

立法會
Legislative Council

LC Paper No. CB(2)1323/99-00
(These minutes have been seen
by the Administration)

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**Subcommittee on Factories and Industrial Undertakings
(Loadshifting Machinery) Regulation**

**Resolution under section 7 of the
Factories and Industrial Undertakings Ordinance (Cap. 59)**

**Minutes of Meeting
held on Tuesday, 21 December 1999 at 10:45 am
in Conference Room A of the Legislative Council Building**

- Members Present** : Hon Mrs Miriam LAU Kin-ye, JP (Chairman)
Hon HO Sai-chu, SBS, JP
Hon Cyd HO Sau-lan
Hon LEE Kai-ming, SBS, JP
Hon CHOY So-yuk
- Member Absent** : Hon Andrew CHENG Kar-foo
Hon Ronald ARCULLI, JP
Hon CHAN Wing-chan
- Public Officers Attending** : Mr Herman CHO
Principal Assistant Secretary for Education and Manpower
- Mr Samson LAI
Assistant Secretary for Education and Manpower
- Mr William SIU
Assistant Commissioner for Labour
- Miss Marie SIU
Senior Government Counsel
- Clerk in** : Mrs Constance LI

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Attendance Chief Assistant Secretary (2) 2

Staff in Attendance : Mr Arthur CHEUNG
Assistant Legal Adviser 5

Mr Stanley MA
Senior Assistant Secretary (2) 6

I. Administration's response to issues raised at the meeting on 23 November 1999

[LC Paper Nos. CB(2)654/99-00(01), CB(2)692/99-00(01) and CB(2)704/99-00(01)]

Duties of responsible person

At the Chairman's invitation, Principal Assistant Secretary for Education and Manpower (PAS(EM)) briefed members on the revised definition of "responsible person" in section 2 and the amended sections 3, 4 and 5 of the Regulation. He said that the Administration considered that a contractor having the overall management of the site should be held responsible for the requirements under section 3 of the Regulation. However, the Administration would not hold a contractor liable if an effective system had been put in place and if the offence was committed by a person who had been specifically delegated the responsibility.

2. The Chairman pointed out that the revised wording had not reflected the intention as described by PAS(EM). Assistant Commissioner for Labour (AC for L) responded that section 8(1) of the Regulation had included a "reasonable excuse" provision for offences relating to qualifications of an operator. He explained that for the Labour Department (LD) to persuade the Court to accept a reasonable excuse under section 8(1), they would look at the delegation of responsibility with regard to the operation of a loadshifting machine. Preferably, there should be a written contract between the principal contractor and the subcontractor, that subcontractor should, among other things, maintain a register of the qualified operators under his employment and the responsible person should require the subcontractor to regularly report on the operation of the loadshifting machinery.

3. The Chairman pointed out that it would be for the Court to determine whether the system put in place by the contractor could constitute a reasonable excuse. However, she was of the view that the principal contractor would have discharged his responsibility if he had appointed a subcontractor in writing to take charge of the operation of the loadshifting machinery on the site. She

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considered it unreasonable to require the principal contractor to monitor the operation of the machinery after delegation. Mr HO Sai-chu echoed the same views.

4. AC for L explained that the Administration considered that a reasonable excuse should be supported by an established system which set out the delegation of authority and responsibilities, and the procedures and measures to ensure safe operation of loadshifting machinery on the site. He stressed that the principal contractor should be responsible for all activities within the construction site and that LD would take into account the actual circumstances and the measures in place to ensure compliance with the legislative requirements.

5. In response to the Chairman, Assistant Legal Adviser 5 (ALA5) advised that the Court would interpret a reasonable excuse from a legal instead of the enforcement policy point of view. He said that the existence of a contract for the delegation of responsibility from the principal contractor to the subcontractor might not be accepted by the Court as a reasonable excuse for an offence under section 3 of the Regulation. The words "shall ensure" in section 3 would imply strict liability of the principal contractor even though he had appointed a subcontractor to take charge of the machinery in question.

