

立法會
Legislative Council

LC Paper No. CB(2)1231/09-10
(These minutes have been seen
by the Administration)

Ref : CB2/BC/11/08

Bills Committee on Minimum Wage Bill

Minutes of meeting
held on Thursday, 11 February 2010, at 10:45 am
in the Chamber of the Legislative Council Building

- Members present** :
- Hon TAM Yiu-chung, GBS, JP (Chairman)
 - Hon Paul CHAN Mo-po, MH, JP (Deputy Chairman)
 - Hon LEE Cheuk-yan
 - Hon LEUNG Yiu-chung
 - Hon Miriam LAU Kin-ye, GBS, JP
 - Hon Abraham SHEK Lai-him, SBS, JP
 - Hon LI Fung-ying, BBS, JP
 - Hon Tommy CHEUNG Yu-yan, SBS, JP
 - Hon Frederick FUNG Kin-kee, SBS, JP
 - Hon Audrey EU Yuet-mee, SC, JP
 - Hon WONG Kwok-hing, MH
 - Hon Jeffrey LAM Kin-fung, SBS, JP
 - Hon Andrew LEUNG Kwan-yuen, SBS, JP
 - Hon WONG Ting-kwong, BBS, JP
 - Hon Ronny TONG Ka-wah, SC
 - Hon CHIM Pui-chung
 - Hon Cyd HO Sau-lan
 - Dr Hon LAM Tai-fai, BBS, JP
 - Hon CHAN Kin-por, JP
 - Dr Hon LEUNG Ka-lau
 - Hon CHEUNG Kwok-che
 - Hon IP Wai-ming, MH
 - Hon IP Kwok-him, GBS, JP
 - Hon Mrs Regina IP LAU Suk-ye, GBS, JP
 - Dr Hon PAN Pey-chyou
 - Dr Hon Samson TAM Wai-ho, JP
- Members absent** :
- Hon Albert HO Chun-yan
 - Hon Emily LAU Wai-hing, JP

Hon Vincent FANG Kang, SBS, JP
Dr Hon Priscilla LEUNG Mei-fun
Hon WONG Sing-chi
Hon WONG Kwok-kin, BBS
Hon Paul TSE Wai-chun

Public Officers attending : Mr Alan WONG Kwok-lun, JP
Deputy Commissioner for Labour (Labour Administration)

Mr FONG Ngai
Assistant Commissioner for Labour (Policy Support and
Strategic Planning)

Miss Mabel LI Po-yi
Senior Labour Officer (Statutory Minimum Wage)
Labour Department

Ms Queenie TANG Yuen-shan
Labour Officer (Statutory Minimum Wage)
Labour Department

Ms Amy CHAN Wing-yan
Senior Government Counsel
Department of Justice

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

Staff in attendance : Mr Arthur CHEUNG
Senior Assistant Legal Adviser 2

Mrs Eleanor CHOW
Senior Council Secretary (2) 4

Ms Kiwi NG
Legislative 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) explain with further examples given by members at the meeting on the application of the provisions on hours worked in the Bill under different scenarios for the purpose of computing statutory minimum wage (SMW);
 - (b) provide information on whether there were any court judgments on the meaning of the term "in attendance" when the employee was permitted to sleep when being in attendance and to consider setting out such criteria for determining whether an employee was "in attendance";
 - (c) explain with examples on the computation of commission in the Bill under different scenarios for the purpose of computing SMW; and
 - (d) relay to the Provisional Minimum Wage Commission about members' request for information on how it would take forward its work in respect of the determination of the statutory minimum wage.
3. The Bills Committee requested Senior Assistant Legal Adviser 2 to study any lack of clarity relating to counting of hours worked in the Bill.
4. The Chairman suggested members might wish to provide in writing information about different scenarios in different trades for the Administration to explain how hours worked would be counted.

II. Date of next meeting

5. The Bills Committee noted that the next meeting would be held on 25 February 2010 at 8:30 am.
6. The meeting ended at 12:46 pm.

