LABOUR DEPARTMENT（Headquarters） 勞工處（總處）

Your reference 來函編號：

Our reference 本處檔案編號： LD CR/1/814 Pt.97

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16 July 2012

Clerk to Panel on Manpower
Legislative Council
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong
(Attn: Ms Alice Leung)

Dear Ms Leung,

Panel on Manpower
Labour Relations Issues in the
List of Follow-up Actions

I refer to LC Paper No. CB(2)2353/11-12(01) which sets out the follow-up actions that the Panel on Manpower has asked the Administration to take. Appended below please find a consolidated response on issues relating to labour relations i.e. items no. 4, 14 and 15 in the List of Follow-up Actions.

A. Arrears of wages in the construction industry (Item 4)

2. The Panel had contemplated in the past measures to reduce late payment or non-payment of wages in the construction industry and the Administration was requested to explore extending the wage monitoring measures implemented in public works and public housing projects to the private sector. The Administration was also suggested to require the principal contractors to make wage payment direct to their subcontractors'

workers. Having tackled the matter with the concerted efforts of the Administration, trade unions and employers in the construction industry in recent years, we would like to provide the following response.

3. With the implementation of wage monitoring measures by the Administration since 2006, there is a clear downward trend in the number of labour disputes (i.e. cases involving over 20 employees) handled by LD relating to public works and public housing projects. In 2011, LD recorded only 7 labour disputes involving these projects, representing a significant drop of 86.0% when compared with the corresponding figure of 50 in 2006.

4. After these measures were proven to be effective in public works contracts, they have been promoted to the private construction sector with a view to gaining a wider application in the whole construction industry. Among others, the Construction Industry Council has published a "Guidelines on measures for protection of workers' wages". The Guidelines, which were prepared with reference to the practices adopted in the pubic construction projects of the Development Bureau since 2006, summarised wage protection measures to facilitate adoption and application by stakeholders, especially those from the private sector. With the concerted efforts of trade unions, employers and various stakeholders, the wage payment situation in the construction industry has improved significantly. The number of labour disputes in private sector construction sites handled by LD has reduced 61.3% from 62 in 2006 to 24 in 2011.

5. We consider that the current three-tier wage protection mechanism for construction workers, namely (a) the criminal liability for late payment/non-payment of wages; (b) the requirement for principal contractors, superior sub-contractors or superior nominated sub-contractors to be responsible for paying the first two months' unpaid wages of an employee of their sub-contractor or nominated sub-contractor; and (c) the ex gratia payment provided by the Protection of Wages and Insolvency Fund (PWIF) in the event of employers' inability to pay wages, has provided adequate wage protection for employees in the construction industry. There is no compelling reason to mandate principal contractors to make wage payment direct to their subcontractors' workers, when this mode of operation also has its own drawbacks, e.g. the principal contractors

would need additional time to verify the status, attendance records and wage amounts of all the employees of sub-contractors at all levels, resulting in possible delay of wage payment. Nevertheless, the Administration will keep constant review of the labour relation scene in the construction industry and is determined to keep up its efforts in protecting wage payment for workers and enhancing harmonious labour relations in the industry.

B. Proposed amendments to the reinstatement and re-engagement provisions under the Employment Ordinance (Cap. 57) (Item 14)

6. At the meeting of the Panel on Manpower held on 20 January 2012, Members asked the Administration to provide further information on cases of unreasonable and unlawful dismissal where the employees requested reinstatement/re-engagement. The information required is provided in paragraphs 7 to 9 below.

(a) *Provisions for taking out prosecution against employers*

7. Any employer who unlawfully dismisses an employee after having reinstated or re-engaged the employee in accordance with a compulsory order for reinstatement/re-engagement commits an offence. The statutory restrictions on termination of employment and the corresponding provisions under which prosecution can be taken out are summarised below.

Scope of employment protection	Prohibition of dismissal	Relevant provisions for taking out prosecution
Maternity protection	An employer shall not dismiss a female employee who has been confirmed pregnant and has served a notice of pregnancy	Section 15(1) and (4) of the Employment Ordinance (EO)

Scope of employment protection	Prohibition of dismissal	Relevant provisions for taking out prosecution
Paid sick leave	An employer shall not dismiss an employee whilst the employee is on paid sick leave	Section 33(4B) and (4BB) of EO
Giving evidence or information to the authorities	An employer shall not dismiss an employee by reason of his giving of evidence or information in any proceedings or inquiry in connection with the enforcement of EO, work accidents or breach of work safety legislation	Sections 72B(1) and 63A(5) of EO; sections 6 and 10(4A) of the Factories and Industrial Undertakings Ordinance (Cap. 59)
Exercising trade union rights	An employer shall not dismiss an employee for trade union membership and activities	Section 21B(2)(b) of EO
Injury at work	An employer shall not dismiss an injured employee before having entered into an agreement with the employee for employees' compensation or before the issue of a certificate of assessment	Section 48 of the Employees' Compensation Ordinance (Cap. 282)

(b) ***Amount of payment made to employees in settlement cases***

8. The Administration was asked to provide information on the amount of payment made to employees in respect of cases of unreasonable and unlawful dismissal where the employees requested reinstatement/re-engagement, and the employers and employees reached

settlement at the Labour Tribunal (LT) by mutual agreement.

