

**President's ruling on
Hon LEE Cheuk-yan's proposed resolution to amend the Minimum
Wage Ordinance (Commencement) (No. 2) Notice 2010
and Hon IP Wai-ming's proposed resolution to amend the
Employment Ordinance (Amendment of Ninth Schedule) Notice 2010**

This ruling is on two proposed resolutions of which notices have been given for the meeting of the Legislative Council ("LegCo") of 5 January 2011:

- (a) Hon LEE Cheuk-yan's proposal to amend the Minimum Wage Ordinance (Commencement) (No. 2) Notice 2010 (L.N. 147) ("No. 2 Commencement Notice"); and
- (b) Hon IP Wai-ming's proposal to amend the Employment Ordinance (Amendment of Ninth Schedule) Notice 2010 (L.N. 148) ("Amendment Notice").

2. In considering whether the proposed resolutions are in order under the Rules of Procedure, I have invited the Administration to comment on them and the Members concerned to respond to the Administration's comments.

Hon LEE Cheuk-yan's proposed resolution on the No. 2 Commencement Notice

3. The No. 2 Commencement Notice appoints 1 May 2011 as the day on which the Minimum Wage Ordinance (15 of 2010) ("MWO"), except sections 1, 2 and 16, Part 3 and Schedule 4, shall come into operation. These excepted provisions mainly concern the setting up of the Minimum Wage Commission and the specification of an hourly wage rate, which already came into operation on 12 November 2010 by virtue of the Minimum Wage Ordinance (Commencement) Notice 2010 (L.N. 146).

4. Hon LEE Cheuk-yan's proposed resolution amends the commencement date of 1 May 2011 to 1 February 2011. The effect of his proposed resolution, if passed by the Council, is to advance the commencement of those provisions of MWO which have not yet been operational by three months, thus enabling the statutory minimum wage ("SMW") regime to take full effect on 1 February 2011.

5. According to the LegCo Brief on the commencement notices, the SMW regime provides a wage floor to forestall excessively low wages but without unduly jeopardizing the labour market flexibility, economic growth and competitiveness or causing significant adverse impact on the employment opportunities for the vulnerable workers. The first prescribed minimum hourly wage rate for an employee under section 9 of MWO, as specified in the Minimum Wage Ordinance (Amendment of Schedule 3) Notice 2010 (L.N. 145), is \$28. The effective date of this rate will be the day on which section 9 of MWO comes into operation.

Administration's comments

6. The Administration is of the view that Mr LEE's proposed resolution has charging effect under Rule 31(1) of the Rules of Procedure, which stipulates that:

“A motion or amendment, the object or effect of which may, in the opinion of the President or Chairman, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong shall be proposed only by –

- (a) the Chief Executive; or
- (b) a designated public officer; or
- (c) a Member, if the Chief Executive consents in writing to the proposal.”

7. The Administration submits that manpower resources would be required for implementing the SMW legislation during those three additional months, which cover conciliation and adjudication services for

SMW claims as well as enforcement actions including workplace inspections, investigations and prosecutions. The extra government expenditure estimated to be incurred would be in the amount of some \$4 million, comprising \$3.6 million in “staff cost” and \$0.3 million in “staff-related administrative expenses”.

Hon LEE Cheuk-yan’s comments

8. Mr LEE does not agree to the Administration’s comments. He submits that the provision of conciliation and adjudication services is not a statutory function of the Labour Department (“LD”). Neither MWO nor any other ordinance, such as the Employment Ordinance (“EO”), requires LD to provide such services. Hence, the expenditure arising from the provision of conciliation and adjudication services cannot be regarded as having a charging effect under Rule 31(1) of the Rules of Procedure. Moreover, given that the existing provisions in EO already provide the Commissioner for Labour with extensive enforcement duties and powers, enforcement work relating to MWO is not a new and distinct function. Mr LEE considers that even if such work is new and distinct, the financial resources for implementing MWO three months earlier should be negligible. Mr LEE further points out that the Administration has not provided a detailed breakdown for the amount of \$4 million. In his view, the related expenditure can be ignored as he estimates that only a small proportion of it, an amount way below \$1 million, would be used on enforcement work¹ and the expenditure will be one-off in nature. Hence, there will not be a continuing charge on public expenditure.

