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## INFORMATION NOTE

### **Supplementary Information on the Operation of Labour Tribunals and Other Mechanisms for Resolving Labour Disputes in Hong Kong and Selected Places**

#### **1. Background**

1.1 The Panel on Administration of Justice and Legal Services and the Panel on Manpower of the Legislative Council, at their joint meeting on 24 May 2004, discussed the research paper entitled "Operation of Labour Tribunals and Other Mechanisms for Resolving Labour Disputes in Hong Kong and Selected Places". They requested the Research and Library Services Division to provide supplementary information on the power of the Employment Court of New Zealand to imprison defaulters.

#### **2. The power to imprison defaulters**

2.1 If a mediated agreement has not been implemented or the decision of the Employment Relations Authority or the Employment Court has not been enforced, one can seek enforcement through a compliance order issued by Employment Relations Authority or the Employment Court. Where any person fails to comply with a compliance order, the person affected by that failure may apply to the Employment Court, which has the power under Section 140(6) of the Employment Relations Act 2000<sup>1</sup> (the 2000 Act) to sentence the person in default to imprisonment for a term not exceeding three months.<sup>2</sup>

2.2 No information can be found on why the Employment Court has been given the power to imprison where a person/company has failed to comply with a compliance order.<sup>3</sup> The related Employment Relations Bill and its explanatory notes did not discuss this matter. This power had existed under the predecessors of the 2000 Act, i.e. the Employment Contracts Act 1991 and the Labour Relations Act 1987. Therefore, it is not a new power. According to the Employment Relation Services, it seems to be a traditional power that continues to be included in the 2000 Act.

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<sup>1</sup> It was enacted in 2000 and came into force on 2 October 2000.

<sup>2</sup> Apart from imprisonment, the Employment Court may order the defaulter to pay a fine of not exceeding NZ\$40,000 (HK\$182,178), or order that the property of the person in default be sequestered. However, a writ of sequestration is rarely awarded.

<sup>3</sup> Reply from the Employment Relations Service of New Zealand.

2.3 While the Employment Court is empowered to imprison defaulters in labour disputes, the District Court does not have the power to imprison defaulters in any disputes. However, it has the power to order a defaulter to undertake supervised community work for a term not exceeding six months, where a judgement debtor has the means to pay but will not pay the judgement debt, and all means of enforcing the judgement have been considered and are inappropriate or unsuccessful.<sup>4</sup> Although the sentence is called “periodic detention”, it does not involve detention of the defaulter at all.

### 3. Implementation of and comments on the power to imprison

3.1 The Employment Court has never exercised its power to imprison defaulters.<sup>5</sup> In *Edwards v Andrew Wright*<sup>6</sup>, the Employment Court stated that imprisonment “*may form a very powerful incentive for payment but if the order comes to be enforced it does not produce the essentially desired result*”. However, there have been a few cases where a party has requested that the Employment Court use that power and the Employment Court has made some comments on the power to imprison.

3.2 In *Drake v Port Wellington Ltd*<sup>7</sup>, the Employment Court stated that it had a limited criminal jurisdiction and was “*clearly not intended to use it except in cases calling for its use*”.

3.3 The 2000 Act contemplates that the Employment Court only needs to be satisfied that the person fails to comply with the compliance order, before it can exercise its power to imprison under Section 140(6). However, the Employment Court has emphasized in *Feather (Labour Inspector) v Payne* that the non-compliance must be deliberate. Judge Colgan believed that the court can only safely act “*if it is satisfied to a very high standard that there has not only been non-compliance but wilful and deliberate non-compliance as opposed to accidental or involuntary non-compliance or, in the case of an order requiring the payment of a sum of money, simply genuine inability to pay*”.<sup>8</sup>

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<sup>4</sup> Section 84(O) of the District Courts Act 1947.

<sup>5</sup> Reply from the Employment Relations Service of New Zealand.

<sup>6</sup> *Edwards v Andrews Wright*, unreported, 25 September 1995, AEC 97/95.

<sup>7</sup> *Drake v Port Wellington Ltd*, [1998] 3 ERNZ 104.

<sup>8</sup> *Feather (Labour Inspector) v Payne*, 4 February 1997, unreported, AEC 4/97.

3.4 In *Bamber v Air New Zealand Ltd*, the Employment Court also held that before anyone was imprisoned for non-compliance, it had to be proved that the person was aware of the making of the order and its precise term. The Employment Court required that *"the order set out that person's obligations to act or refrain from acting in an adequately clear and exact way, and that the person has nevertheless defied the order or at least neglected to comply with it"*.<sup>9</sup>

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<sup>9</sup> *Bamber v Air New Zealand Ltd*, unreported, 1 Feb 1995, AEC 1/95.

## Reference

1. Agnew, Peter. (2002) *Employment Law Guide*, 6<sup>th</sup> ed. Wellington, LexisNexis.
2. Department of Labour. (2000) *Employment Relations Bill: Explanatory note*.