

立法會
Legislative Council

LC Paper No. CB(2)1411 /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, 25 February 2010, at 8:30 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-yee, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon LI Fung-ying, BBS, JP
Hon Tommy CHEUNG Yu-yan, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Vincent FANG Kang, SBS, 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
Hon CHAN Kin-por, JP
Dr Hon Priscilla LEUNG Mei-fun
Hon CHEUNG Kwok-che
Hon WONG Sing-chi
Hon IP Wai-ming, MH
Hon IP Kwok-him, GBS, JP
Hon Mrs Regina IP LAU Suk-yee, GBS, JP
Dr Hon PAN Pey-chyou
Hon Paul TSE Wai-chun
Dr Hon Samson TAM Wai-ho, JP

Member attending : Hon CHEUNG Man-kwong

- Members absent** : Hon Albert HO Chun-yan
Hon Frederick FUNG Kin-kee, SBS, JP
Dr Hon LAM Tai-fai, BBS, JP
Dr Hon LEUNG Ka-lau
Hon WONG Kwok-kin, BBS
- 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
Chief Labour Officer (Statutory Minimum Wage) (Acting)
Labour Department
- Ms Queenie TANG Yuen-shan
Senior Labour Officer (Statutory Minimum Wage) (Acting)
Labour Department
- Mr Eamonn MORAN, JP
Law Draftsman
Department of Justice
- 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
- Mr Ian CHOW
Council Secretary (2) 1
- Ms Camy YOONG
Clerical Assistant (2) 1
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I. Meeting with the Administration

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

2. The Bills Committee requested the Administration to -
 - (a) further explain, with reference to the 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) further explain, with reference to the examples given by members at the meeting, on the calculation of commission under the SMW regime and the arrangement for commission payment under the Bill;
 - (c) provide a response on the application of the provisions on "hours worked" and "place of employment" in the light of the views of Senior Assistant Legal Adviser 2 on these issues;
 - (d) provide information on the provisions on hours worked in SMW legislation in the Mainland, the United Kingdom and the United States;
 - (e) provide information on whether other jurisdictions with SMW legislation had also in place statutory regulations regarding the number of hours worked of employees; and
 - (f) consider the suggestion of providing an exemption clause to the effect that employers would not be required to keep record of the total number of hours worked for employees who earned more than a specified income.
3. The Bills Committee noted that the Administration was exploring measures to reduce the administrative costs of employers with regard to the requirement for the keeping of record on the total number of hours worked of employees. The Administration was requested to report the outcome to the Bills Committee.

II. Date of next meeting

4. The Bills Committee noted that the next meeting would be held on 18 March 2010 at 10:45 am.

(Post meeting note: The meeting was subsequently rescheduled to 19 March 2010 at 8:30 am.)

5. At the suggestion of Ms Emily LAU, the Chairman said that he would explore the possibility of scheduling additional meetings in April and May 2010.
6. The meeting ended at 10:28 am.

Council Business Division 2
Legislative Council Secretariat
28 April 2010

**Proceedings of meeting of the
Bills Committee on Minimum Wage Bill
on Thursday, 25 February 2010, 8:30 am
in the Chamber of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action Required
000000 - 000639	Chairman	Opening remarks	
000640 - 001805	Chairman Admin	Briefing on the Administration's response to issues raised at the Bills Committee meeting held on 11 February 2010 (LC Paper No. CB(2)978/09-10(01))	
001806 - 002246	Chairman SALA2	<p>Salient points of the judgment delivered by an Australian court relating to the definition of "place of work" (LC Paper No. CB(2)989/09-10(01))</p> <p>SALA2 referred to the judgment that the meaning to be given to the words in the definition of "place of work" in the Australian Safety, Rehabilitation and Compensation Act also involved a question of fact, not a question of law</p>	
002247 - 002911	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) circumstances under which a hotel in which the employer provided accommodation to an escort guide during a trip outside Hong Kong would not be regarded as a place of employment for the purpose of computing statutory minimum wage ("SMW") (Example (3));</p> <p>(b) whether the flight time during which an escort guide was travelling during the tour would be counted as hours worked (Example (3)); and</p> <p>(c) whether an employer had to top</p>	

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		<p>up the difference if the monthly basic salary of an employee was below the minimum wage (\$3,000 in Example (5))</p> <p>Response of the Administration -</p> <p>(a) "place of employment", as defined in clause 2, meant any place at which an 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 question as to whether an escort guide, while on call or standby, was in attendance at the hotel for the purpose of doing work or receiving training was to be determined by the contract of employment, the agreement or the direction of the employer;</p> <p>(b) the time during which the escort guide in Example (3) was, in accordance with the contract of employment or with the agreement or direction of the employer, accompanying the tour group on a flight should be counted as hours worked under the Bill; and</p> <p>(c) in Example (5), the employer had to top up the difference if the amount of wages payable in respect of the wage periods of January and February (\$3,000 each) was below the minimum wage. If an employer intended to change the commission system in order to apportion commission payable and paid among different wage periods to meet the SMW level, he should act according to the contract of employment and,</p>	