6. AC for L reiterated that the principal contractor had the responsibility for the overall management of the site. However, LD would exercise discretion and not prosecute the principal contractor if the latter had put in place a delegation and monitoring system to ensure compliance with the statutory requirements

7. The Chairman said that she was not entirely convinced that LD should have discretion in determining which responsible person should be prosecuted. She said that the Regulation should provide a defence clause if the Administration did not intend to hold the principal contractor liable under certain circumstances.

8. Mr HO Sai-chu shared the Chairman's concern that the law should clearly reflect the policy intention as it would be undesirable to give too much discretion to the law enforcement agency as to whom should be prosecuted.

9. ALA5 suggested that the Administration might consider using "due diligence" instead of "shall ensure" so that the responsible person would only be required to take reasonable and sufficient measures to ensure compliance with the requirements under section 3 of the Regulation.

10. AC for L considered that the provisions of the Regulation had already reflected the legislative intent. He said that the strict liability provisions were in line with other Regulations made under the Factories and Industrial Undertakings Ordinance (FIUO), such as the Construction Site (Safety) Regulations, the Suspended Working Platforms Regulation and the Lifting Appliances and

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Lifting Gear Regulations. He emphasized that the principal contractor must be responsible for the safe operation of loadshifting machines on the construction site, in order to ensure the safety of all persons working on the site.

11. ALA5 pointed out that the use of "shall ensure" might be inconsistent with the provision of a "reasonable excuse" for offences under the Regulation. He said that section 6A of FIUO had included the phrase "so far as is reasonably practicable" for a proprietor of an industrial undertaking to take measures to ensure the health and safety of his employees at work. He suggested adding a similar provision to the Regulation, so that a principal contractor could discharge his obligations under the Regulation by taking reasonable and sufficient measures to implement and supervise the arrangements for compliance with the Regulation.

12. The Chairman stressed that the principal contractor could not check every operator employed on the construction site. She was of the view that the subcontractor who had the direct management or in charge of the loadshifting machinery should be the responsible person for offences under section 3 of the Regulation. She considered that the strict liability on the principal contractor as imposed by the words "shall ensure" in section 3 was unreasonable. She therefore requested the Administration to consider ALA5's suggestion in paragraph 11, or to re-draft the definition of "responsible person" to specify that it referred to the employer of the loadshifting machine operator. PAS(EM) agreed to consider the suggestion.

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13. The Chairman also sought clarification on the meaning of "employed by him and who is instructed (whether directly or indirectly) by him" in section 4 of the Regulation. She expressed concern as to whether the employees of subcontractors would be regarded as indirectly employed by the principal contractor if they were required to follow the work instructions of the principal contractor.

14. ALA5 said that under the revised section 4, the responsible person of a loadshifting machine would have to provide training to persons who were "employed and instructed" by him to operate a loadshifting machine. If "employed" was to be interpreted in accordance with the meaning in the Employment Ordinance, the subcontractor's employees could not be regarded as employed by the principal contractor. Senior Government Counsel (SGC) confirmed the interpretation of ALA5.

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Operating a loadshifting machine without a valid certificate

15. PAS(EM) said that the Administration was not in favour of introducing another offence for workers who were found operating a loadshifting machine without a valid certificate. He explained that the Administration could prosecute such workers under section 6B of the FIUO since their action was likely to endanger the safety of other persons on the site. Furthermore, an operator of loadshifting machine who could not produce a valid certificate for inspection upon demand was already an offence under section 6 of the Regulation.

Training schedule and capacity

[LC Paper No. CB(2)692/99-00(01)]

16. PAS(EM) said that the Administration had obtained further information from the training providers. The Vocational Training Council (VTC) could train 204 experienced operators, 96 new operators and 20 instructors a year. The Occupational Safety and Health Council (OSHC) also planned to train 2 100 forklift truck operators and 48 instructors in 2000-2001 at a fee of \$850 and \$9,800 respectively. Moreover, OSHC had agreed to provide 30 to 40 instructor training places for members of the Hong Kong Container Freight Station Association (HKCFSA). All these courses would be subject to the vetting and approval by the LD.

17. The Chairman inquired about the certification arrangements for the forklift truck operator course organized by HKCFSA. AC for L replied that these courses would also be vetted and recognized by LD in the same way as other courses organized by VTC and OSHC.