**Proceedings of meeting of the
Bills Committee on Minimum Wage Bill
on Thursday, 11 February 2010, 10:45 am
in the Chamber of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action Required
000000 - 000354	Chairman	Opening remarks	
000355 - 002228	Chairman Admin	Briefing on the Administration's response to issues raised at the Bills Committee meeting held on 28 January 2010 (LC Paper No. CB(2)922/09-10(01))	
002229 - 002850	Chairman Hon LEE Cheuk-yan Admin	<p>Issues raised by Hon LEE Cheuk-yan with reference to the examples quoted in the Administration's paper -</p> <p>(a) whether a hotel in which the employer provided accommodation to an escort guide during a trip outside Hong Kong would be regarded as a place of employment as defined in clause 2 of the Bill for the purpose of computing statutory minimum wage (SMW) (Example (5)); and</p> <p>(b) whether the personal time during layover period of the cockpit and cabin crew not being regarded as hours worked under clause 3(1)(a) for the purpose of computing SMW was in contradiction with the calculation of holiday pay of the cockpit and cabin crew which was understood to include layover time according to their existing contract of employment (Example (3))</p> <p>Response of the Administration -</p> <p>(a) a hotel in which the employer provided accommodation to an escort guide could be a place of employment as defined in</p>	

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		<p>clause 2 at one time but not the other for the purpose of SMW computation, depending on whether the employee was in attendance at the hotel for the purpose of doing work or receiving training according to the contract of employment or with the agreement or at the direction of the employer as determined by the facts of the case. The Bill, as presently drafted, had catered for the multifarious work patterns of employees in different trades and industries; and</p> <p>(b) the calculation of holiday pay was stipulated in the Employment Ordinance (EO) while the Bill sought to provide for a SMW as a wage floor</p>	
002851 - 003243	Chairman Hon Andrew LEUNG Admin	<p>Issues raised by Hon Andrew LEUNG -</p> <p>(a) whether the wording "in accordance with the contract of employment or with the agreement or at the direction of the employer" should be added after "place of employment" in clause 3(1)(a); and</p> <p>(b) which provision in the Bill had stipulated that the personal time during the layover of the cockpit and cabin crew would not be regarded as hours worked for the purpose of computing SMW</p> <p>Response of the Administration -</p> <p>(a) the term "place of employment" used in clause 3 was defined in clause 2. "Place of employment", as defined in clause 2, meant any place at which the employee was, in</p>	

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		<p>accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance for the purpose of doing work or receiving training. The drafting of clause 3(1)(a) was clear; and</p> <p>(b) according to the definition of "place of employment" in clause 2, if an employee in his personal time during the layover was not in attendance at a place of employment for the purpose of doing work or receiving training in accordance with the contract of employment or with the agreement or at the direction of the employer, such time was not hours worked under clause 3(1)(a) for the purpose of computing his minimum wage</p>	
003244 - 003845	Chairman Hon Miriam LAU Admin	<p>Issues raised by Hon Miriam LAU -</p> <p>(a) whether the time of a real estate agent who, with the agreement or at the direction of the employer, was in attendance at a certain place for say, four hours after the contractual working hours, for the purpose of doing work such as arranging the signing of sale and purchase agreement and whether the sleeping time of an employee who was forced to stay overnight in the Mainland as return travel was not available until the following day would be counted as hours worked under clause 3(1)(a) for the purpose of computing SMW;</p> <p>(b) concern about possible grey areas that could give rise to labour disputes and legal challenge in future; and</p>	Admin to explain with further examples given by Hon Miriam LAU and other members at the meeting on the application of the provisions on hours worked in the Bill under different scenarios for the purpose of computing SMW

