

立法會
Legislative Council

LC Paper No. CB(2)484/09-10
(These minutes have been seen
by the Administration)

Ref : CB2/BC/10/08

Bills Committee on Employment (Amendment) Bill 2009

Minutes of meeting
held on Tuesday, 27 October 2009, at 2:30 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 Ronny TONG Ka-wah, SC
Dr Hon LAM Tai-fai, BBS, JP
Hon WONG Sing-chi
Hon IP Wai-ming, MH
Hon IP Kwok-him, GBS, JP
Hon Paul TSE Wai-chun
- Members absent** : Hon WONG Ting-kwong, BBS, JP
Hon Cyd HO Sau-lan
- Public Officers attending** : Mr Byron NG, JP
Assistant Commissioner for Labour (Labour Relations)
- Miss Bonny WONG
Senior Labour Officer (Labour Relations) 1
Labour Department
- Miss Betty CHEUNG
Senior Assistant Law Draftsman
Department of Justice

Miss Emma WONG
Senior Government Counsel
Department of Justice

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

Staff in attendance : Ms Clara TAM
Assistant Legal Adviser 9

Ms Judy TING
Senior Council Secretary (2) 8

Ms Camy YOONG
Clerical Assistant (2) 1

I. Meeting with the Administration

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

2. The Bills Committee requested the Administration to -
 - (a) illustrate the application of the proposed section 43P under the different scenarios of partial payment of an award of the Labour Tribunal (LT) or the Minor Employment Claims Adjudication Board (MECAB) and default of part of the instalment of the LT/MECAB award;
 - (b) consider improving the drafting of proposed section 43N(1)(a) by explicitly including payment in lieu of notice in the definition of "specified entitlement" in the proposed section for employees' easy reference;
 - (c) provide information on the means for an employee to make claims where his employer failed to make payment to the mandatory provident fund after deducting a portion of his wages for that purpose;
 - (d) consider listing all reasonable excuses in the proposed section 43P(1)(b);
 - (e) provide information on provisions in other ordinances where there were elaborations on what constituted a reasonable excuse; and

- (f) advise the timeframe for the process of investigation, prosecution and institution of criminal proceedings for defaults of LT/MECAB awards as set out in Annex A to LC Paper No. CB(2)80/09-10(01).

(Post-meeting note: The Administration's response was issued to members vide LC Paper No. CB(2)307/09-10 on 18 November 2009.)

3. The meeting ended at 4:30 pm.

Council Business Division 2
Legislative Council Secretariat
7 December 2009

**Proceedings of meeting of the
Bills Committee on Employment (Amendment) Bill 2009
on Tuesday, 27 October 2009, at 2:30 pm
in Conference Room A of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action Required
000000 - 000208	Chairman	Opening remarks	
000209 - 001527	Admin Chairman	Briefing on the Administration's paper on "Supplementary information on the basis and justifications for criminalization of non-payment of award by the Labour Tribunal (LT)" (LC Paper No. CB(2)2617/08-09(01))	
001528 - 003037	Hon LEE Cheuk-yan Admin Chairman	<p>Issues raised by Hon LEE Cheuk-yan -</p> <p>(a) whether criminal legal proceedings could be instituted against an employer who had made partial payment of an award of LT or the Minor Employment Claims Adjudication Board (MECAB), if the part paid had a criminal element while the defaulting part was civil in nature;</p> <p>(b) whether criminal legal proceedings could be instituted against an employer who had defaulted part of a lump-sum settlement which was treated as a LT/MECAB award and had both criminal and civil elements; and</p> <p>(c) whether the Labour Department (LD) needed to bid for additional manpower resources in order to handle the workload created from the Bill</p> <p>Response of the Administration that -</p> <p>(a) the employers referred to in the two scenarios quoted by Hon LEE Cheuk-yan would be subject to criminal sanctions by virtue of the proposed sections 43P and 43N(2). The Administration</p>	Admin

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		<p>would illustrate the application of the section 43P offence in various scenarios of LT/MECAB defaults in writing; and</p> <p>(b) LD would review the manpower required to handle the additional workload arising from the Bill</p>	
003038 - 003943	Hon LI Fung-ying Admin Chairman	<p>Issues raised by Hon LI Fung-ying -</p> <p>(a) whether a settlement reached between an employer and employee outside LT would be covered by the Bill; and</p> <p>(b) reasons for the increasing number of claimants seeking assistance from the Award Enforcement Support Service (AESS) in the first half of 2009 and reasons for the remaining half of employers who were not insolvent or ceased business but had defaulted payment of LT awards (paragraphs 6 and 7 of LC Paper No. CB(2)2617/08-09(01))</p> <p>Response of the Administration that -</p> <p>(a) a settlement reached between an employer and employee should be filed in LT in order to be covered by the Bill. The Administration would promote awareness among employees after the Bill was enacted;</p> <p>(b) the number of AESS cases had increased substantially in the first half of 2009 because of the increasing awareness of AESS since its introduction in July 2008 and the financial hardship faced by employers since the advent of the financial tsunami; and</p> <p>(c) there was no information on why employers who were not insolvent or ceased business had defaulted</p>	