II Clause-by-clause examination

[LC Paper No. CB(2)704/99-00(01)]

18. Members noted that the Administration had provided a revised draft of the Regulation (version as at 20 December 1999) which was tabled at the meeting.

Section 1 - Commencement

19. PAS(EM) said that there would be a 18-month grace period for the commencement of the Regulation other than the provisions on training. The Administration would review the training progress and the supply of qualified operators and report to the LegCo Panel on Manpower 12 months after enactment of the Regulation. The commencement notice would be published in gazette by the Commissioner for Labour (C for L). AC for L added that section 2 of the Regulation should be effective upon enactment to enable early provision of training courses for loadshifting machine operators.

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20. The Chairman asked about the timetable for implementing phase two, i.e. provision of training for operators of compactor, dumper, grader, locomotive and scraper as listed in items (f) to (j) in Part II of the Schedule to the Regulation.

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21. PAS(EM) replied that only a small number of loadshifting machinery was included under phase two and the Administration would liaise with the Construction Industry Training Authority and VTC on the provision of training to these operators. He undertook to brief the LegCo Panel on Manpower on the training arrangements for phase two in due course.

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22. The Chairman inquired whether the commencement notice would also be subject to the positive vetting of the Legislative Council. SGC responded that the commencement notice to be made by C for L under the Regulation was subsidiary legislation which would have to be laid on the table of the Legislative Council under section 34 of the Interpretation and General Clauses Ordinance. At the request of the Chairman, PAS(EM) undertook to provide a response as to whether the commencement notice would be subject to positive vetting.

23. Mr LEE Kai-ming asked whether the Regulation would cover loadshifting machinery operating in private cargo handling areas and container terminals. PAS(EM) replied that the Regulation would not cover these areas as its scope was confined to industrial undertakings and construction sites.

Section 2 - Interpretation

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24. Members noted the improvements made to the definitions of "certificate" and "loadshifting machine". The Administration would provide a written response to address members' concerns about the definition of "responsible person".

Section 3 - Operation of a loadshifting machine

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25. The Chairman requested the Administration to consider whether it was reasonable to impose strict liability on the "responsible person" under this section. She asked the Administration to give further consideration to members' concerns as discussed earlier at the meeting.

Section 4 - Duty of responsible person to provide training course

26. ALA5 enquired about the need for including "to be evidenced by the possession of a valid certificate" in section 4(1) as it would give the effect that the responsible person must ensure that the operator would pass the test and successfully obtain a certificate after training. He pointed out that failure in complying with the requirement would constitute an offence under section 8(2).

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27. The Chairman and Mr HO Sai-chu urged the Administration to improve the drafting of this section. As section 3 had already required the responsible person to ensure that loadshifting machines were to be operated by persons with a valid certificate, they questioned the need for including the requirement of a valid certificate under section 4.

28. AC for L responded that the purpose of the section was to require the responsible person to ensure the provision of training to persons who were employed and instructed by him to operate loadshifting machinery. SGC added that the contractor should not instruct his employee to operate a loadshifting machine if the latter did not have a valid certificate.

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29. In view of the concerns expressed by the Chairman and members, PAS(EM) agreed to consider improving the drafting of the section.

Section 5 - Duty of person to attend training course

30. The Chairman inquired about the reason for replacing "required" by "instructed" under this section as the coverage would be different. Miss Cyd HO added that a qualified operator might be "required" by circumstances, but not "instructed" by the contractor, to operate a loadshifting machine on the construction site.

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31. SGC explained that section 5 imposed duty on a person who was instructed to operate a machine to attend training course. This corresponded with section 4 which imposed a duty on a responsible person to provide training course to a person who was instructed by him to operate a loadshifting machine. If an operator was "required by circumstances" instead of "instructed" by the responsible person to operate a loadshifting machine, the responsible person would have no responsibility under section 4. AC for L added that the provision was only to ensure that the employee concerned would attend the training provided by the responsible person. ALA5 suggested that section 5 could be rephrased to specify that the persons in section 5 referred to persons specified in section 4(1). SGC undertook to consider the suggestion.

Date of next meeting

32. Members agreed to hold the next meeting at 10:45 am on 12 January 2000.

III Any other business

33. There being no other business, the meeting ended at 12:50 pm.

Legislative Council Secretariat

2 March 2000