My opinion

9. This is the first time I have been asked to rule whether a motion to advance an appointed commencement date in a piece of subsidiary legislation may have charging effect under Rule 31(1) of the Rules of Procedure. In this particular case, I shall have to ask myself two questions: first, whether the provisions which are to commence operation pursuant to the No. 2 Commencement Notice will create any new

¹ Hon LEE Cheuk-yan points out that according to the replies to Members’ questions on the Estimates of Expenditure 2010-11, the number of prosecutions taken out by LD in relation to wage offences was 1 750, while the number of labour claims handled by LD in relation to non-payment of wages was 7 117.

statutory function; and second, whether the performance of any statutory function arising from the advancement of the commencement of the relevant sections of MWO will require the spending of an amount of public money that is not nominal or negligible.

10. There is no provision in MWO which requires LD to provide conciliation and adjudication services for SMW claims. In this respect, I have carefully studied the staffing proposal contained in EC(2010-11)14 which has been submitted by the Administration for the meeting of the Establishment Subcommittee on 5 January 2011 and the meeting of the Finance Committee on 28 January 2011 on the creation of one Assistant Commissioner for Labour and one Chief Labour Officer to undertake, among other duties unrelated to the SMW scheme, the spearheading of the implementation of the SMW scheme. None of the duties of the two officers has referred to the provision of conciliation and adjudication services or any enforcement work unique to MWO.

11. The only requirements introduced by MWO that attract penal consequences for non-compliance are those which require employers to keep certain records in respect of certain employees for the purpose of MWO for inspection by authorized officers. These requirements are added to the existing requirement to keep wage and employment records provided in section 49A of EO. Under this section, every employer shall at all times keep and maintain a record on each employee covering the period of employment during the preceding 12 months. Such a record shall include nine items of particulars, such as the personal data of the employee, job title and wages paid. Upon the coming into operation of section 20 of MWO, if a person is an employee within the meaning of MWO and the wages payable to the employee in respect of any wage period are less than the monthly monetary cap specified in the Ninth Schedule to EO, the particulars in the record of the employee shall also include the total number of hours worked by the employee in that wage period; as for an employee who is a student intern or a work experience student exempted from MWO, the record shall include certain relevant documents.

12. Under section 72 of EO, the Commissioner for Labour or an authorized officer is empowered to inspect the above wage and employment records. The only amendment that MWO has made is by adding to section 72(1)(b) of EO the words now quoted in italics as follows: “The Commissioner, or any public officer authorized by the Commissioner in writing for the purpose and on production of that authority, may require the production of any register, record, form or other document required to be kept under this Ordinance (*and, in the case of a record which includes particulars required to be included under section 49A(3)(ea), require that the particulars under section 49A(3)(a), (d), (e), (ea) and (f) are produced in a single document*) and inspect, examine and copy the same”. Any person who contravenes the requirement to keep such records may be prosecuted under the existing EO. In other words, notwithstanding the coming into effect of MWO and any changes made to the list of particulars set out in the records as a result of MWO, the inspection of such records is a mandatory function of the Commissioner for Labour under the existing EO.

13. As I see it, the conciliation and adjudication services are not statutory functions under the relevant sections of MWO. The early commencement of the uncommenced sections of MWO will not impose a statutory obligation on the Administration to provide conciliation and adjudication services. Any extra expenditure arising from the provision of such services during the three months’ period therefore cannot be regarded as the necessary expenditure required for the early implementation of MWO.

14. As regards workplace inspections, investigations and prosecutions, these are existing functions of the Commissioner for Labour and such activities are carried out regardless of whether MWO comes into effect or not. There is no evidence to convince me that to inspect the additional particulars, i.e. the total number of hours worked during the wage period, added to the “single document” which contains all relevant particulars for inspection would amount to a new function, the carrying out of which will have charging effect.

15. In view of the above, I am not convinced that the early commencement of the relevant sections of MWO will have any charging effect under Rule 31(1) of the Rules of Procedure.

