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(Translation)

19 May 2014

The Hon Mrs Regina IP LAU Suk-yee
Chairman of the Legislative Council Panel on Public Service
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Mrs IP,

Meeting on 19 May 2014
Agenda Item IV: Use of Agency Workers

I am writing in response to the written request made by the Hon LEE Cheuk-yan on 14 May 2014 for information about an equal opportunity litigation case involving an agency worker providing service for the Education Bureau (EDB).

Service Contracts between Procuring Bureaux/Departments and Employment Agencies

Agency workers generally refer to the manpower supplied by employment agencies under service contracts with the procuring bureaux/departments (B/Ds). The service contracts will specify the manpower (usually in terms of number of workers or man-hours) to be supplied to the procuring B/Ds in a specific period. The manpower supplied must meet specific requirements in terms of academic qualification, technical qualification or experience, etc. In accordance with the guidelines issued by the Civil Service Bureau, B/Ds may only use agency workers to meet urgent or unforeseen service needs or unexpected surge in service demands for the short-term; to fill short-term

manpower gap; to provide short-term manpower to deliver service the mode of which will be changed shortly; or to meet service needs which entail irregular work pattern or where the nature of the work involved renders it difficult to recruit and retain staff.

Agency Workers

Agency workers are employed by their agencies and do not have a contractual employment relationship with the procuring B/Ds. Thus, their terms of employment and work arrangements, including which particular procuring B/Ds they are going to and their contract periods etc, are to be decided by the employment agencies. However, if the agency workers fail to meet the service requirements, the procuring B/Ds may, under the terms of the service contracts, request the employment agencies to redeploy suitable workers to provide service.

Liability of Employment Agencies

Although agency workers are not government employees, there are provisions in the service contracts between the B/Ds and the employment agencies specifying that the contractors shall abide by the laws of Hong Kong that are in force during the contract periods. Therefore, both the employment agencies and their employees are subject to and protected by labour legislation and anti-discrimination laws. Should an employment agency violate the relevant laws and regulations thus affecting the rights and benefits of an agency worker as an employee, the agency worker concerned may consider taking legal action against the employment agency and seeking compensation.

Litigation Case

Regarding the equal opportunity litigation case mentioned by the Hon LEE, the plaintiff was an agency worker employed by Emaster Consultants Ltd. (the defendant), who had been deployed to provide service to the EDB since 24 November 2009. The plaintiff informed the defendant of her pregnancy after her contract was renewed in October 2010. She was then asked to return the original contract and sign a new one commencing after a break of one day. As there was no continuity between the old and new contracts, the plaintiff could not be granted paid maternity leave in accordance with the relevant provisions of the Employment Ordinance. The plaintiff was then represented by the Equal Opportunities Commission to file claims against the defendant under the Sex Discrimination Ordinance, accusing that the defendant, when

deciding on whether to offer her employment and on the terms of her employment, had by reason of her pregnancy, given her less favourable treatment than the defendant had given or would give to a non-pregnant worker. The less favourable treatment in this case was a break of one day between the commencement date of the new contract and the expiry date of the old one to avoid granting paid maternity leave to the plaintiff.

The Hon LEE pointed out that the plaintiff had continuously provided service to the EDB for a total of almost two and a half years in the different capacities as an agency worker and as a Non-Civil Service Contract (NCSC) staff. He queried whether this showed that the EDB should not have engaged an agency for supply of manpower in the first place. According to the EDB, it procured manpower through an employment agency at the end of 2009 to provide logistical support for subject-related teacher network activities. According to its plan at that time, the teacher network activities were to be piloted. After one year, it decided that the activities should be further piloted for another nine months and therefore continued to use the service provided by the employment agency. However, the plaintiff resigned in February 2011 (i.e. before the completion of the service contract signed with the employment agency).

Afterwards, the plaintiff was offered a NCSC job in March 2011 through open recruitment. The NCSC position required the post-holder to perform various administrative tasks related to teachers' professional development activities, including the design of PowerPoint presentations, management of statistical data, etc. This NCSC position had been created before the employment of the plaintiff. Its job nature and functions were different from the service provided by the employment agency (i.e. the service provided by the plaintiff as an agency worker). Therefore, the EDB considers that although the plaintiff had served the EDB in the different capacities as an agency worker and as a NCSC staff, the two jobs are different in nature and should not be mixed up as one.

As agency workers are employed by their agencies, the procuring B/Ds have never "contracted out" their responsibilities as an employer through the service contracts they sign with the agencies. As employers, the agencies are obliged to abide by all relevant labour legislation and other laws of Hong Kong.

Regarding the statement that the defendant may choose to close her business rather than compensating the plaintiff, according to the legislation governing the winding-up of companies, the plaintiff can claim against the company in liquidation in the capacity of a creditor, or even file a winding-up petition against that agency. A limited company may be wound up by the court in the circumstances set out in the Companies (Winding Up and Miscellaneous Provisions) Ordinance, which include the circumstance of this case, i.e. the company being unable to pay a debt of \$10,000 or above. The creditor, who is qualified for receiving legal aid under the Legal Aid Ordinance and Rules, may consider applying to the Legal Aid Department for assistance in preparing and filing a winding-up petition. If, after deduction of all fees and expenses, there are funds remaining in the estate of the company, the liquidator will distribute this sum to creditors whose claims have been admitted.

Yours faithfully,

(Ms Maisie CHAN)
for Secretary for the Civil Service