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Bills Committee on Employment (Amendment) Bill 2009

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper provides background information on the enforcement of Labour Tribunal (LT) and Minor Employment Claims Adjudication Board (MECAB) awards.

Background

2. LT was set up in 1973 under the Labour Tribunal Ordinance (Cap. 25). It has exclusive jurisdiction over employment-related civil claims. Being civil in nature, the litigating parties bear the responsibility of enforcing LT judgment if it is not complied with. With little means, some employees have great difficulties in enforcing LT awards on defaulting employers.

3. In the 2003-2004 session, the Panel on Manpower and the Panel on Administration of Justice and Legal Services held a number of meetings with the Administration, the Judiciary Administration and deputations on the improvement of the existing mechanism for enforcement of LT awards and the effectiveness of the existing operation of LT as a quick, cheap, simple and informal forum for resolving employment disputes. In response to the requests of the Panels to improve the operation of LT, the Chief Justice set up an internal Working Party in June 2003 to conduct a review on the operation of LT.

4. The Working Party on the Review of the Labour Tribunal (the Working Party) published a report in June 2004 with 37 recommendations, all of which were accepted by the Chief Justice. The two Panels discussed the Working Party report and related issues at their joint meetings on 9 November 2004 and 13 December 2004. The two Panels noted that some of the measures recommended by the Working Party had already been implemented by administrative means and some required legislative amendment.

5. At present, if a judgment debtor does not settle payment in full or at all, the judgment creditor can enforce the award. He has a choice of several modes of execution, including -

- (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).

6. The efficacy of the execution modes greatly hinges on the knowledge of the availability and whereabouts of the assets and properties of the judgment debtor. A Charging Order may not provide genuine relief if a 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 is knowledge of the whereabouts of the monies of the judgment debtor. As for Writs of Fieri Facias, a judgment creditor has to bear the costs of the execution (e.g. a deposit of \$5,200 for bailiff service, in addition to other administrative costs).

7. An employee may also choose to file a winding-up or bankruptcy petition against the defaulting employer so as to exert pressure on the employer to pay up to avoid being forced out of business. The employee may apply for assistance from the Legal Aid Department (LAD), subject to his passing the means test and the merits test. 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 from taking recovery action through this channel.

8. MECAB is a board established under the Minor Employment Claims Adjudication Board Ordinance (Cap. 453) with limited jurisdiction to adjudicate minor employment claims. Minor employment claims are those -

- (a) arising from disputes of statutory or contractual rights of employment;
- (b) involving not more than 10 claimants; and
- (c) not exceeding \$8,000 per claimant.

Deliberations of the Panel on Manpower

9. The Panel on Manpower discussed the improvement measures on the enforcement of LT awards at its meetings on 16 February 2006, 24 April 2008 and 8 July 2008. At the meeting on 8 July 2008, the Administration advised that it had identified three viable and effective measures to enhance the enforcement of LT awards with particular focus on employers who were financially able but unwilling to pay. There were basically two types of LT defaults, namely, cases in respect of which employers were financially unable to pay, and cases in respect of which employers were financially able but unwilling to pay. Employees of insolvency cases where employers were financially unable to pay should seek redress from the Protection of Wages on Insolvency Fund. As to how unscrupulous employers should be dealt with, the Administration proposed -

- (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.

10. Regarding the Administration's proposal to make wilful non-compliance of LT awards an offence, members were informed that directors and other persons responsible for the management of the company would be held criminally liable if they were proven to have caused the breaches in question.

11. Some members enquired about the party responsible for instituting legal proceedings against defaulting employers and the penalty upon conviction. They also asked about the interim measures to deal with defaulting employers before non-compliance with LT awards became a criminal offence.

12. The Administration advised that in case of deliberate default by employers, the Labour Department (LD) would institute prosecution against employers and the proceedings would be conducted at the Magistracy. The maximum penalty for wage offences under the Employment Ordinance (Cap. 57) (EO) was a fine of \$350,000 and imprisonment of three years. As an integral part of LD's work, enforcement had been enhanced to deter employers from committing wage offences. If the employer was a limited company, LD, apart from prosecuting the company for wage offences, would also prosecute the responsible persons of the company for a like offence.

13. Some members expressed concern that prosecution would be instituted against an employer only when the employee concerned was willing to serve as witness. They considered that prosecution should be instituted against an employer whenever there was sufficient evidence.

14. The Administration explained that if the employee concerned was unwilling to serve as witness, the Administration would not be able to institute prosecution. The court had previously stated that instituting prosecution without sufficient evidence would be a waste of court resources. The Administration would step up publicity and education and encourage employees to serve as witnesses.

