

Bills Committee on Minimum Wage Bill

Administration's Response to Issues Raised at the Bills Committee Meeting Held on 4 May 2010

Introduction

This paper provides information requested by Members of the Bills Committee at its meeting held on 4 May 2010 when examining the Minimum Wage Bill (the Bill).

Transitional arrangement for persons with disabilities (PWDs) already in employment

2. Since 2008, the Labour Department (LD) has held over 10 meetings with PWDs, parent groups and non-governmental organisations providing vocational rehabilitation services to discuss the appropriate arrangement for PWDs under the statutory minimum wage (SMW) regime. The Equal Opportunities Commission (EOC) has all along been engaged in the course of these discussions. In our previous deliberations, we first focused on formulating the cardinal principles under the Bill and incorporated the proposals arrived at these discussions into the Bill. After introduction of the Bill into the Legislative Council, we continued in-depth discussions with these stakeholders on the specific operational details of the assessment mechanism, including the transitional arrangement to provide serving PWD employees with a right to make a choice.

3. The provision of the transitional arrangement seeks to allow the serving PWD employees who are paid lower than the SMW rate, in particular those with more severe disabilities, to have a choice according to their own circumstances upon implementation of SMW, including whether to receive not less than the SMW rate, or to undertake a productivity assessment, or to retain the current contractual wage level as long as he remains in the same job performing the same work. The right to invoke such an option is vested in the serving PWD employee, not his employer. The transitional arrangement enables serving PWD

employees to remain in their present job according to their own choice without the worry of being affected by the implementation of SMW, and thus avoid the possible impact of the SMW on their existing employment. The LD has also consulted the Department of Justice which advises that the proposal is in compliance with the Disability Discrimination Ordinance (DDO) and relevant human rights provisions of the Basic Law.

Signing the certificate of assessment

4. The Bill stipulates that an approved assessor must provide a certificate of assessment after conducting an assessment of the PWD's productivity in performing the work, and the certificate must be signed by the PWD, the employer and the approved assessor. As a matter of fact, in the event that the certificate of assessment is not signed by the employer and/or the employee owing to disagreement over the outcome of the assessment, the parties would unlikely continue their employment relationship. Nonetheless, if their employment relationship continues for various reasons, the PWD employee should be paid wages at or above the SMW rate with effect from the following day after the assessment is conducted, given the certificate of assessment would be invalid without the signature of the employer and/or the employee.

Exemption under the DDO

5. Paragraph 2 of EOC's document (LC Paper No. CB(2)1478/09-10(01)) sets out the three questions raised by Members. Question 1 is : Whether the dismissal of a PWD on account of the outcome of an assessment made under Schedule 2 to the Bill is inconsistent with the DDO; Question 2 is: Whether the DDO would have the effect of exempting an employer dismissing a PWD on account of the outcome of the assessment, *even if the exemption is not provided in clause 23 of the Bill.*

6. Paragraphs 3 and 4 of EOC's document are in reply to the questions set out above. It is pointed out in paragraph 3 that generally speaking, the inherent requirements of a particular employment must be looked at when considering whether or not dismissal of a person with disability is inconsistent with the DDO. It should be pointed out that an assessment under the Bill serves to determine whether the disability affects the degree of productivity of a PWD in performing his work for the purpose of deciding whether he should be remunerated at no less than

the SMW level or at a rate commensurate with his productivity, and clause 23 pertains to termination of employment on account of the assessment outcome. If an individual is dismissed because he is found to be unable to meet the inherent requirements of the particular employment, even with reasonable accommodation, the act of dismissal in itself may not be inconsistent with the DDO, irrespective of whether there is exemption under clause 23 of the Bill or not.

7. Paragraph 4 of EOC's document is based on the assumption in Question 2 above: ***“even if the exemption is not provided in clause 23 of the Bill”***. In this respect, if the reason for dismissal is the individual's failure to satisfy inherent requirements of the particular employment, the individual may not have a claim under the existing DDO even without the clause 23 exemption. If an employee is dismissed on ground of disability rather than owing to his failure to satisfy the inherent requirements of the particular employment, the Bill does not operate to affect his claim under the DDO. The exemption to the DDO relating to dismissal provided by the Bill is limited to the situation where the reason for the dismissal is the outcome of the assessment.

8. The last sentence of paragraph 4 of EOC's document reads “In such circumstances, it would be for the court to judge whether a particular dismissal constitutes an infringement of the DDO on the basis of the evidence to be presented by the litigating parties.” We entirely agree that if an employee is concerned that the reason for his dismissal is not because of the outcome of the assessment or his failure to satisfy inherent requirements, he may lodge a complaint with the EOC and, if necessary, the case may be referred to the court to determine whether a particular dismissal constitutes an infringement of the DDO on the basis of the evidence to be presented by the litigating parties.

Labour and Welfare Bureau
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