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		<p>payments. LD would provide necessary assistance to the affected employees</p>	
<p>003944 - 005347</p>	<p>Hon Andrew LEUNG Admin Chairman</p>	<p>The need to list all reasonable excuses in the proposed section 43P(1)(b) in order to protect the interests of employers as raised by Hon Andrew LEUNG</p> <p>Response of the Administration that -</p> <p>(a) the circumstances of non-payment or late payment of wages and other entitlements varied from case to case and the court's judgment should not be unduly fettered (paragraphs 12 and 13 of LC Paper No.CB(2)80/09-10(01));</p> <p>(b) there were four steps to protect innocent employers including the proof of wilfulness to default payment, opportunity to give a reasonable excuse for defaulting payment, the opportunity to be heard during investigation, and ascertaining reasonable prospect of conviction before prosecution action would be instituted (paragraph 16 of LC Paper No. CB(2)80/09-10(01)); and</p> <p>(c) safeguards were also provided to directors and partners as set out in paragraph 46 of LC Paper No. CB(2)80/09-10(01)</p> <p>Suggestion of Hon Andrew LEUNG to make reference to the Copyright Ordinance (Cap. 528) which seemed to have elaborated on what constituted a reasonable excuse</p> <p>Response of the Administration that -</p> <p>(a) the term "reasonable excuse" appeared in more than 800 provisions under other ordinances and the majority of them had not</p>	

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		<p>elaborated on what constituted, or did not constitute, a reasonable excuse;</p> <p>(b) whether to list the reasonable excuses in the Bill was a policy rather than a drafting issue; the real difficulties lied in whether specifying excuses could be exhaustive (the limited purpose if non-exhaustive) and the policy implications given the almost limitless permutations of circumstances; and</p> <p>(c) it would revert to the Bills Committee after studying the approach adopted by the Copyright Ordinance</p>	Admin
005348 - 010343	Hon LEUNG Yiu-chung Admin Chairman	<p>Issues raised by Hon LEUNG Yiu-chung -</p> <p>(a) the need to explicitly include payment in lieu of notice in the "specified entitlement" in the proposed section 43N(1)(a) for employees' easy reference; and</p> <p>(b) whether the contribution of mandatory provident fund (MPF) on the part of an employee could be recovered if his employer, who had deducted a portion of his wages for that purpose, had not deposited it to his MPF account</p> <p>Response of the Administration that -</p> <p>(a) the Administration would consider the possibility of improving the drafting of the proposed section 43N(1)(a);</p> <p>(b) the deducted wages alleged for contribution of MPF on the part of employee, if withheld by an employer without enrolling him for MPF, could be regarded as part of wages due under which an</p>	The Administration to provide information on the means for an employee to make claims where his employer failed to make payment to MPF after deducting a portion of his wages for that purpose

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		<p>employee could lodge a civil claim for the wages in arrears against the employer in LT/MECAB;</p> <p>(c) if an employer deducted a portion of the employee's wages unlawfully (e.g. deducting a portion of the employee's wages for his MPF payment but a MPF account had never been opened for such purpose), the employer might be liable for a claim arising from non-compliance with the Employment Ordinance (EO);</p> <p>(d) if an employer deducted a portion of the employee's wages for the purpose of the latter's contribution to MPF but had defaulted such payment, the MPF Authority might take action against the employer to recover the outstanding mandatory contribution; and</p> <p>(e) non-compliance with the MPF Scheme Ordinance quoted by Hon LEUNG Yiu-chung did not come under the jurisdiction of LT</p>	
010344 - 011500	Hon Jeffrey LAM Admin Chairman	<p>Issues raised by Hon Jeffrey LAM -</p> <p>(a) risk of employers being criminalized because what constituted a "reasonable excuse" was unclear;</p> <p>(b) LD had very often been sympathetic towards the employee rather than the employer in a labour dispute. In a number of cases, the judge had commented that LD had failed to remain neutral in playing its role as a mediator; and</p> <p>(c) whether the Administration would follow the four steps mentioned above when instituting legal</p>	

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		<p>proceedings against an employer</p> <p>Response of the Administration that -</p> <p>(a) at present, the investigation and prosecution authorities abided by the guidelines issued by the Department of Justice (DoJ) when instituting legal proceedings against an employer. The four steps would apply after the enactment of the Bill;</p> <p>(b) in order to remain impartial and neutral, LD would seek DoJ's advice on a need basis before instituting legal proceedings against an employer; and</p> <p>(c) whether an excuse was reasonable would be assessed against specific facts of the case in question. As an excuse might be reasonable in one but unreasonable in another, the Bill would not elaborate on what constituted "reasonable excuse" and leave it to the discretion of the court</p>	<p>The Administration to consider listing all reasonable excuses in the proposed section 43P(1)(b)</p>
<p>011501 - 012251</p>	<p>Hon Paul TSE Admin Chairman</p>	<p>Issues raised by Hon Paul TSE -</p> <p>(a) although one of the four steps allowed employers to put forth a valid reason to avoid being convicted, some employers might choose, having regard to legal advice, to remain silent until the case was heard in the court; and</p> <p>(b) whether an employee of a company such as a messenger who knew or ought to have known that a LT award was being defaulted would be caught by the section 43P offence</p> <p>Response of the Administration that an officer who was not involved in the management of the body corporate would not be liable for the section</p>	

