

**Bills Committee on
The Employment (Amendment) Bill 2009**

**Supplementary Information on the
Basis and Justifications for Criminalisation of
Non-payment of Award by the Labour Tribunal**

Introduction

This paper provides supplementary information on the legal basis and justifications of criminalisation pursuant to the request of some Members at the Bills Committee meeting held on 16 July 2009.

Purpose of the Bill

2. The Employment (Amendment) Bill 2009 seeks to create a new offence for an employer's failure to pay an award by the Labour Tribunal (LT) or the Minor Employment Claims Adjudication Board (MECAB) that comprises wages and statutory entitlements underpinned by criminal elements under the Employment Ordinance (EO).

Public concern about defaults of LT awards

3. The LT was set up in 1973 under the Labour Tribunal Ordinance, Cap. 25, to provide a speedy, inexpensive and informal forum for adjudicating employment-related civil claims. As in the case of all civil actions, the successful party bears the responsibility of enforcing the award if it is not being complied with. Like other civil judgment creditors, an employee with a defaulted LT award may resort to execution by such mode as issuing a Writ of Fieri Facias¹ (which involves enforcement of an award by a bailiff) or filing a winding-up or bankruptcy petition against the defaulting employer.

¹ A Writ of Fieri Facias is for seizing goods and chattels (at a value equivalent to the judgment debt plus the incidental expenses of the execution) in the premises of the judgment debtor. Other execution modes may include a Charging Order against the landed properties of the judgment debtor and 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.

4. However, employees with little means are often deterred by the time and costs² involved in seeking to have awards in their favour enforced. Although the LT has no statistics on defaulted awards as some employees and employers may settle the judgment sum on their own, there are occasionally cases of employers who choose not to settle the LT award even though they are financially able to do so, as gauged from subsequent investigations following employees' further complaint to the Labour Department (LD). There have also been media reports on cases of irresponsible employers defaulting for a prolonged period or repeatedly on LT awards made in favour of a large number of employees. Such has aroused growing public concern and calls for sterner action to achieve greater deterrence.

5. To deter defaults of LT awards, a concrete measure strongly favoured by stakeholders is to make non-payment of LT awards a criminal offence. Some employer representatives also agree that irresponsible defaulting employers should be sanctioned though they caution at the same time that any new offence should not inadvertently penalise those employers who have no intention to default or are willing but unable to pay. After careful examination, the Administration considered criminalisation of the defaulting acts viable and submitted the proposal for the new offence to the Labour Advisory Board and the LegCo Manpower Panel in July and December 2008 respectively.

Seriousness of defaulting on LT awards

6. As an enhanced measure to assist employees with defaulted LT awards, LD introduced the Award Enforcement Support Service (AESS)³ starting from 14 July 2008. As at the end of August 2009, LD has provided AESS to 3 966 employees, or around 280 employees per month. The half yearly figure of 2009 as compared with that of 2008 records an

² Despite the uncertain efficacy, an employee needs to bear possible legal fees for enforcing the LT award such as enforcement by a bailiff, which may require a deposit of over \$5,000 in addition to other administrative costs. 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.

³ Under the AESS, selected LD officers are assigned to provide information on enforcing LT awards to the aggrieved employees, assist them to apply for ex-gratia payment from the Protection of Wages on Insolvency Fund and refer them to seek assistance from other departments, including the Legal Aid Department and Social Welfare Department as appropriate.

increase of 113%, while the increase in the number of disputes and claims handled by LD and the number of cases referred to LT by LD stood at 5% and 10% respectively in the corresponding period. The detailed figures are given below:

Period	No. of claimants assisted by AESS	No. of disputes and claims handled by LD	No. of cases referred to LT by LD
July to Dec 2008	1 039	10 732	2 322
Jan to June 2009	2 213	11 233	2 565
Percentage change	+113%	+5%	+10%

7. Though by experience, about half of the employees seeking AESS informed us that their employers were insolvent or ceased business, we are highly concerned about the other half of employees, the number of which is quite substantial, affected by defaulted awards. We share the view of many stakeholders that being remunerated timely and fully is the basic right of an employee, and non-payment of the outstanding sum awarded by LT, if done wilfully, should be sanctioned.

Legal basis and justifications for criminalising non-payment of LT awards

8. The LT and MECAB have exclusive jurisdiction over claims for outstanding entitlements as provided by the EO. Though the obligation of paying wages and employment benefits emanates from private contracts, failure to pay wages and other statutory entitlements is an offence under the EO. In addition, under section 31O(1A)⁴ of the EO, failure to comply with the order of LT to pay severance payment is already an offence. Therefore, the criminal element in default of wages and statutory entitlements under the EO forms a solid basis to distinguish payments under LT awards from other civil debts.

9. At the Bills Committee meeting held on 16 July 2009, Members expressed concern about the read-across implications of criminalising

⁴ Under section 31O(1A), where the MECAB or LT has ordered that any sum in respect of severance payment is payable by an employer, it shall order the time within which such sum shall be payable, provided that if it has made no order as to the time within which the sum is payable, the sum shall be paid within 14 days from the date of the order of payment. By section 31O(3)(a), an employer who without reasonable excuse fails to comply with subsection (1A) shall be guilty of an offence.

non-payment of LT awards on other civil judgments. Indeed, extending the criminal liability to other payments not underpinned by criminal sanction may entail much wider implications beyond the EO. The Administration is thus prudent to ensure that the new offence is limited solely to LT and MECAB awards comprising wage and statutory entitlements that are underpinned by criminal sanction under the EO.

10. At the same meeting, a member also asked about the need for the new offence given that the EO had been considered effective in combating wage offences. Despite our rigorous enforcement actions, as noted in paragraph 6 above, there is an upward trend in default of LT awards. Since non-payment of LT awards per se (even though the award covers statutory entitlements underpinned by criminal sanctions in the EO) is currently not a criminal offence, we consider that attaching criminal liability directly to the default of LT awards would not only target the financially capable employers who are unwilling to pay, but also serve as an important and additional deterrent.

11. Under existing wage and other EO provisions, difficulties in prosecution arise in some cases where the components of wages and their computation emanate from an oral contract between the employer and the employee agreed years ago or where no formal record of daily wage and length of service for calculating employment benefits is available, thus rendering it difficult to establish the contractual intention or amount in arrears. If the proposed offence is created and an award made by LT clearly indicates that wages or other statutory entitlements are payable by an employer, the prosecution will no longer need to go behind the award to ascertain the contractual intention and amount in dispute. The new offence coupled with the existing EO offences will form an all-embracing net to effectively catch culpable employers in different scenarios.

12. The LD has taken rigorous enforcement actions to combat wage offences. At present, any employer who wilfully and without reasonable excuse fails to pay wages when it becomes due is liable to prosecution. In 2008, a total of 958 summonses on wage offences were convicted, similar to the level in 2007 and up by 22% as compared with 2006. In the same year, we secured 199 convicted summonses against responsible persons of companies, up by 58% and 188% respectively as compared with figures in 2007 and 2006. It is worth noting that the number of wage disputes and claims handled by LD in 2008 was 6 982 in 2008, down by

11% and 21% respectively as compared with the figures in 2007 and 2006. A new offence built on similar elements of adopting “wilful and without reasonable excuse” as wage offences, will, we believe, go a long way towards deterring wilful defaults of LT awards.

Labour and Welfare Bureau
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