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		<p>subject to the terms of the contract, consult staff and work out mutually agreeable arrangement with the employee</p>	
<p>002912 - 003451</p>	<p>Chairman Hon Jeffrey LAM Admin</p>	<p>Issues raised by Hon Jeffrey LAM with reference to Example (3) quoted in the Administration's paper -</p> <ul style="list-style-type: none"> (a) the period during which an escort guide, while on call or standby, stayed in the hotel could be counted as hours worked in one situation but not the other; this would create confusion and labour disputes; (b) whether the court had given a meaning of the term "in attendance" applicable to other industries; and (c) how the court would deal with a case involving the interpretation of "in attendance" in future and whether the Administration would issue guidelines for different industries to illustrate the scenarios under which the period of "in attendance" would be counted as hours worked for the computation of SMW <p>Response of the Administration -</p> <ul style="list-style-type: none"> (a) the Administration was not aware of any judgments on the meaning of "in attendance" in the scenarios stated in paragraph 4 of the Administration's paper (LC Paper No. CB(2)978/09-10 (01)); (b) Example (3) sought to illustrate the situation under which, according to the proposal in the Bill, whether the period during which the escort guide was 	

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		<p>staying in the hotel would be counted as hours worked for the purpose of computing SMW. In accordance with the Employment Ordinance ("EO"), employer and the employee were also free to agree between themselves to regard on-call or standby time as hours worked for SMW computation; and</p> <p>(c) the court would take into account facts of the case to determine whether a period should be regarded as hours worked for the purpose of computing SMW</p>	
003452 - 004401	Chairman Hon Audrey EU Admin SALA2	<p>Issues raised by Hon Audrey EU on the definition of "place of employment" -</p> <p>(a) as it was not uncommon for an employee to meet his client in a place, say a restaurant, other than his office, whether such a place would be regarded as "place of employment" for the purpose of computing SMW;</p> <p>(b) whether there was any case law providing the meaning of "in attendance" in other industries; and</p> <p>(c) whether there was any case law interpreting that an employee was still in attendance during his sleeping time</p> <p>Response of the Administration -</p> <p>(a) "place of employment" could be anywhere which fell within the definition in clause 2. In determining whether the time during which the employee was meeting a client in a restaurant instead of the office was hours worked under the Bill or not,</p>	

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		<p>the court would look into all the relevant factors of the case such as the employment contract, the employer's agreement or direction, and any relevant trade practices; and</p> <p>(b) the concept of "place of employment" in the Bill provided flexibility to cater for different situations in various trades and industries</p> <p>SALA2's interpretation relating to "place of employment" -</p> <p>(a) agreed that "place of employment" could be anywhere which fulfilled the definition in clause 2, depending on the facts of the case;</p> <p>(b) whether an employee was 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 employer or not would depend on the facts of the case. The scenario of an employee falling asleep during working hours should rather be a contractual issue with the employer; and</p> <p>(c) the personal time during which an escort guide was sleeping in a hotel was not hours worked for the purpose of computing SMW, unless there was agreement to the contrary with the employer. However, when he was awakened for the specific purpose of discharging a duty required of him by the employer and the employment contract, the time during which</p>	

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		<p>he was awake to discharge the duty in question was hours worked for computing SMW</p> <p>The Administration concurred with the interpretation of SALA2</p>	
004402 - 005256	Chairman Hon WONG Ting-kwong Admin	<p>Issues raised by Hon WONG Ting-kwong with reference to the examples quoted in the Administration's paper -</p> <p>(a) concern about strained relationship between employers and employees arising from disputes over computation of hours worked;</p> <p>(b) whether the period during which a real estate agent worked after office hours not at the direction of the employer would be counted as hours worked (Example (1));</p> <p>(c) whether the period during which the employee travelled back to his office in Hong Kong from the factory in Dongguan would be counted as hours worked (Example (2)). If the return transport from Dongguan to Hong Kong commenced at 6:00 am, whether hours worked would be counted from 6:00 am as well;</p> <p>(d) when a tour group encountered problems overseas, it was usually the local guide, rather than the Hong Kong escort guide, who would help the clients concerned. In the circumstances, whether the period during which the escort guide was not attending to the problems would be counted as hours worked (Example (3)); and</p>	

