

立法會
Legislative Council

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by the Administration)

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Bills Committee on Employment (Amendment) Bill 2009

Minutes of meeting
held on Thursday, 16 July 2009, at 4:30 pm
in Conference Room A of the Legislative Council Building

Members present : Hon Alan LEONG Kah-kit, SC (Chairman)
Hon LEE Cheuk-yan
Hon LEUNG Yiu-chung
Hon LI Fung-ying, BBS, JP
Hon Tommy CHEUNG Yu-yan, SBS, JP
Hon WONG Kwok-hing, MH
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon LEUNG Kwok-hung
Hon WONG Ting-kwong, BBS, JP
Hon Ronny TONG Ka-wah, SC
Hon Cyd HO Sau-lan
Hon WONG Sing-chi
Hon IP Wai-ming, MH
Hon Paul TSE Wai-chun

Members absent : Dr Hon LAM Tai-fai, BBS, JP
Hon IP Kwok-him, GBS, JP

Public Officers attending : Item II
Mr Byron NG
Assistant Commissioner for Labour (Labour Relations)

Mr Ernest IP
Chief Labour Officer (Labour Relations)

Miss Bonny WONG
Senior Labour Officer (Labour Relations)1

Miss Betty CHEUNG
Senior Assistant Law Draftsman

Miss Emma WONG
Senior Government Counsel

Clerk in attendance : Mr Raymond LAM
Chief Council Secretary (2) 1

Staff in attendance : Ms Clara TAM
Assistant Legal Adviser 9

Mrs Eleanor CHOW
Senior Council Secretary (2) 4

I. Election of Chairman

Mr Alan LEONG was elected Chairman of the Bills Committee.

II. Meeting with the Administration

2. The Bills Committee deliberated (index of proceedings attached at **Annex**).

3. The Administration was requested to -

- (a) explain the legal basis and justifications for criminalizing an employer for non-payment of the sum awarded by the Labour Tribunal (LT) and Minor Employment Claims Adjudication Board (MECAB), including information on unenforced LT/MECAB awards, and whether it would impact on defaults of other civil judgments as well, in particular when the Employment Ordinance (EO) had been effective in combating wage offences;
- (b) explain the approach adopted for drafting the proposed section 43N(1) by setting out the entitlements underpinned by criminal elements in EO instead of making reference to Part XIII of EO regarding offences of EO;

- (c) provide more information on the entitlements of employees covered in EO but not in the proposed section 43N(1);
- (d) consider specifying non-payment of wages in lieu of notice and defaulted contribution of mandatory provident fund as entitlements of employees under the proposed section 43N(1);
- (e) explain the procedures and time taken to investigate a complaint lodged by an employee with defaulted LT/MECAB awards and to institute criminal proceedings against the defaulting employer;
- (f) consider whether the approach adopted for the proposed sections 43Q(3), (4) and (5) should also be adopted for section 64B of EO;
- (g) advise whether the presumption provisions in the proposed sections 43Q(3) and (4) were proportionate and consistent with the Basic Law;
- (h) advise whether there was safeguard to protect the interests of directors or responsible persons of a body corporate and a partner in a firm, given that the element of "ought to have known" in the proposed sections 43Q(3) and (4) would assist the proof of prosecution, and explain the procedures for the safeguard, if any;
- (i) advise whether a partner in a firm would be subject to two counts of offence under the proposed sections 43P and 43Q respectively; and
- (j) consider listing out all reasonable excuses in the proposed section 43P(1)(b) for the avoidance of doubt.

III. Dates of future meetings

4. Members agreed that the next two meetings would be held in October 2009 to discuss the Administration's response to the above issues raised by members and to receive the views of deputations on the Bill. Members also agreed that representatives of employer and employee associations would be invited to give views on the Bill.

(Post-meeting note: With the concurrence of the Chairman, the next two meetings would be held on 12 October 2009 at 4:30 pm and 27 October 2009 at 2:30 pm to meet with deputations and the Administration respectively.)

