

For discussion on
18 December 2008

Legislative Council Panel on Manpower

Legislative Proposals to Enhance the Enforcement of Labour Tribunal Awards

Purpose

This paper briefs Members on the progress on the preparation for making legislative amendments to enhance the enforcement of Labour Tribunal (LT) awards.

Background

2. LT was set up under the Labour Tribunal Ordinance, Cap. 25, to provide a speedy, efficient, inexpensive and informal forum for the adjudication of employment-related civil claims. The modes of execution of LT awards are nevertheless no different from the enforcement of any other civil judgments in respect of which the successful party bears the responsibility of enforcing the judgment if it is not complied with.

3. There has been increasing concern in the community over some employers' failure in effecting payment to their employees even after LT had so awarded. The Administration shares this concern and is committed to identifying feasible measures to enhance the enforcement of LT awards. Following consultation with various stakeholders on the possible way forward, we submitted to the Labour Advisory Board (LAB) and the Legislative Council (LegCo) Panel on Manpower in April 2008 the options thus proposed.

4. An option strongly favoured by stakeholders and Members is to make non-payment of LT awards a criminal offence so as to achieve effective deterrence against defaulting employers. Some employer representatives also agreed that irresponsible employers who are able but unwilling to pay the awards should be sanctioned.

5. In July 2008, the Administration reported to LAB and the LegCo Manpower Panel the proposal to make non-payment of LT awards a criminal offence. Additional supporting measures were also proposed. Those measures include empowering LT to order the defaulting employers to pay an additional sum to their employees and to disclose financial information. The Labour and Welfare Bureau (LWB) and Labour Department (LD) have since been working closely with the Department of Justice (DoJ) and consulting the Judiciary on various legal and implementation details with a view to making legislative amendments to give effect to the measures.

Making non-compliance of LT awards a criminal offence

6. The Administration notes the concern of stakeholders and Members about the issue and intends to take forward the criminalisation of non-payment of LT awards as a matter of top priority. The relevant issues and considerations in criminalising such non-payments are described in the following paragraphs.

Coverage

7. LWB and LD have rigorously examined with DoJ and the Judiciary the legal feasibility of criminalising non-payment of LT awards. Since LT is but one of the branches of the Judiciary involved in civil judgments, in taking forward the proposal we need to be wary of the possible read-across implications for the execution of other civil remedies and actions to be taken to follow up defaults of other civil debts.

8. After thorough deliberation, the Administration considers that to contain the read-across implications we must differentiate the criminalisation of non-payment of LT awards from the enforcement of other civil judgments *firmly and solely* on the basis of the uniqueness of employment-related civil debts as currently provided for in the Employment Ordinance (Cap. 57)(EO). Under the EO, though the obligation of paying wages and employment benefits emanates from private contracts, failure to clear wages and other statutory benefits are offences. Hence, the current legislative provision in the EO for criminalisation of employment-related civil debts would provide the basis for criminalising the non-payment of the LT award originally intended to remedy such civil debts.

9. As a corollary, prudence is needed to ensure that the criminal offence should only apply to the non-payment of LT awards comprising wages and entitlements underpinned by criminal elements under the EO. Indeed, extending the criminal liability to other payments without criminal elements may entail much wider implications beyond the EO, as referred to in

paragraph 7 above.

Penalty level of the new offence

10. The offence for non-payment/ late payment of wages under the EO carries a maximum fine of \$350,000 and imprisonment of 3 years. In order to achieve effective deterrence and send a strong message that the non-payment/ late payment of LT awards is a serious misconduct, setting the maximum penalty for the new offence on par with wage offences at \$350,000 and 3 years' imprisonment may be appropriate.

Elements of the new offence

11. Some members of the LAB and employer groups whom we have consulted raised the importance of distinguishing between cases in which employers have genuine financial difficulty to pay the LT award, and cases in which employers are financially able but unwilling to pay. They generally support that the offence should focus on the latter category of cases, i.e. targeting the wilful employers rather than those who face genuine financial difficulties. We therefore consider it appropriate to adopt "wilfully and without reasonable excuse" as the key elements of the new offence. Under the EO, these are also the elements for wage offences attracting the maximum penalty discussed in paragraph 10 above.