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		<p>(e) whether the time during which an escort guide was making preparatory work for the tour group in the airport would be counted as hours worked (Example (3))</p> <p>Response of the Administration -</p> <p>(a) whether the real estate agent working after office hour in Example (1) would be counted as hours worked for the purpose of SMW computation would depend on whether he was, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance in the place for the purpose of doing work or receiving training. The court would look into all the factors of the case, including, inter alia, industry practice and implied employment terms between the employer and the employee;</p> <p>(b) travelling time between Dongguan and Hong Kong in Example (2) would be counted as hours worked for SMW computation; and</p> <p>(c) to improve labour relations, employers and employees were encouraged to enhance communication and stipulate clearly the employment terms in the contract of employment to prevent disputes</p>	
005257 - 010121	Chairman Hon Paul TSE Admin	<p>Issues raised by Hon Paul TSE on the application of "hours worked" and "place of employment" in the tourism industry -</p> <p>(a) possible difficulties in the computation of SMW would be encountered by the tourism</p>	

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		<p>industry since "hours worked" and "place of employment" would be determined by the facts of each case;</p> <p>(b) clause 14 provided that any 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. An employer would face the risk of legal challenge if the contract of employment had the effect of undermining the SMW entitlement of the employee;</p> <p>(c) while the tourism industry welcomed the introduction of SMW, implementing SMW on an hourly rate basis would not work in the tourism industry;</p> <p>(d) as far as an escort guide was concerned, his place of employment was anywhere in the world and it was the norm for him to be on call or standby anytime while in overseas. It was uncertain whether sleeping time and flight time would be counted as hours worked; and</p> <p>(e) as the Member representing the tourism sector, he should be consulted on the different issues in the Bill</p> <p>Response of the Administration -</p> <p>(a) in the course of preparing the Bill, the Administration had undertaken intensive and extensive engagement and consultation with various stakeholders in different sectors, including the tourism sector. The Administration had taken into account the work patterns of employees in</p>	

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		<p>different trades and industries with a view to ensuring that the SMW regime was feasible and struck a reasonable balance among various interests; and</p> <p>(b) Labour Department would vigorously launch publicity and promotional activities so that both employers and employees would understand the legal provisions and their respective obligations and entitlements under the SMW regime</p>	
010122 - 011309	<p>Chairman Hon Miriam LAU Admin Hon Audrey EU</p>	<p>Issues raised by members on possible grey areas with reference to the examples quoted in the Administration's paper -</p> <p>(a) whether the period during which a real estate agent awaiting customers for the sale and purchase agreement to be signed after office hour would be counted as hours worked (Example (1)) for the purpose of SMW computation;</p> <p>(b) whether the travelling time in clause 3(1)(b) included the personal time of the employee before he travelled from the factory to Dongguan (Example (2));</p> <p>(c) whether a contract of employment could include the arrangement to pay commission in different wage periods for the purpose of alleviating the financial burden of the employer to top up the payment in January and February in Example (5) when the basic salary was below the SMW level;</p> <p>(d) whether the arrangement in (c) above would contravene clause</p>	<p>Admin to further explain the provisions on hours worked and the counting of commission payment under the Bill with reference to the examples given by members</p>

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		<p>14, and if not, which clause in the Bill had provided for such an arrangement; and</p> <p>(e) the Administration should consider issuing guidelines with examples in different trades to help employers and employees understand their respective obligations and entitlements under the SMW regime</p> <p>Response of the Administration -</p> <p>(a) commission was within the definition of wages as defined in EO;</p> <p>(b) the Bill provided flexibility to allow employers and employees to agree between themselves how commission should be payable and paid in light of great diversity of commission systems among various trades and fluctuations in the commission income of some employees during different wage periods; and</p> <p>(c) the arrangement for commission to be payable and paid in different wage periods according to the contract of employment was permissible under the Bill</p>	
011310 - 011849	Chairman Hon Ronny TONG Admin	<p>Issues raised by Hon Ronny TONG -</p> <p>(a) how "hours worked" was dealt with in the SMW legislation in the Mainland, the United Kingdom and the United States and the need for Hong Kong to make reference to these practices; and</p> <p>(b) to provide an exemption clause</p>	Admin to provide information on the provisions on hours worked in SMW legislation in the Mainland, the United Kingdom and the United States