5. The meeting ended at 6:39 pm.

Council Business Division 2
Legislative Council Secretariat
9 September 2009

**Proceedings of meeting of the
Bills Committee on Employment (Amendment) Bill 2009
on Thursday, 16 July 2009, at 4:30 pm
in Conference Room A of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action Required
000000 - 000153	Hon LEE Cheuk-yan Hon LI Fung-ying Hon Alan LEONG	Election of Chairman	
000154 - 000314	Chairman	Opening remarks	
000315 - 001404	Chairman Admin	<p>Briefing of the Administration on the Bill</p> <p>Object of the Bill -</p> <p>To create a new offence targeting at employers wilfully defaulting payment of certain awards made by the Labour Tribunal (LT) and the Minor Employment Claims Adjudication Board (MECAB) so as to achieve additional deterrence and enhance employees' protection</p> <p>Important principles -</p> <p>(a) need to be cautious in limiting the scope of offence - the sole basis of criminalization of LT defaults lay in the criminal liability already existing under the Employment Ordinance (EO) on defaults of wages and certain other entitlements; and</p> <p>(b) need to strike a pragmatic and reasonable balance between the importance attached by employees on effectiveness in catching the culpable employers and the employers' concern about netting in innocent businessmen</p> <p>Proposed key components -</p> <p>(a) the offence be applied to any LT/ MECAB award comprising</p>	

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		<p>wages and entitlements underpinned by criminal elements under EO;</p> <p>(b) an employer wilfully and without reasonable excuse failing to pay any sum payable under an LT/ MECAB award referred to in paragraph (a) within 14 days from the date on which the sum is due commits an offence and is liable for a maximum penalty of \$350,000 and three years' imprisonment; and</p> <p>(c) a director or responsible person proved to have given consent, connivance or been neglectful of the default by the body corporate could be liable for the same offence; a presumption is proposed on the consent, connivance or neglect of a director or responsible person if he is proved to be concerned in the management or knew or ought to have known about the award, and the presumption may be rebutted if sufficient evidence is adduced to raise an issue of absence of consent, connivance or neglect and the prosecution could not prove consent, connivance or neglect beyond reasonable doubt</p>	
001405 - 002503	Chairman Hon WONG Kwok-hing Admin	<p>Issues raised by Hon WONG Kwok-hing -</p> <p>(a) whether the rebuttable presumption provision in the proposed section 43Q(5) would render prosecution against directors and responsible persons of a body corporate difficult; and</p> <p>(b) why contribution of mandatory provident fund (MPF) on the</p>	

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		<p>part of employer was not included in the "specified entitlements" in the proposed section 43N(1) so as to make him liable to criminal offence for defaulting payment</p> <p>Response of the Administration that -</p> <p>(a) the rebuttable presumption in fact assisted to alleviate the prosecution difficulties in cases where an employee had limited knowledge of the role of director or responsible person at the time of default (e.g., due to the long time lapse after the employee left the company or the award having been made ex-parte); and</p> <p>(b) the new offence was entailed under EO to cover the default of LT/MECAB awards comprising wages and entitlements underpinned by criminal elements under EO only</p>	
002504 - 003629	Chairman Hon LEE Cheuk-yan Admin	<p>Issues raised by Hon LEE Cheuk-yan -</p> <p>(a) coverage of the "specified entitlements" in proposed section 43N(1);</p> <p>(b) whether an employer could be prosecuted on wage offence under EO as well as defaulting LT or MECAB awards under the Bill;</p> <p>(c) the procedures for instituting legal proceedings against employers for LT defaults; and</p> <p>(d) purpose of the presumption provisions in the proposed section 43Q(3) and (4) and the rebuttable provision in the</p>	

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		<p>proposed section 43Q(5)</p> <p>Response of the Administration that -</p> <p>(a) the "specified entitlements" in the proposed section 43N(1) covered almost all EO entitlements, except remedies purely civil in nature including compensation under section 32P of EO and wages vicariously liable to be paid by principal contractors/superior subcontractors under Part IXA of EO;</p> <p>(b) as confirmed by the Department of Justice (DoJ), since sufficiently different elements were involved in the offences, prosecution could be brought against an employer for both wage offence and the new offence for defaulting LT awarded payment;</p> <p>(c) the time for investigation on default of LT awards might be shortened in cases where findings had been made previously on wage offence in the case; and</p> <p>(d) the rebuttable presumption was introduced to tackle the problem in the context of LT defaults, where unlike the circumstances of wage offences, an employee might have long left the company, thus having limited knowledge of the role of the director or responsible person</p> <p>The Administration was requested to -</p> <p>(a) provide information on employees' entitlements covered by EO but not covered by the</p>	<p>Admin</p>