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		<p>43P offence</p> <p>The application of the rebuttable presumption in the proposed section 43Q(3), (4) and (5) on liability of directors and partners</p>	
<p>012252 - 013537</p>	<p>Hon IP Wai-ming Admin Chairman</p>	<p>Issues raised by Hon IP Wai-ming -</p> <p>(a) whether the requirements to prove "wilfulness" and "reasonable excuse" for default payment made it too difficult to prosecute unscrupulous employers;</p> <p>(b) whether an employer who defaulted part of the instalment of LT/MECAB award had contravened the Bill; and</p> <p>(c) why compensation under section 32P of EO was not included in the "specified entitlement" in the proposed section 43N(1)</p> <p>Response of the Administration that -</p> <p>(a) 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>(b) the new offence was proposed under EO to cover the default of LT/MECAB awards comprising wages and entitlements underpinned by criminal elements under EO only;</p> <p>(c) an employer who had defaulted part of the LT/MECAB payment or instalment would be subject to criminal sanctions by virtue of the proposed section 43P(1) and (2); and</p> <p>(d) compensation under section 32P</p>	

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		<p>of EO was civil in nature with no criminal liability in default (paragraphs 21-23 of LC Paper No. CB(2) 80/09-10(01))</p> <p>Further response of the Administration on the need to list reasonable excuses in the Bill -</p> <p>(a) whether an excuse was reasonable required the exercise of judgment. A judgment would have to be made from the policy angle having regard to the views of the employers and employees. As it was not uncommon for the two parties to have different views on what constituted a reasonable excuse, there were practical difficulties in reaching an agreement, especially when the reasonableness of an excuse ought to be assessed against the specific circumstances of the case in question; and</p> <p>(b) the feasibility to list all the reasonable excuses in the Bill was hence not a drafting issue but a policy issue</p>	<p>The Administration to provide information on provisions in other ordinances where there were elaborations on what constituted a reasonable excuse</p>
013538 - 014227	Chairman Admin	<p>Response of the Administration to the issues raised by the Chairman -</p> <p>(a) the Bill did not cover cases that were referred from LT to a District Court or High Court under which a judgment was delivered in favour of the employee; and</p> <p>(b) the Bill did not cover the civil liability of principal contractor or superior subcontractor of the construction industry for wages (up to the first two months) that were owed to an employee by a subcontractor</p>	

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014228 - 015208	Hon LEE Cheuk-yan Admin Chairman	<p>Issues raised by Hon LEE Cheuk-yan -</p> <ul style="list-style-type: none"> (a) why the prosecution for an offence could not be commenced without the consent in writing of the Commissioner for Labour as stipulated in proposed section 43S(1); (b) how to determine whether an employer had willfully defaulted payment; and (c) timeframe for the procedures of investigation, prosecution and institution of criminal proceedings for defaults of LT/MECAB awards <p>Response of the Administration that -</p> <ul style="list-style-type: none"> (a) the Administration would consider all the relevant information from the employee, employer and relevant third party to decide whether there was sufficient evidence to support a charge under the new offence. As a procedure to distinguish wilful defaults, the Commissioner for Labour's consent in writing is required if prosecution would be instituted; and (b) procedures of investigation, prosecution and institution of criminal proceedings for defaults of LT/MECAB awards were detailed in paragraphs 2-9 and Annex A to LC Paper No. CB(2) 80/09-10(01) 	The Administration to advise the timeframe for each of the steps set out in Annex A to LC Paper No. CB(2) 80/09-10(01)
015209 - 020214	Hon Paul TSE Admin Chairman	<p>Issues raised by Hon Paul TSE -</p> <ul style="list-style-type: none"> (a) whether an employer would be subject to criminal sanction if the LT award was paid after 14 days from the date on which the sum was due; 	

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		<p>(b) whether insolvency or bankruptcy would be regarded as an reasonable excuse for an employer to default LT payment; and</p> <p>(c) how to plug the loophole if an employer reached a settlement with the employee or lodged an appeal to a higher court before legal proceedings was instituted against him for defaulting a LT award</p> <p>Response of the Administration that -</p> <p>(a) whether an employer had a reasonable excuse to make late payment or default LT award upon insolvency or bankruptcy would depend on the circumstances of individual case; and</p> <p>(b) a LT award would remain in force until such time a higher court had overturned the ruling upon appeal. The appellant might be required to give a security to the court</p>	
020215 - 020315	Chairman	Closing remarks	