15. Some members suggested that in order to tackle the problem in obtaining evidence to prove that a wage offence was made with the consent or connivance or to be attributable to the neglect of the company director of a body corporate, the Administration should consider reversing the onus of proof or imposing an evidential burden on the defendant director as to his not having knowledge of or consented to the offence. They considered that in case of defaulted severance payment, the onus of proof was on employers.

16. The Administration responded that members' proposal involved a change in legal principle and policy, as the onus of proof rested with the prosecution. The legal principle in prosecution against employers defaulting wages and those found to have committed wilful non-compliance with LT judgment should be the same. Section 64B of EO, which specified the criminal liability of the responsible persons of a body corporate with regard to wage offences, was effective in enabling LD to take enforcement actions against the responsible persons of a body corporate. The issue concerned was not about the adequacy of legislative provisions but the need to strengthen enforcement actions such as evidence collection and intelligence gathering against wage offences.

17. Regarding the prerequisite for proof of guilty intent of defaulting employers, the Administration explained that the proof of guilty intent would be one of the requirements for conviction, as in the case of wage default. The broad legal principle adopted in prosecution against defaulted wages could be considered for cases of defaulted LT awards.

18. A member pointed out that there were in general three elements of "guilty intent", namely "wilful", "reckless" and "negligent". The member asked whether the Administration had considered "reckless" as an acceptable condition for finding a defaulting employer criminally liable, and whether the Administration would, in terms of legal procedure, consider imposing evidential burden on the defaulting employer to prove that the defaulted sum was not due to wilful or reckless act.

19. The Administration responded that the condition upon which a defaulting employer would be found criminally liable might cover other elements of guilty intent. For example, according to section 64B of EO, "consent", "connivance" or "neglect" were the elements of offence against which an employer could be convicted. The Administration proposed to make "wilful" non-compliance of LT awards an offence.

20. At its meeting on 18 December 2008, the Panel on Manpower was briefed on the Administration's proposal to assist employees in enforcing LT awards. Members were informed that three enhancement measures, namely, making non-payment of LT awards a criminal offence, empowering LT to order defaulting employers to pay additional sums to employees and empowering LT to order disclosure of the financial details of defaulting employers, were proposed by the Administration. The Administration had been working on the legal and implementation details for introducing legislative amendments to make non-payment of LT awards a criminal offence. As regards the two other proposed enhancement measures, more time was needed to study in detail the legal and implementation issues with the Department of Justice and the Judiciary.

21. Members were informed that the Administration planned to introduce a bill into the legislative Council (LegCo) by July 2009 to make non-payment of LT awards a criminal offence. Before the bill was enacted, LD would continue to take vigorous enforcement actions to deter employers from committing wage offences, thereby reducing the incidence of defaulted LT awards. LD had put in place since July 2008 one-stop service whereby an officer in each of its Labour Relations Division branch offices would, 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 LT awards. The officer would provide relevant information on various modes of executing LT awards, assist in the procedures of application for ex gratia payment and make appropriate referrals to other government departments, including LAD and the Social Welfare Department, for assistance.

22. The Administration informed the Panel that MECAB had similar jurisdiction as LT on employment-related claims made by not more than 10 claimants for a sum not exceeding \$8,000 per claimant. If an employer defaulted on a MECAB award, the execution modes available to the aggrieved employees were the same as those for enforcement of LT awards. Enforcement of MECAB awards was no less easy than enforcement of LT awards. Given the similar nature of the awards, the same principle of criminalizing non-payment of LT awards should apply to similar non-payment of MECAB awards.

23. Members in general supported the Administration's proposals. Some members questioned the need to introduce a new law to make non-payment of LT awards a criminal offence, given that EO already required employers to pay wages to employees within seven days from the day on which they became due, failing which employers would be subject to criminal sanction.

24. The Administration explained that civil and criminal proceedings were governed by different legal procedures and principles. LT, which was set up in 1973, was dedicated to adjudicating employment-related civil claims.

Being civil in nature, the litigating parties bore the responsibility of enforcing the LT judgment, if it was not complied with. Under EO, however, default of wages and other statutory entitlements carried criminal liability. The mere existence of guilty act by failure to observe statutory obligations was a necessary but not sufficient condition for finding an employer criminally liable. The proof of *mens rea* was in general a cardinal requirement for a criminal offence.

