures as soon as practicable.

19. Members are invited to note the content of this paper.

Labour and Welfare Bureau
Labour Department
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