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		<p>(c) improvement on the drafting of clause 3 of the Bill so that employers and employees would have a clear understanding on how hours worked would be counted for the purpose of computing SMW</p> <p>Response of the Administration -</p> <p>(a) clause 3 on hours worked should be read in conjunction with the definition of "place of employment" in clause 2. Clause 3 sought to state the hours that should be counted and not to be counted as hours worked for SMW computation, and did not purport to give an exhaustive list of all scenarios of "hours worked"; and</p> <p>(b) given the multifarious work patterns of employees, apart from clause 3, the question as to whether any time or period was hours worked had to be decided by reference to any agreement or contract of employment and to all other relevant circumstances of the case</p>	
003846 - 004318	Chairman Hon LI Fung-ying Admin	<p>Issues raised by Hon LI Fung-ying with reference to Example (9) quoted in the Administration's paper -</p> <p>(a) impact of clause 3(2)(a) on the entitlement of paid meal break of an employee provided under a verbal agreement between an employer and an employee; and</p> <p>(b) impact of clause 3(2)(a) on labour relations</p> <p>Response of the Administration -</p> <p>(a) clause 3(2)(a) provided an</p>	

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		<p>exception so that if an employee worked in accordance with the contract of employment or with the agreement or direction of the employer during meal break, the period would not be excluded as hours worked in the computation of SMW;</p> <p>(b) the court in deciding whether an employee was contractually entitled to paid meal break would take into account the facts of the case such as trade custom, company practice, and any implied employment terms between the employer and the employee if such entitlement was not specified in the contract of employment; and</p> <p>(c) clause 3(2)(a) did not change the existing arrangements under the EO whereby employers and employees were free to agree between themselves the employment terms on meal break. The Bill did not seek to prescribe whether or not an employee should be remunerated for meal break under his contract of employment, nor was the object of the Bill to regulate the arrangement of meal break. These employment issues should be subject to the mutual agreement of the employer and the employee</p>	
004319 - 004911	Chairman Hon Jeffrey LAM Admin	<p>Issues raised by Hon Jeffrey LAM -</p> <p>(a) whether the Administration could provide more examples to illustrate how hours worked would be counted for SMW computation under clause 3 in different trades in order to remove uncertainty;</p>	

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		<p>(b) possible grey areas could give rise to disputes and legal challenge in future; and</p> <p>(c) how to define the "usual" place of employment in clause 3(2)(b) if a person worked in more than one location</p> <p>Response of the Administration -</p> <p>(a) the Administration had given 12 examples drawn from various trades and industries in its paper (LC Paper No. CB(2)922/09-10(01)) to illustrate the application of "hours worked" and "place of employment" for the purpose of computing SMW;</p> <p>(b) LD would vigorously launch publicity and promotional activities so that both employers and employees would know and understand the legal provisions and their respective obligations and entitlements under the SMW regime;</p> <p>(c) "place of employment", as defined in clause 2, meant any place at which the employee was, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance for the purpose of doing work or receiving training. The clause could cater for the situation where the employee might have more than one place of employment; and</p> <p>(d) for clause 3(2)(b), whether a place was the "usual" place of employment of an employee was a question of facts to be determined by reference to all</p>	

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		the relevant circumstances of the case	
004912 - 005739	Chairman Dr Hon LEUNG Ka-lau Admin	<p>Issues raised by Dr Hon LEUNG Ka-lau -</p> <p>(a) whether there was no direct relevance between clause 3(1)(a) and the rulings of the Court of Final Appeal (CFA) on cases involving correctional services officers and hospital doctors in respect of on-call or standby hours, as mentioned in paragraph 10 of the Administration's paper (LC Paper No. CB(2)922/09-10(01));</p> <p>(b) the Administration should make reference to definitions of "hours worked" and "place of employment" adopted by overseas jurisdictions (e.g. countries in Europe, the United States) and consider whether the two definitions in the Bill should be suitably amended; and</p> <p>(c) whether an employer could specify in the contract of employment that certain place at which an employee was in attendance for the purpose of doing work or for other purposes would not be regarded as a place of employment for computing SMW</p> <p>Response of the Administration -</p> <p>(a) the CFA decisions relating to correctional services officers and hospital doctors did not have direct relevance to the statutory interpretation of clause 3(1)(a) in relation to on-call or standby time as explained in paragraph 10 of the</p>	

