

For information on
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Legislative Council Panel on Manpower

Findings on A Review of Section 64B of the Employment Ordinance on the Criminal Liability of the Responsible Persons of a Body Corporate with regard to Wage Offences

Purpose

This paper informs Members of the findings of a review conducted by the Labour Department (LD) on section 64B of the Employment Ordinance (EO) on the criminal liability of the responsible persons of a body corporate with regard to wage offences.

Background

2. Regarding the criminal liability of the responsible persons of a body corporate, section 64B of the EO stipulates that :

“Where an offence under section 63B or 63C 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 officer of the body corporate, the director, manager, secretary or other similar officer shall be guilty of the like offence.”

3. Thus, under the existing section 64B provisions, the responsible persons of a body corporate, including directors, managers and secretaries or other similar officers (“the responsible persons”), would be held criminally liable if a wage offence committed by the body corporate is proved to have been committed with either one of the three elements of the offence, namely “consent”, “connivance”, or “neglect”.

4. After a spate of restaurant closure cases that took place in early 2005, there have been calls by some labour groups that the EO should be amended in such a way as to make it easier to hold company directors criminally liable for wage offences. At a meeting in February 2006, the Labour Advisory Board (LAB) endorsed that a review of section 64B be conducted. LD sought the advice of the Department of Justice in conducting the review. We have now completed the review and the findings are set out in paragraphs 5-8 below.

The review findings

5. We have examined the feasibility of amending the existing section 64B in the following manner :

- (A) To add “act without reasonable excuse”, or “failure to act without reasonable excuse” as the elements of offences, in addition to the existing ones, namely “consent”, or “connivance”, or “neglect”, for holding the responsible persons criminally liable for wage offences committed by a body corporate;
- (B) To add a presumption clause such that all the responsible persons would be presumed to be criminally liable for wage offences committed by a body corporate, unless they have taken all practicable or reasonable steps to prevent the commission of wage offences;
- (C) To remove the required elements of offences, i.e., “consent”, or “connivance”, or “neglect”, so as to hold all responsible persons strictly liable criminally for wage offences committed by the body corporate.

6. Scenario (A) is based on a suggestion from some labour groups that a company director should be held criminally liable if he has failed to pay wages on behalf of the body corporate without reasonable excuse. However, legal advice is that the addition of the two proposed elements, i.e., “*act without reasonable excuse*”, or “*failure to act without reasonable excuse*”, would not in any way lessen the burden of proof on the prosecution for establishing section 64B offences. Furthermore, it is noted that the three existing elements of offence under section 64B should already cover scenarios under which wage offences committed by the body corporate should be attributable to the unreasonable acts of the responsible persons. In other words, it would be quite redundant to add the two more elements under scenario (A). This is because “consent” and “connivance” should have adequately dealt with the scenarios where the responsible persons’ acts were “without reasonable excuse”, whereas “neglect” should have already covered the scenarios where such persons “failed to act without reasonable excuse”.

7. As for scenarios (B) and (C), they would likely be in conflict with the Hong Kong Bill of Rights Ordinance (Cap. 383) and the Basic Law. The effect of both scenarios is that all the responsible persons would be presumed to be liable (in the case of scenario (B)), or be strictly liable (in the case of scenario (C)), for the wage offences committed by the body corporate, regardless of their roles in decision-making, financial control and the wage default incidents in question. Although scenario (B) provides that a responsible person would not

be liable if he can put forward contrary evidence, the “presumption clause” therein would violate the legal principle that the burden of proof should be placed on the prosecution rather than the defendant. Under both scenarios, strict criminal liability would in effect be imposed on those responsible persons who may not have control over the management and finance of the body corporate, or may have no role to play in the wage default incidents, even though some of them may just be employees of managerial or supervisory level who are also owed wage payment. It is not considered fair and reasonable that the responsible persons of a body corporate should be held criminally liable under those circumstances.

