

Bills Committee on Minimum Wage Bill

Administration's Response to Issues Raised at the Bills Committee Meeting Held on 29 April 2010

Introduction

This paper provides information requested by Members of the Bills Committee at its meeting held on 29 April 2010 when examining the Minimum Wage Bill (the Bill).

Special arrangement for persons with disabilities (PWDs) whose productivity may be impaired by their disabilities

2. As a matter of principle, we consider that PWD employees, like their able-bodied counterparts, should be protected by the statutory minimum wage (SMW). Thus, the Bill is applicable to able-bodied employees and PWD employees alike. Nevertheless, we also recognise the possible adverse impact of SMW on the employment opportunities of some PWDs whose productivity is impaired by their disabilities.

3. On the treatment of PWDs under the SMW regime, the Labour Department (LD) has met with more than 50 rehabilitation organisations, including non-governmental organisations providing vocational rehabilitation services with subvention from the Social Welfare Department, self-help groups and parent groups, with the participation of the Equal Opportunities Commission alongside. LD has also met with over 30 employer representatives who have ample experience in employing PWDs. The majority view gauged is that in order to strike a reasonable balance between providing wage protection to PWDs and safeguarding their employment opportunities, the Bill should provide a special arrangement so that PWDs whose productivity may be impaired by their disabilities will have the right to choose to have their productivity assessed to help determine whether they should be remunerated at not lower than the SMW level or at a rate commensurate with their productivity. Under this special arrangement, the productivity of a PWD in performing his work will be assessed in the actual workplace under a simple mechanism. To forestall abuse, the right to invoke such an assessment is vested in the PWD rather than his employer.

4. This special arrangement for PWD employees has been formulated after elaborate discussions involving the PWDs, parent groups, rehabilitation organisations and the Equal Opportunities Commission. These organisations have contributed their suggestions and expressed support for the special arrangement.

5. All the proposals in the Bill, including the special arrangement for the PWD employees, are in conformity with the provisions of the Basic Law, including those concerning human rights. The special arrangement is not incompatible with the Disability Discrimination Ordinance (DDO). Firstly, the DDO, same as the Minimum Wage Ordinance if enacted, has no constitutional or overriding status. Secondly, the DDO does not oblige the employer to employ a person who is unable to carry out the inherent requirements of the particular employment due to his disabilities. A person who is able to carry out the inherent requirements of a particular employment should be protected by the SMW, irrespective of whether he is a PWD or not. The special arrangement provided in the Bill is to ensure that, while safeguarding the principle of like treatment of PWDs and able-bodied, the employment opportunities of the PWD employees would not be affected by the introduction of SMW.

Trial period of employment

6. If a PWD invokes the special arrangement, he may, in accordance with Schedule 2 of the Bill, choose to agree with the employer to undergo a trial period of employment. The terms of the trial period of employment (e.g. its duration) seek to protect the interests of the PWD employees by enabling them to invoke the assessment only when they consider themselves accustomed to the working environment, while avoiding unnecessary prolongation of the trial period on the other. The PWD is engaged by the employer under an employment contract in the trial period. The purpose of the trial period of employment is to provide an opportunity for an assessment to be conducted on the degree of productivity impairment, if any, arising from the disability of a PWD. The choice of an assessor from among the approved list is vested in the PWD. During the trial period of employment, the wages of the PWD must not be less than 50% of the SMW. The length of the trial period is four weeks or until the end of the day on which the assessment of the

PWD's productivity is completed, whichever is the shorter¹. Therefore, when a PWD has the assessment of his productivity completed on a certain day during the trial period of employment, the trial period will end on that day and the minimum wage level determined according to his degree of productivity will be effective from the following day. If a PWD has not been assessed during the trial period of employment, the employer has to pay him not less than the SMW with effect from the first day after the expiry of the trial period. Where the PWD is subsequently assessed, the minimum wage level determined according to his degree of productivity would take retrospective effect from the first day after the expiry of the trial period of employment.

7. The wage level of a PWD must not be lower than 50% of the SMW during the trial period of employment. Rehabilitation groups consulted generally feel that this is an appropriate wage floor which would encourage employers to open up employment opportunities to PWDs, including those with more severe disabilities. Individual PWDs may negotiate for higher wages with employers in accordance with their work abilities. In addition, this arrangement can increase the possibility of the PWD employees getting a pay rise after the assessment which should prove more palatable to them. As PWDs who need to invoke the special arrangement are likely to be those with more severe disabilities, it is very likely that their employment opportunities would be jeopardised should the percentage of 50% of the SMW for the trial period of employment be raised.