9. Among the cases referred to LT during the period from July 1997 to May 2012, there are 12 cases falling into the aforesaid category. The relevant information is tabulated below:

Amount of payment made to employee	Number of cases
Less than $5,000	1
$5,000 - $9,999	1
$10,000 - $19,999	3
$20,000 - $29,999	1
$30,000 - $39,999	2
$40,000 - $99,999	3
$100,000 or above	1

C. Implementation of the Employment (Amendment) Ordinance 2010 (Item 15)

10. At the meeting of 15 March 2012, Members requested the Administration to provide further information about the implementation of the Employment (Amendment) Ordinance 2010 (the Amendment Ordinance) which came into operation on 29 October 2010. The information required is provided in paragraphs 11 to 19 below.

(a) *Number of default cases where prosecution had not been instituted*

11. In the 15-month period from November 2010 to January 2012, LD handled a total of 835 cases of defaulted LT or Minor Employment Claims Adjudication Board (MECAB) awards falling within the ambit of the Amendment Ordinance. Among which, there were 669 cases where criminal investigation or prosecution could not be taken out due to various factors. Of these cases, 47% involved employees refusing to act as prosecution witnesses; 31% concerned mainly business cessation and the employers or directors could not be located; 8% concerned companies having been wound up or the employers having gone bankrupt; 9% were under appeal or the companies having been dissolved etc. so that criminal

investigation needed to be withheld or prosecution not initiated; and the remaining 5% were cases having no prima facie evidence or, upon investigation, lacking sufficient evidence to initiate prosecution.

(b)*Reasons for employers not locatable*

12. Some Members noted that the employers in a sizable proportion of cases could not be located. They requested the Administration to provide reasons of this and examine whether there was any loophole in the Amendment Ordinance.

13. Statistics show that among the LT or MECAB default cases handled by LD, about half of the employees involved had reported right at their lodging claims with LD that their employers had ceased business, and expressed difficulties in locating their employers. Of the 835 default cases handled by LD during the 15-month period from the commencement of the Amendment Ordinance to January 2012, we further observe that about 70% of the LT/MECAB awards were made ex-parte with the defendant employers failing to attend the hearings. These illustrate that among the default cases, a significant portion of employers were unable to be reached since the very early stage of these cases. When the affected employees approached LD subsequently with the defaulted LT or MECAB award, a sizable portion of them might have already lost contact with their employers for quite some time, hence presenting more uncertainty and difficulty for LD officers to locate their employers. Whilst LD would attempt every possible means including conducting workplace inspections to addresses provided by the employees for locating the employers, we note that in such circumstances the last known addresses are usually left vacant or occupied by other undertakings, and the employers concerned are ultimately not contactable.

14. The Amendment Ordinance targets at those employers who are financially viable but wilfully default payment of the awarded sums. As most employers whose companies ceased operation generally have problems in making payments, they are lesser targets of the Amendment Ordinance. On the other hand, from the instant the ex-employees of closed down companies are referred to LT/MECAB, it is known that their employers would unlikely be able to pay the awarded sum. But for the

purpose of supporting the quantum of their claims in their application for ex gratia payment from PWIF, some of these affected employees would lodge claims at LT/MECAB for an award to back up their application for ex gratia payment. For these employees who fail to receive any award sum, LD would provide all possible assistance to them including making referrals to the Legal Aid Department for filing winding-up or bankruptcy petitions against their employers and assisting them in their application for ex gratia payment from PWIF.

15. As pointed out in the aforesaid paragraphs, cases where employers cannot be located have each of their own underlying causes and do not reflect any loophole in the Amendment Ordinance.

(c) *Time required for investigation and prosecution*

16. Some Members requested the Administration to provide more detailed information pertaining to the number of cases involved and the time taken by LD for investigating and taking out prosecution of default cases. In the 15-month period from the commencement of the Amendment Ordinance on 29 October 2010 and up to January 2012, LD had taken out prosecution for 46 cases and prosecution for another 32 cases was under consideration. Among these cases, investigation for relatively straightforward ones can be completed in around one to two months' time following the employees' provision of witness statements (inclusive of the time taken for arranging and conducting hearings with their employers). After this, it takes around four to six weeks' time to complete the assessment of sufficiency of evidence and recommendation on the giving of consent for prosecution. In sum, for relatively straightforward cases, the time required for completing relevant investigation and taking out prosecution was about two to three months following employees' provision of witness statements.

17. For more complicated cases, a longer time for investigation and prosecution would inevitably be required. Depending on the circumstances of individual cases, investigation officers may need to locate the employers through various means, clarify disputed facts or doubts with the employers and witnesses, take supplementary statements and collect supplementary information, collect relevant information time and again in

respect of cases involving a number of defendants and witnesses who provide contradictory information etc. From operational experience, for cases with higher complexity, it might take about four to six months in general to complete the required investigation and prosecution procedures following employees' provision of witness statements. Nevertheless, the required processing time hinges on the complexity of individual cases and hence cannot be generalised.

18. It is noteworthy that by nature of the claim items involved, offence cases of the Amendment Ordinance usually concern other wage offences under the EO as well. To enhance efficiency and minimise employees' time for giving statements and testifying at courts, LD usually processes various suspected offences of an employer in relation to the same employee or incident in one go. As it is not viable to breakdown the time required for processing each individual offence item of the same case, the timeframe mentioned above in respect of investigation and prosecution covered the total time required for cases that involve multiple offence items.

19. Criminal prosecution requires a high standard of proof to the extent that a suspected offence must be proved beyond reasonable doubt. To attain this standard, prudent and detailed information and evidence collection is absolutely necessary. Despite this, LD strives to complete investigation and prosecution of all suspected offences expeditiously and properly.

Yours sincerely,

(Charles HUI)

for Commissioner for Labour