Hon IP Wai-ming's proposed resolution on the Amendment Notice

16. As amended by MWO, EO will require, in addition to a number of data an employer is already required to keep record of, an employer to keep the total number of hours worked by employees in a wage period upon the implementation of the SMW scheme. However, an employer will be exempted from this additional requirement if wages payable to the employee are not less than the monetary cap to be set in the Ninth Schedule to EO as added by MWO.

17. The Amendment Notice amends the Ninth Schedule to EO to specify \$11,500 as the monthly monetary cap on keeping records of hours worked, and the Notice will also come into operation on the day on which sections 20 and 22 of MWO come into operation (which is appointed for 1 May 2011 by the No. 2 Commencement Notice).

18. Hon IP Wai-ming's proposed resolution seeks to raise the monthly monetary cap from \$11,500 to \$20,000.

Administration's comments

19. The Administration is of the view that Mr IP's proposed resolution would have charging effect under Rule 31(1) of the Rules of Procedure. The Administration submits that should the monetary cap be raised from \$11,500 to \$20,000, more employers would be required to keep records on the total number of hours worked by their employees, and records of more employees would have to be kept. To ensure employers' compliance with the requirement, enforcement officers of the Administration would need to spend more time for the verification of records, related investigation and necessary follow-up actions. According to the Administration, additional manpower resources would therefore be required and extra government recurrent expenditure would be incurred, which is estimated to be in the amount of some \$1 million

per annum, comprising \$1.2 million in “staff cost” and \$0.1 million in “staff-related administrative expenses”.

Hon IP Wai-ming’s comments

20. Hon IP Wai-ming does not agree to the Administration’s comments. Mr IP submits that the Administration has already undertaken to provide additional resources for enforcement work relating to MWO. Hence, regardless of what the monthly monetary cap is, the Administration would have already estimated the manpower resources for verifying records and carrying out investigations. Mr IP further submits that how LD would randomly carry out inspections and conduct investigation of cases would depend on whether the problem is serious after MWO has come into operation, and that the work targets in this regard could be set with flexibility.

21. Mr IP further argues that cases which require investigation are those which arise from complaints, and an increase in the number of complaints is related to publicity and compliance of the law by employers and is not necessarily related to an increase in the monthly monetary cap. As regards the amount of some \$1 million per annum put forward by the Administration, Mr IP considers that before the implementation of MWO, the costs of enforcement are no more than a forecast, hence the Administration’s claim that an increase in the monthly monetary cap would result in higher enforcement costs is also no more than a forecast.

My opinion

22. As I have mentioned in paragraph 11 above, upon the coming into operation of section 20 of MWO, if a person is an employee within the meaning of MWO and the wages payable to the employee in respect of any wage period are less than the monthly monetary cap specified in the Ninth Schedule to EO, the particulars in the record of the employee shall also include the total number of hours worked by the employee in that wage period. The advice given to me by the Counsel to the Legislature is that in relation to the Commissioner for Labour’s power under section 72(1)(b) of EO, enforcement officers should, in the course of inspecting the record of an employee kept under section 49A of EO,

also check whether the total number of hours worked is recorded as required by MWO regardless of what the monthly monetary cap is at the time of inspection. In the circumstances, I am not convinced that enforcement officers would need to spend more time for the verification of records, related investigation and necessary follow-up actions, and that additional manpower resources of some \$1 million per annum would be required.

23. As regards the Administration's argument that as a result of the increase in the monthly monetary cap, more employers would be required to keep records on the total number of hours worked by their employees, and records of more employees would have to be kept, these are points of merits which I should not take into consideration in making a ruling under the Rules of Procedure.

My ruling

24. I rule that Hon LEE Cheuk-yan's proposed resolution to amend the Minimum Wage Ordinance (Commencement) (No. 2) Notice 2010 and Hon IP Wai-ming's proposed resolution to amend the Employment Ordinance (Amendment of Ninth Schedule) Notice 2010 do not have charging effect within the meaning of Rule 31(1) of the Rules of Procedure and may be moved at the Council meeting of 5 January 2011.

(Jasper TSANG Yok-sing)
President
Legislative Council

3 January 2011