8. Where a PWD has completed the assessment within the trial period of employment, the SMW level determined according to his degree of productivity will take effect on the following day. Both the employer and the PWD cannot claim from one another the wage difference reckoned from the first day of the trial period of employment. The assessment mechanism is intended to be simple so that the PWDs would not be required to pay back retrospectively the wage difference during the trial period of employment, and the employers' willingness to employ PWDs with productivity impaired by their disabilities would not be dampened due to introduction of SMW. Therefore, after balancing all the considerations, we are of the view that there should be no

1 On an application made jointly by the PWD and the employer before the end of the trial period of employment, the Commissioner for Labour may, in exceptional circumstances, extend the length of the trial period by up to 4 weeks.

retrospective claims on the wage difference with regard to the percentage of the degree of productivity assessed.

9. The percentage of the SMW during the trial period of employment, the length of the trial period and whether there are retrospective claims on the wage difference after assessment are all inter-related. After consultations with the rehabilitation organisations and relevant stakeholders, we consider that the arrangement in setting the wages to be no less than 50% of the SMW in the trial period of employment lasting for not more than four weeks (save for cases in exceptional circumstances) with no retrospective claims would strike an appropriate balance.

Outcome of assessment of degree of productivity

10. There were suggestions that a certain minimum percentage, say 50%, should be set such that PWD employees must be remunerated at least 50% of the SMW irrespective of the outcome of productivity assessment. We consider that an across-the-board mandatory requirement as such will affect the employment opportunities and in turn the social integration of PWDs, especially those with severe disabilities.

Review of the assessment of degree of productivity

11. We appreciate that stakeholders may have divergent views on whether PWD employees who have their degree of productivity assessed should have a review in the form of a second assessment. On the one hand, there are views that if a PWD employee has a second assessment, the SMW rate to which he is entitled can be adjusted upward or downward on the basis of the second assessment outcome, thereby taking into account his degree of productivity which may improve or deteriorate over time. On the other hand, there are views suggesting that the assessment mechanism must be simple and easy to implement. If there is a review arrangement, it could discourage some employers from employing PWDs and put a strain on the labour relations between the employer and the PWD employee, leading to, say, disputes on whether the PWD is forced by the employer to undertake a review assessment to facilitate a pay cut. Some rehabilitation organisations point out that the productivity of some PWD employees may deteriorate due to the changing state of their disabilities and a review may not be to their advantage. Many rehabilitation organisations consider that employers

are obliged to treat their disabled and able-bodied employees alike (including the application of the same mechanism to appraise the performance of their employees and conduct salary reviews) which is a more preferred way to address the issue of PWDs' salary adjustment as a result of their productivity enhancement.

12. In our proposal, the right to invoke the assessment mechanism is vested in the PWD rather than the employer. Besides, the PWD is free to choose an approved assessor to conduct his assessment. Since SMW is a novel regime for Hong Kong and the issue of review assessment has its controversies, we propose that the special arrangement be reviewed in the light of operational experience after the implementation of SMW so that we can gauge prudently whether there is a need for the review assessment, its pros and cons, and, if found necessary, the appropriate arrangement(s).

Certificate of assessment

13. As provided in the Bill, an approved assessor must provide to the PWD and the employer a certificate of assessment after conducting an assessment of the degree of productivity of a PWD in performing the work. The certificate must state the degree of productivity that can be achieved by the PWD in performing the work, and be signed by the PWD, the employer and the approved assessor. The minimum wage level applicable to the PWD employee would be derived by the SMW rate multiplying the degree of productivity as stated in the certificate. The PWD and the employer shall be well aware of the outcome of assessment to avoid unnecessary misunderstanding and disputes over computation of the minimum wage to which the PWD employee is entitled. Therefore, the Bill provides that the certificate of assessment must be signed by the three parties including the PWD, the employer and the approved assessor.

14. On whether a provision should be added to the Bill to sanction the employer for failing to sign the certificate of assessment, we consider that such a proposal is not appropriate. The special arrangement aims to reduce any possible adverse impact of SMW on PWDs' employment opportunities. The assessment seeks to determine the productivity of the PWDs in performing the work. Therefore, neither the employers nor the PWDs should be sanctioned or held criminally liable for failing to sign the certificate of assessment, otherwise both would hesitate to go through the special arrangement which would in turn defeat the purpose of minimising possible adverse impact of SMW on PWDs' job opportunities.

As a matter of fact, after a PWD employee has his productivity assessed under Schedule 2, the SMW level applicable to him would be determined according to the degree of productivity as stated in the certificate of assessment. Failure on part of the employer to sign the certificate would render it invalid, in which case the PWD employee would be entitled to receive the SMW rate or more.

15. In our proposal, the productivity assessment should be conducted in the PWD's actual workplace on the basis of his actual performance in doing the work. If a PWD employee changes job and finds a new employer, the certificate of assessment in respect of the original job would not be applicable to his new employer. If the PWD finds it necessary, he can again invoke an assessment of the degree of productivity for his new job pursuant to Schedule 2 of the Bill.