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		<p>"specified entitlement" in the proposed section 43N(1);</p> <p>(b) consider whether the approach adopted for the proposed section 43Q should also be adopted for section 64B(1) of EO to make directors or responsible persons of a body corporate liable for offence with understanding that it was beyond ambit of this Bill; and</p> <p>(c) advise on the procedures and time taken to investigate a complaint lodged by an employee with defaulted award and to institute criminal proceedings against the employer for LT defaults</p>	
003630 - 004526	Chairman Hon LI Fung-ying Admin	<p>Issues raised by Hon LI Fung-ying -</p> <p>(a) whether the payment in lieu of notice was covered in the "specified entitlement" in the proposed section 43N(1)(a);</p> <p>(b) whether the legal proceedings to be instituted against employers could be shortened, as the case had already been heard in LT and 14 days had lapsed after the LT award was due; and</p> <p>(c) whether the proposed sections 43P(1)(b) and 43S provided too much safeguards to employers and rendered prosecution against unscrupulous employers ineffective</p> <p>Response of the Administration that -</p> <p>(a) by virtue of section 25 of EO and paragraph (a) of the definition of "specified entitlement" in the proposed</p>	

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		<p>section 43N(1), the proposed offence covered default of an LT/MECAB award comprising payment in lieu of notice;</p> <p>(b) the proposed section 43S, similar to section 64 of EO, gave defendants opportunity of being heard before prosecution was commenced and served to distinguish employers who were genuinely culpable from those who were not; and</p> <p>(c) the proposed element of "wilfully and without reasonable excuse" aimed to target at employers defaulting deliberately and were also elements of existing wage offences under EO</p> <p>The Administration was requested to provide more information about the process for instituting legal proceedings for defaults of LT/MECAB awards</p>	Admin
004527 - 010644	Chairman Hon Andrew LEUNG Admin	<p>Issues raised by Hon Andrew LEUNG -</p> <p>(a) the legal basis for criminalizing an employer's non-payment of LT award with the concern about any read-across implication on the enforcement of other civil judgments;</p> <p>(b) the need to criminalize non-payment of LT awards comprising wages and entitlements underpinned by criminal elements of EO when defaults of wages and other statutory entitlements were already offences under EO; and</p> <p>(c) why reasonable excuses were not set out in the proposed</p>	

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		<p>section 43P(1)(b) for the avoidance of doubt</p> <p>Response of the Administration that -</p> <p>(a) the offence was limited to LT/MECAB awards comprising "specified entitlements" (i.e. wages and entitlements underpinned by criminal elements of EO) to distinguish the LT awarded sums under the proposed offence from judgment sums made by other civil courts;</p> <p>(b) the new offence was proposed in view of the community's grave concern about LT defaults and to give additional deterrence on top of existing EO offences; and</p> <p>(c) under the proposed section 43P(1), only when the defendant had defaulted an LT award wilfully and at the same time had no reasonable excuse would the defendant be convicted. The proposed section 43S would also ensure employers the opportunity of being heard before prosecution could be commenced</p> <p>The Administration was requested to give information in writing to explain the basis of criminalizing non-payment of LT awards and the adoption of "without reasonable excuse"</p>	Admin
010645 - 011445	Chairman Hon LEUNG Kwok-hung Admin	<p>Expression of support for the Bill by Hon LEUNG Kwok-hung who urged the early implementation of the Bill</p> <p>The Administration was requested to provide statistical information</p>	Admin

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		<p>which supported the proposal to criminalize an employer's non-payment of LT/MECAB awards</p>	
<p>011446 - 012701</p>	<p>Chairman Hon LEUNG Yiu-chung Admin</p>	<p>Issues raised by Hon LEUNG Yiu-chung -</p> <p>(a) why payment in lieu of notice was not specified in the "specified entitlement" in the proposed section 43N(1); and</p> <p>(b) how to determine whether an excuse given by an employer was reasonable under the proposed section 43P(1)(b)</p> <p>The Administration was requested to consider specifying payment in lieu of notice in the "specified entitlement" under the proposed section 43N(1)</p> <p>Response of the Administration that -</p> <p>(a) the proposed section of 43N(1), in the definition of "specified entitlement", in paragraph (a) referred to "any sum under section 25 of EO", this covered payments due upon termination including payment in lieu of notice; and</p> <p>(b) whether an excuse was reasonable would depend on the circumstances of individual case</p>	<p>Admin</p>
<p>012702 - 014153</p>	<p>Chairman Hon IP Wai-ming Admin</p>	<p>Issues raised by Hon IP Wai-ming -</p> <p>(a) why compensation under section 32P of EO was not included in the "specified entitlement" in the proposed section 43N(1);</p> <p>(b) when the Bill would commence operation;</p>	