Liability of directors and responsible persons of body corporate

12. Under section 64B(1) of the EO, where an offence committed by a body corporate is proven to have been committed with the consent or connivance of, or attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, the director, manager, secretary or other similar officer shall be guilty of the like offence. In cases where the employer is a body corporate, an LT award will be entered against the corporate employer. Members and employee groups that we have consulted informally all strongly feel that the personal liability of the responsible persons provided for under the EO is an important deterrent against wage offences. They therefore all favour the introduction of a similar provision to help prevent non-payment/ late payment of LT awards. The Administration shares this view. The proposed legislative amendment on criminalisation of non-payment of LT awards that we are working on, in conjunction with DoJ, will therefore include a similar rule of liability so that the culpable director or other responsible person of the body corporate, who has consented to and connived at non-payment, or where non-payment is attributable to his negligence, shall be guilty of the offence committed by the

body corporate.

13. Since the EO has already provided for a definition of employer¹ and conferred liability on directors and responsible persons of body corporate, and the justification of criminalising non-payment of LT awards stems from the criminal nature of defaulting wages and other entitlements under the EO, it appears appropriate for the new offence to be stated in the EO.

14. In addition, in deliberating on the contents of the legislative proposal, we are well aware of the utmost importance Members attach to holding, and meting out appropriate sanctions against, the directors and responsible persons of wilful employers personally liable in order to enhance the deterrent effects. To duly reflect such concern into the legislative proposal, we have been exploring the possibility of easing the difficulty in proving the consent, connivance or neglect of the directors and responsible persons; and in particular, in proving the knowledge of directors and responsible persons about the award against the body corporate.

15. Meanwhile, LD has continued and will continue with its rigorous enforcement against directors and responsible persons for wage offences, thereby helping to reduce the incidence of defaulted LT awards. In 2007, we secured 126 convicted summonses against responsible persons of companies, up 83% over 2006. In the first 11 months of 2008, there were 157 such convicted summonses, up 37% over the same period in 2007.

Liability of partners and officers of a firm

16. Under section 64B(2) of the EO, any other partner in a firm or any person concerned in the management of the firm can be held liable for wage offences committed by a partner in the firm if it is proved that the former has consented, connived or been negligent in the non-payment of wages by the firm. We propose extending this to the legislative proposal under preparation, given the similar nature and penalty as compared to wage offences. In other words, where the employer is a firm, liability for the offence of non-payment of LT awards committed by a partner of the firm may be imposed on partners and officers concerned in the management on the same basis.

¹ Under section 2 of EO, employer is defined as any person who has entered into a contract of employment to employ any other person as an employee and the duly authorized agent, manager, secretary or factor of such first mentioned person.

Provisions on adducing evidence

17. It is anticipated that prosecution of an employer for failing to pay the awarded sum would involve the issues of (a) whether LT has awarded a sum against the employer; (b) whether the employer knows about the award; and (c) whether the employer has paid the award as required.

18. In criminal proceedings, documents submitted as evidence have to be proved and where it is sought to establish the truth of the related facts, the producer of the document may need to be called, save for some recognised exceptions. To save time of the court and all concerned parties, it may be desirable to make statutory provisions on the acceptance of certain documents as prima facie proof, subject to proof to the contrary, of some basic facts which are less contentious. The proceedings may then be simplified and parties may focus on the issues in dispute, e.g. whether a reasonable excuse is available. Our preliminary view is that such documents can include (a) a copy of the LT award to be admitted as exhibit as if it is the original copy of the award; and (b) a certificate made by LT be admitted as evidence of certain facts, e.g. whether the payment has been effected if it is ordered to be made via LT, the service of notice of hearing or award on the employer, etc.

Applicability to non-payment of awards made by the Minor Employment Claims Adjudication Board

19. The Minor Employment Claims Adjudication Board (MECAB) has similar jurisdiction as LT on employment-related claims made by not more than 10 claimants for a sum not exceeding \$8,000 per claimant. If an employer defaults on a MECAB award, the execution modes available to the aggrieved employees are the same as those for enforcement of LT awards. Enforcement of MECAB awards is no less easy than enforcement of LT awards. Given the similar nature of the awards, the same principle of criminalising non-payment of LT awards should apply to similar non-payment of MECAB awards, including elements such as wilful defaults without reasonable excuse by employers, same penalty level, and liability of directors and responsible persons for the new offence.

Other measures

20. As regards the proposals to empower LT to order defaulting employers to pay an additional sum to employees concerned and to disclose financial information, more time is needed to study in detail the legal and implementation issues with DoJ and the Judiciary.

Consultation with the Labour Advisory Board

21. The LAB discussed at its meeting on 10 December 2008 the relevant issues and considerations in making non-payment of LT awards a criminal offence as set out in paragraphs 7 to 19 above. LAB Members supported the principles and the proposed way forward for constructing the new offence.

Advice sought

22. Members are invited to give views on the issues set out in paragraphs 7 to 19 above.

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