8. The review findings suggest that there is no need to amend the existing section 64B for the purpose of stepping up prosecution against the responsible persons of a body corporate for wage offences, as the elements of offences in the existing provisions can already cover all scenarios under which wage offences committed by a body corporate should be attributable to the unreasonable acts of such persons. Operational experience over the past two years tends to support this view. It suggests that the enforcement difficulties previously encountered by LD did not arise out of any inadequacies or loopholes in the existing provisions of section 64B, but rather due to problems which could largely be overcome by non-legislative means set out in paragraphs 9-12 below.

New measures to step up prosecution

9. In parallel with the above-mentioned review, LD has reviewed its modus operandi with regard to the enforcement of section 64B. A key finding of this operational review is that the main reason why there were relatively few convictions against the responsible persons in the past was due to problems such as insufficient evidence on the roles of responsible persons, inadequate documentary evidence such as wage and employment records and financial documents, and difficulties in locating the responsible persons for serving summonses. In other words, the main problem lies in the collection of evidence and technical issues, which could not be resolved by amending the legislation.

10. To address the enforcement difficulties identified, we have revised our investigation strategies and deployed more resources to target enforcement action against responsible persons for wage offences. First, we have stepped up publicity (through leaflets, media interview and press releases, etc.) to encourage more employees to be prosecution witnesses (PWs) in section 64B cases, and to alert the responsible persons to the relevant provisions and conviction cases as well as the penalties which may befall them if the body corporates did not pay wages to employees in accordance with the EO.

11. Second, since the latter half of 2005, LD has employed six ex-police officers as Investigation Officers (IOs), and one Senior Police Superintendent as Investigation Advisor (IA), so as to strengthen our capability in evidence collection and intelligence gathering. In handling suspected section 64B cases, IOs conduct investigation proactively at an early stage, whereas IA renders advice and guidance on such action. New enforcement strategies have been adopted, as follows:

- (a) Once a major insolvency case occurs, IOs would conduct proactive investigation immediately by paying site visits.
- (b) To identify the responsible persons liable for section 64B offences, IOs would interview as many key persons as possible at an early stage. They would reach out to company directors, shareholders, managers, supervisors and personnel and accounting staff, etc, to gather evidence.
- (c) IOs would seize documentary evidence such as wage and employment records, books of account, financial/bank statements promptly.
- (d) If the whereabouts of the responsible persons are unknown, IOs would help locate them through various means such as visiting other establishments still operated by them, contacting parties who may have their new addresses.
- (e) IOs would actively encourage employees who have knowledge of the financial position of the body corporate and the roles of the responsible persons to be PWs.

12. Third, LD has also stepped up staff training to enhance the investigation skills of our law enforcement officers. IA and outside experts such as lawyers, accountants and lay prosecutors have conducted training for our staff covering various topics such as criminal laws, statement-taking, evidence collection, inspection of questioned documents, analysis of financial documents, prosecution proceedings, and mock trials.

Results of enforcement action

13. With the implementation of the new measures, LD has recorded a more than sevenfold increase in the number of convicted summonses against the responsible persons of body corporates for wage offences from 8 in 2005 to 69 in 2006. In January to November 2007, 115 convicted summonses were recorded, which increased by 156% over that of the same period of 2006. Moreover, eight company directors were given jail/suspended jail sentence or subject to community service order in 2006 and January to November 2007.

14. The much enhanced enforcement efforts mentioned above have sent a strong message to the responsible persons of a body corporate that LD takes a serious view on wage offences. We note that in quite a number of recent insolvency cases, the responsible persons were more ready to clear wages owed by the body corporate on knowing the serious consequences of contravention of section 64B of the EO.

Conclusion

15. Our review of section 64B of the EO suggests that the provisions in their present form are adequate in enabling LD to take out effective enforcement actions against the responsible persons of a body corporate. Amendment from the legal perspective is thus not necessary. Furthermore, the new and non-legislative measures and the resultant sharp increase in the number of convicted summonses suggest that our previous enforcement problems (re. paragraph 9 above) have largely been addressed. Indeed, LD has progressively built up the necessary expertise in prosecuting responsible persons whose acts had contributed to the evasion of wage liabilities by the body corporates concerned. We would continue with our vigorous enforcement actions against the responsible persons of a body corporate in deserving cases.

16. Members of the Labour Advisory Board were informed of the review findings on 10 December 2007. They supported the review findings that there is no need to amend section 64B.

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