Termination of the PWD's contract of employment

16. Consequential amendments to the DDO are necessary to enable the PWD employees and the employers to understand clearly that acts done in connection with the special arrangement for PWDs, including the termination of the employment contract on account of the outcome of an assessment made under Schedule 2, would not be in breach of the DDO so that employers would not be discouraged from employing PWDs under the SMW regime. The Bill seeks to provide for a wage floor and does not affect other rights and obligations in the employment relationship. In other words, when seeking to terminate a contract of employment, the employer must comply with the Employment Ordinance, other relevant legislation in force and the relevant terms of the employment contract, and act in accordance with the contractual terms and the provisions of the Employment Ordinance.

Criteria for the approved assessor, cost of assessment and status of the approved assessor

17. Under Schedule 2 of the Bill, an approved assessor should hold the profession or occupation or qualification as specified by the Commissioner for Labour and possess the experience in providing vocational rehabilitation or other services in relation to the employment of PWDs. It is our intent that the approved assessors should be eligible persons, such as registered social workers, registered occupational therapists and registered physiotherapists, with experience in providing

vocational rehabilitation or other services in the employment of PWDs. Information on the assessors approved by the Commissioner for Labour would be included in a list of approved assessors. A PWD who decides to invoke the assessment mechanism is entitled to select any of the approved assessors from the list to conduct his productivity assessment.

18. As far as the assessment cost is concerned, there are views from some stakeholders that PWDs whose productivity is affected by their disabilities and thus need to invoke the special arrangement are of a vulnerable nature and should not be asked to bear the assessment cost. Neither should the employers shoulder the cost, so as not to dampen their incentive to employ PWDs. There are thus calls for the Government to take up this responsibility and pay for the assessment cost. While we will positively and sincerely consider this suggestion, we will have to ensure that the assessment cost, if paid from the public coffers, should be reasonable in quantum and would not inadvertently provide a financial incentive for possible abuse of the special arrangement. Discussions with the rehabilitation organisations on the details of the assessment mechanism are underway to map out the arrangement for the payment of the assessment fee.

19. Regarding section 6 of Schedule 2 on the status of the approved assessors, while some of those eligible may currently work in the Government or the Hospital Authority, they would not be acting as a servant or an agent of the Government when they conduct a productivity assessment under the special arrangement, unless they are conducting the assessment in the capacity as a public officer. Approved assessors should act as independent persons in the course of conducting the productivity assessments. They should possess relevant professional experience and be reasonably credible. They should conduct the assessment impartially in accordance with section 4 of Schedule 2 in order to determine the productivity of a PWD in performing his work. In the event of misconduct on the part of an approved assessor, the Commissioner for Labour may consider withdrawing the approval, and the PWD employee or the employer may also lodge a complaint with the professional authority concerned.

Transitional arrangement for PWDs already in employment

20. As a matter of principle, when the SMW comes into operation, PWDs already in employment will, like their able-bodied counterparts, be entitled to SMW. In the course of consultations with the PWDs, parents,

rehabilitation organisations and the Equal Opportunities Commission, the majority view gauged is that the Bill should provide those serving PWDs earning below the SMW with a right to make a choice in order to avoid the possible impact of the SMW on their existing employment. Upon deliberations, the majority view of the stakeholder groups supports a transitional arrangement which allows the serving PWD employees to have the following choices prior to the implementation of the SMW legislation:

(1) To opt for the SMW

or (2) To opt for a productivity assessment

The assessment will be conducted within one year after the SMW takes effect to help determine whether the PWD should be remunerated at not lower than the SMW rate or a level commensurate with his productivity.

or (3) To opt for retaining the current contractual wage level

The PWD will retain his current contractual wage level below the SMW as long as he remains in the same job performing the same work after the commencement of the SMW. No productivity assessment is required to be conducted.

In other words, if a serving PWD employee considers that his disability would affect his productivity, he may opt for undergoing a productivity assessment or retaining his current contractual wage level. In order to avoid abuse, only the serving PWD employee, not his employer, would have the right to invoke such an option. We are preparing the proposed amendments to the Bill on this transitional arrangement to provide serving PWD employees with a right to make a choice.

Right to invoke special arrangement by serving PWDs who receive no less than SMW

21. The special arrangement is put in place to minimise any possible adverse impact of SMW on the employment opportunities of PWDs. After the SMW comes into operation, a PWD employee who receives wages at or above the SMW will also have the right to invoke the assessment mechanism under Schedule 2 of the Bill when his

disabilities change and affect his productivity in performing the existing work. Under such circumstances, this PWD may choose to agree with the employer to undergo a trial period of employment and undertake a productivity assessment in the trial period to help determine whether he should be remunerated at not lower than the SMW level or at a rate according to his productivity.

Labour and Welfare Bureau
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