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		<p>Administration's paper;</p> <p>(b) the definitions of "hours worked" and "place of employment" in the Bill had taken into account the unique situation of different trades in Hong Kong; and</p> <p>(c) a provision in a contract of employment that purported to extinguish or reduce any right, benefit or protection conferred on the employee by the Bill was void under clause 14</p>	
005740 - 010356	Chairman Hon LEE Cheuk-yan Admin	<p>Views of Hon LEE Cheuk-yan with reference to examples quoted in the Administration's paper -</p> <p>(a) if an escort guide was in a hotel arranged by the employer while he was on call or standby during the night, whether the period during which he was in the hotel, irrespective of whether he was sleeping or doing work, should be counted as hours worked under clause 3(1)(a) for computing SMW (Example (5)); and</p> <p>(b) if an employee was travelling between his place of residence and a place in Hong Kong which was not his usual place of employment at the direction of his employer, whether the travelling time should also be counted as hours worked under clause 3 for computing SMW (Example (10)). The requirement "outside Hong Kong" in clause 3(2)(b) was not necessary</p> <p>Response of the Administration -</p> <p>(a) whether on-call or standby time of an escort guide during the</p>	

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		<p>night in a hotel would be counted as hours worked under clause 3(1)(a) for computing SMW would depend on whether the guide was in attendance at a place of employment as defined in clause 2 according to the facts of the case. If he was not in attendance at a place of employment, then the on-call or standby time was not hours worked under clause 3(1)(a) for SMW computation; and</p> <p>(b) the example quoted by Hon LEE Cheuk-yan involved travelling time of an employee between his place of residence and a place within Hong Kong which was not his usual place of employment. This was not covered by the exception in clause 3(2)(b)</p>	
010357 - 011028	Chairman Hon Audrey EU Admin	<p>Views of Hon Audrey EU -</p> <p>(a) an escort guide was required to sleep in the same hotel as the tour group by nature of his work as it was the accommodation provided by the employer. The Administration's response that a hotel could be a place of employment defined in clause 2 at one time but not the other was contentious. For instance, it was unclear whether the additional time spent by an escort guide in a hotel due to delay of air flight should be counted as hours worked;</p> <p>(b) the term "in attendance" in the definition of "place of employment" in clause 2 was the key factor as to whether the time during which an escort guide stayed in a hotel should be counted as hours worked;</p>	<p>Admin was requested to provide information on whether there were any court judgments on the meaning of the term "in attendance" when the employee was permitted to sleep when being in attendance, and to consider setting out such criteria for determining whether an employee was "in attendance"</p> <p>SALA2 was requested to study any lack of clarity relating to counting of hours worked in the Bill</p>

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		<p>how to interpret the term "in attendance" in the Bill;</p> <p>(c) whether there were any court judgments on the meaning of the term "in attendance" when the employee was permitted to sleep when being in attendance; and</p> <p>(d) as possible grey areas could be subject to legal challenge in future, the Administration should consider setting out the criteria for determining whether the time during which an employee was "in attendance" should be counted as hours worked</p> <p>Response of the Administration -</p> <p>(a) clause 3(1)(a) had to cater for different trades and industries, and an arbitrary definition of "in attendance" might not apply across the board; and</p> <p>(b) whether an employee was in attendance at a place of employment under clause 3(1)(a) was a question of fact to be determined by reference to all the relevant circumstances of the case</p>	
011029 - 011604	Chairman Dr Hon LEUNG Ka-lau Admin	Views of Dr Hon LEUNG Ka-lau that the Administration should consider examining precedent labour cases with a view to formulating a set of objective criteria to determine whether the time in attendance should be regarded as hours worked. Criteria could include rights and obligations of employers and employees and the implications of failing to meet these rights and obligations. For instance, if an escort guide being not in attendance	Admin to explain with further examples on the application of the provisions on hours worked in clause 3 for SMW computation under different scenarios as raised by members