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		<p>(c) whether the requirements in the proposed sections 43P(1)(b), 43Q(3)-(5) and 43S provided too much safeguards to unscrupulous employers, directors or responsible persons of a body corporate and a partner in a firm and would render prosecution ineffective; and</p> <p>(d) whether the Bill would impact on employees who were eligible to receive ex gratia payment from the Protection of Wages on Insolvency Fund (PWIF)</p> <p>Response of the Administration that -</p> <p>(a) compensation under section 32P of EO was civil in nature with no criminal liability in default;</p> <p>(b) a commencement notice would be made after enactment of the bill;</p> <p>(c) the safeguards in the proposed offence aimed to attain the legislative intent of targeting unscrupulous employers only and had balanced the views of different stakeholders; and</p> <p>(d) the Bill had no direct impact on employees eligible for receiving ex-gratia payment on PWIF</p>	
014154 - 015703	Chairman Hon Tommy CHEUNG Admin	<p>Issues raised by Hon Tommy Cheung -</p> <p>(a) why strict liability was imposed on directors and responsible officers under the proposed section 43Q;</p> <p>(b) how an imprisonment penalty could be imposed on a body</p>	

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		<p>corporate;</p> <p>(c) differences between the liability of an employer for defaulting LT/MECAB awards under the proposed section 43P and the liability of directors, partners, etc. for offence under the proposed section 43Q; and</p> <p>(d) why the new offence was necessary against such factors as EO's effectiveness in deterring wage offences, seriousness of LT/MECAB award defaults and possible impact of criminalizing defaults of LT/MECAB awards on defaults of other civil remedies and debts</p> <p>Response of the Administration that -</p> <p>(a) the proposed section 43Q did not impose a strict liability as the prosecution had to prove that the section 43P offence by a body corporate had been committed with the consent or connivance of, or to be attributable to any neglect of the director or responsible persons;</p> <p>(b) in case the employer was a body corporate, imprisonment could not be imposed on the body corporate convicted under proposed section 43P but could only be imposed on directors or responsible persons convicted under proposed section 43Q for consenting to or conniving at the section 43P offence or for the section 43P offence being attributable to their neglect; and</p> <p>(c) the proposed section 43P dealt with offences by an employer who could be a body corporate,</p>	

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		<p>a sole proprietor or a partner, while the proposed section 43Q dealt with offences by a director/ responsible person of a body corporate or the other partner of a firm who consented to, connived at or was neglected of the section 43P offence by the body corporate or a partner</p> <p>The Administration was requested to provide a written response on the necessity of the new offence as raised by Hon Tommy CHEUNG.</p>	Admin
015704 - 020221	Chairman Hon Paul TSE Admin	<p>The Administration was requested to provide a written response to the following issues raised by Hon Paul TSE -</p> <p>(a) whether the presumption in the proposed sections 43Q(3) and (4) was proportionate and consistent with the Basic Law; and</p> <p>(b) whether a partner in a firm would be subject to two counts of offence under the proposed sections 43P and 43Q respectively</p> <p>Response of the Administration that -</p> <p>(a) the presumption under the proposed sections of 43Q(3) and (4) merely shifted an evidential burden to a director or responsible person (or a partner) who was concerned in the management of the body corporate (or the firm) or knew or ought to have known of the award, once there was sufficient evidence to raise an issue as to absence of consent, connivance or neglect, the prosecution would need to prove consent, connivance or neglect beyond</p>	Admin

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		<p>reasonable doubt; the said sections had been cleared with DoJ as consistent with the Basic Law; and</p> <p>(b) a partner entering into employment contract with an employee would be liable as an employer under the proposed section 43P. The proposed section 43Q would only be initiated against the other partner if the latter could be proved to have consented to, connived at or was neglectful of the default by his partner</p> <p>The Administration was requested to provide more information to explain the proposed provisions shifting the evidential burden to directors</p>	Admin
020222 - 020443	Chairman	<p>The Administration was requested to respond later on the following issues raised by the Chairman -</p> <p>(a) why the entitlements underpinned by criminal elements in EO were listed out instead of making reference to Part XIII of EO regarding offences of EO for defining "specified entitlement" in the proposed section 43N(1); and</p> <p>(b) while the element of "ought to have known" under the proposed sections 43Q(3) and (4) would assist the proof of prosecution, whether there was safeguard to protect the interest of the directors or responsible persons of a body corporate and the relevant procedures, if any</p>	Admin
020444 - 020613	Chairman Hon LEUNG Yiu-chung Admin	The Administration was requested to consider including the following debts, which could form part of LT/MECAB award, in the	Admin

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		"specified entitlement" in the proposed section 43N(1) - (a) payment in lieu of notice; and (b) MPF contribution on the part of employer	
020614 - 020844	Chairman Hon Andrew LEUNG Hon LEUNG Kwok-hung Admin	Date of next meeting Invitation of views of deputations on the Bill	

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