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		<p>in the Bill so that employers would not be required to keep record of the total number of hours worked for employees who earned more than a specified income</p> <p>Response of the Administration -</p> <p>(a) the Bill had taken into account practices adopted by other jurisdictions in implementing SMW; and</p> <p>(b) exempting the requirement for keeping records on the total number of hours worked for employees having a specified income involved complex issues. The Administration was considering various factors such as the administrative work of employers on the one hand and effective enforcement of the SMW regime on the other hand</p> <p>Concern about the timetable for enactment of the Bill and the time required to explore the feasibility of exempting the requirement for keeping record on the total number of hours worked for employees having a specified income</p>	<p>Admin to report the outcome to the Bills Committee</p>
<p>011850 - 012700</p>	<p>Chairman Hon WONG Sing-chi Admin Hon Audrey EU Hon Miriam LAU</p>	<p>Issues raised by members with reference to Example (5) regarding commission-based employees -</p> <p>(a) whether it was permissible for an employer and an employee to agree on new arrangements on commission payable and paid; and</p> <p>(b) whether the employer could recover the commission paid if an employee resigned before he had earned any commission</p>	<p>Admin to provide further information on the provisions on the counting of commission payment with reference to the examples quoted by members</p>

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		<p>Response of the Administration -</p> <p>(a) given the great diversity and complexity of commission systems in practice, the Bill sought to ensure certainty and clarity to employers and employees in determining whether employers had remunerated their commission-based employees at a rate not below SMW, hence there was a difference under the Bill between the handling of payment of commission and that of other wage items;</p> <p>(b) section 32 of EO regulated the recovery of overpayment of wages; and</p> <p>(c) any top-up payment for the difference between an employee's wages and his minimum wage during a wage period was not recoverable</p>	
<p>012701 - 013255</p>	<p>Chairman Hon IP Kwok-him Admin</p>	<p>Issues raised by Hon IP Kwok-him -</p> <p>(a) whether the concept of hourly minimum wage rate as proposed in the Bill could be extended to cover daily wage, weekly wage or monthly wage; and</p> <p>(b) whether it was permissible for a contract of employment to specify that the sleeping time of an escort guide, if not on call or standby, would not be counted as hours worked</p> <p>Response of the Administration -</p> <p>(a) after careful consideration, the Administration proposed that the SMW regime should be based on a hourly wage rate; and</p>	

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		<p>(b) an employer and an employee were free to agree between themselves a contract of employment provided that the terms contained therein did not purport to extinguish or reduce any right, benefit or protection conferred on the employee by the Bill</p>	
<p>013256 - 014041</p>	<p>Chairman Hon Andrew LEUNG Admin SALA2</p>	<p>Issues raised by Hon Andrew LEUNG -</p> <p>(a) request the Administration to provide a response to explain, with reference to the examples quoted by members and the possible grey areas pointed out by members, how hours worked would be counted for the purpose of computing SMW and how commission could be counted in determining whether the employee was remunerated not less than SMW; and</p> <p>(b) concern about labour disputes arising from counting of hours worked. For instance, an escort guide might consider that the time he spent with the tour group for purchasing souvenirs should be counted as hours worked while the employer thought otherwise because the activity, initiated by the escort guide for the purpose of earning commission, was not directed by the employer</p> <p>Response of the Administration that whether the time during which an employee spent on an activity should be counted as hours worked for the purpose of computing SMW would depend on whether the activity was specified in the contract of employment, agreed or directed by the employer e.g. the activity was covered by implied</p>	<p>Admin to provide response on the application of the provisions on "hours worked" and "place of employment" in the light of the views of SALA2 on these issues</p>

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		employment terms between the employer and the employee	
014042 - 014948	Chairman Hon Emily LAU Admin	Timing for enactment of the Bill; progress of work of the Bills Committee; suggestion of scheduling additional meetings for the Bills Committee; request for the Administration to provide responses to issues raised by members	
014949 - 015315	Chairman Hon Paul TSE	<p>Issues raised by Hon Paul TSE -</p> <p>(a) request for the Administration to explain how to address the difficulty in determining whether a period should be counted as hours worked when "place of employment" might easily shift from one place to another; and</p> <p>(b) request for the Administration to provide information on whether other jurisdictions with SMW legislation had also in place statutory regulations regarding the number of hours worked of employees</p>	Admin to explain and provide information on (b)
015316 - 015709	Chairman Hon Audrey EU	<p>Issues raised by Hon Audrey EU -</p> <p>(a) with reference to Example (5) and the scenario about paying a real estate agent's commission in advance, the Administration to explain how commission could be counted in determining whether the employee was remunerated not less than SMW; and</p> <p>(b) suggesting the provision of an exemption clause in the Bill to the effect that employers would not be required to keep record of the total number of hours worked for employees whose salary exceeded a specified amount</p>	Admin to explain on (a) and consider the suggestion in (b)

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015710 - 015814	Chairman Hon Miriam LAU	Whether the period during which a real estate agent was in attendance at a place of employment longer than the hours specified by the employer could be counted as hours worked	Admin to explain
015815 - 015948	Chairman Hon LEE Cheuk-yan	Need for employers to keep record of hours worked of employees	
015949 - 020022	Chairman	Date of next meeting	

Council Business Division 2
Legislative Council Secretariat
28 April 2010