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		<p>at a hotel at the direction of his employer would result in his summary dismissal, then the time during which he was in attendance at a hotel should be regarded as hours worked for SMW computation</p> <p>Response of the Administration that it would provide more examples to illustrate the application of "hours worked" and "place of employment" provisions in the Bill for computing SMW</p>	
011605 - 012001	Chairman Hon Miriam LAU Admin	<p>Views of Hon Miriam LAU -</p> <p>(a) whether the travelling time in clause 3(2)(b) included the time that an employee spent waiting for a vehicle;</p> <p>(b) the Administration should enhance clarity of clause 3 of the Bill to prevent labour disputes in future and to enable employers and employees to understand how hours worked would be counted for SMW computation without resorting to adjudication in court; and</p> <p>(c) the Administration should consider issuing guidelines on hours worked for different trades</p> <p>Response of the Administration -</p> <p>(a) given the multifarious work patterns of employees, the Bill did not seek to provide an exhaustive list on all different scenarios of "hours worked" for the purpose of computing SMW. Clause 3 on hours worked should be read in conjunction with the definition of "place of employment" in clause 2; and</p>	Admin to explain the application of the provisions on hours worked in clause 3 for SMW computation under the scenario quoted by Hon Miriam LAU

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		<p>(b) the Administration would consider preparing examples drawn from different trades and industries to illustrate how hours worked should be counted under clause 3 for SMW computation for reference by employers and employees</p>	
<p>012002 - 014004</p>	<p>Chairman Hon LEE Cheuk-yan Hon Miriam LAU Admin</p>	<p>Issues raised by Hon Miriam LAU on employees whose wages were paid on a commission basis -</p> <p>(a) whether employers were aware of the treatment of commission under clause 5(5);</p> <p>(b) whether an employer had to pay an employee the minimum wage in the first two months of employment if the latter did not earn any commission and his basic salary was below SMW, and whether the employer could use the commission earned in the third month, which far exceeded SMW, to set off the difference paid to the employee in the first two months; and</p> <p>(c) the Administration should provide in writing examples on different scenarios for wages paid on a commission basis so that employers would understand their obligations under the Bill</p> <p>Response of the Administration -</p> <p>(a) clause 5(5) set out how commission should be counted for SMW computation in a wage period;</p> <p>(b) the Administration explained the operation of clause 5(5) in the example quoted by Hon Miriam LAU whereby for the</p>	<p>Admin to provide examples to illustrate the computation of commission in the Bill under different scenarios for SMW computation so that employers could understand their obligations under the Bill</p>

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		<p>purposes of the Bill, commission was counted as part of the wages payable in respect of a wage period according to the timing when the commission was paid;</p> <p>(c) there was a great diversity of commission systems among various trades and different establishments. The Bill did not seek to regulate the commission systems which should be mutually agreed by the employer and the employee concerned; and</p> <p>(d) the Administration had undertaken extensive consultation with various stakeholders. The Bill already provided flexibility to cushion fluctuations in the commission income of some employees during different wage periods and ensured certainty in determining whether the employers had remunerated their employees not below the SMW level</p>	
014005 - 020339	<p>Chairman Hon LEE Cheuk-yan Hon LI Fung-ying Hon IP Wai-ming Hon Mrs Regina IP Hon Cyd HO Hon Miriam LAU Hon Tommy CHEUNG</p>	<p>Discussion on Entitlement to Minimum Wage</p> <p>Discussion on Minimum Wage Commission and process for setting prescribed minimum hourly wage rate</p> <p>Establishment and constitution of the Minimum Wage Commission (MWC); function of MWC; whether MWC should comprise public officers; how the representative from the labour sector would be selected to become a member of MWC; whether the frequency for reviewing the SMW rate should be specified in the Bill; objectives of implementing SMW;</p>	<p>Admin to relay to the Provisional MWC about members' request for information</p>

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		<p>whether the criteria for determining the SMW rate should be stipulated in the Bill; criteria considered by the Provisional MWC in deliberating on the initial SMW rate</p> <p>Request for Provisional MWC to provide information on how it would take forward its work in respect of the determination of SMW</p>	
020340 - 020400	Chairman	<p>Closing remarks</p> <p>Date of next meeting</p>	

Council Business Division 2
Legislative Council Secretariat
1 April 2010