25. Some members expressed concern about the long time taken for investigation and prosecution against non-payment of LT awards. They requested the Administration to simplify the procedures for adducing evidence. They also urged the Administration to shorten the process for instituting criminal proceedings against non-payment of LT awards.

26. The Administration advised that if an employer did not pay the award, the employee could lodge a complaint with LD. Upon receipt of such a complaint, LD would invoke its investigation mechanism. If investigation revealed that the company had committed an offence, LD would further see if any responsible person of the company should be made culpable. Prosecution would be instituted against directors and responsible persons of the body corporate concerned, if there was sufficient evidence.

27. The Administration stressed that it was important to differentiate the criminalization of non-payment of LT awards from the enforcement of other civil judgments firmly and solely on the basis of the uniqueness of criminalization of certain employment-related debts as currently provided for in EO. The Administration was wary of the possible read-across implications for the execution of other civil remedies and actions to be taken to follow up defaults of other civil debts. As a corollary, prudence was needed to ensure that the criminal offence should only apply to the non-payment of LT awards comprising wages and entitlements underpinned by criminal elements under EO. As legal provisions, the efficacy of section 64B of EO in convicting irresponsible persons of body corporate had not been cast in doubt. Rather, the crux were the problems frequently encountered in criminal investigation.

Relevant papers

28. A list of relevant papers available on the LegCo website (<http://www.legco.gov.hk>) is in the **Appendix**.

Enforcement of Labour Tribunal Awards

Relevant papers and minutes of meetings

<u>Meeting</u>	<u>Meeting Date</u>	<u>Papers</u>
<p>Panel on Administration of Justice and Legal Services and Panel on Manpower</p>	<p>24 May 2004</p>	<p>Research Report on "The Operation of Labour Tribunals and Other Mechanisms for Resolving Labour Disputes in Hong Kong and Selected Places" [RP06/03-04]</p> <p>Administration's paper on "Measures to improve referral of unsettled cases of labour disputes and claims from the Labour Department to the Labour Tribunal" [LC Paper No. CB(2)2424/03-04(01)]</p> <p>Judiciary Administration's letter dated 17 May 2004 on "Operation of the Labour Tribunal" [LC Paper No. CB(2)2424/03-04(02)]</p> <p>Judiciary Administration's paper on "Practice and Procedure in the Labour Tribunal" [LC Paper No. CB(2)1932/02-03(02)]</p> <p>Administration's paper on "Conciliation service provided by the Labour Department and the system of referring unsettled cases to the Labour Tribunal" [LC Paper No. CB(2)2527/02-03(01)]</p> <p>Judiciary Administration's letter dated 21 August 2003 [LC Paper No. CB(2)3025/02-03(01)]</p> <p>Minutes of meeting [LC Paper No. CB(2)3167/03-04]</p>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Papers</u>
Panel on Administration of Justice and Legal Services and Panel on Manpower	9 November 2004	Report of the Working Party on the Review of the Labour Tribunal published in June 2004 [LC Paper No. CB(2)136/04-05] Minutes of meeting [LC Paper No. CB(2)327/04-05]
Panel on Administration of Justice and Legal Services and Panel on Manpower	13 December 2004	Minutes of meeting [LC Paper No. CB(2)726/04-05]
Panel on Administration of Justice and Legal Services	31 March 2005	Minutes of meeting [LC Paper No. CB(2)1590/04-05]
Panel on Manpower	16 February 2006	Administration's paper on "Enforcement of Labour Tribunal Awards" [LC Paper No. CB(2)1086/05-06(04)] Minutes of meeting [LC Paper No. CB(2)1412/05-06]
Panel on Manpower	24 April 2008	Administration's paper on "Enforcement of Labour Tribunal Awards" [LC Paper No. CB(2)1662/07-08(04)] Administration's letter dated 17 July 2008 on "Enforcement of Labour Tribunal Awards" [LC Paper No. CB(2)2649/07-08(01)] Minutes of meeting [LC Paper No. CB(2)2013/07-08]
Panel on Manpower	8 July 2008	Administration's paper on "Enhancement Measures on Enforcement of Labour Tribunal Awards" [LC Paper No. CB(2)2480/07-08(02)] Minutes of meeting [LC Paper No. CB(2)2755/07-08]

<u>Meeting</u>	<u>Meeting Date</u>	<u>Papers</u>
Panel on Manpower	18 December 2008	Administration's paper on "Legislative proposals to enhance the enforcement of Labour Tribunal awards" [LC Paper No. CB(2)480/08-09(05)] Minutes of meeting [LC Paper No. CB(2)865/08-09]