

立法會
Legislative Council

LC Paper No. CB(2)806/09-10
(These minutes have been seen
by the Administration)

Ref : CB2/BC/10/08

Bills Committee on Employment (Amendment) Bill 2009

Minutes of meeting
held on Wednesday, 9 December 2009, at 8:30 am
in Conference Room B of the Legislative Council Building

- Members present** : Hon Alan LEONG Kah-kit, SC (Chairman)
Hon LEE Cheuk-yan
Hon LI Fung-ying, BBS, JP
Hon Tommy CHEUNG Yu-yan, SBS, JP
Hon WONG Kwok-hing, MH
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon LEUNG Kwok-hung
Hon WONG Ting-kwong, BBS, JP
Hon Ronny TONG Ka-wah, SC
Dr Hon LAM Tai-fai, BBS, JP
Hon WONG Sing-chi
Hon IP Wai-ming, MH
Hon IP Kwok-him, GBS, JP
Hon Paul TSE Wai-chun
- Members absent** : Hon LEUNG Yiu-chung
Hon Cyd HO Sau-lan
- Public Officers attending** : Mr Byron NG, JP
Assistant Commissioner for Labour (Labour Relations)
- Mr Ernest IP
Chief Labour Officer (Labour Relations)
Labour Department
- Miss Bonny WONG
Senior Labour Officer (Labour Relations) 1
Labour Department

Miss Betty CHEUNG
Senior Assistant Law Draftsman
Department of Justice

Miss Emma WONG
Senior Government Counsel
Department of Justice

Clerk in attendance : Mr Raymond LAM
Chief Council Secretary (2) 1

Staff in attendance : Ms Clara TAM
Assistant Legal Adviser 9

Miss Florence WONG
Senior Council Secretary (2) 5

Ms Camy YOONG
Clerical Assistant (2) 1

I. Meeting with the Administration

The Bills Committee deliberated (index of proceedings attached at **Annex**).

2. The Bills Committee requested the Administration to -
 - (a) explain whether the proposed section 43P covered awards where the sum payable comprised specified entitlements and other payments such as those awarded under sections 32O and 32P but not under the proposed section 43N(1); and
 - (b) provide information on the enforcement actions and measures against overseas director and middle management who had consented to, connived at, or been neglectful of the wilful non-payment of an award.

II. Date of next meeting

3. The Bills Committee agreed that the Clerk would ascertain the availability of members on 22 December 2009 at 10:45 am and schedule the next meeting in consultation with the Chairman.

(Post-meeting note: With the concurrence of the Chairman, the next two meetings of the Bills Committee were scheduled for 22 December 2009 at 10:45 am and 13 January 2010 at 8:30 am.)

4. The meeting ended at 10:40 am.

Council Business Division 2
Legislative Council Secretariat
22 January 2010

**Proceedings of meeting of the
Bills Committee on
Employment (Amendment) Bill 2009
on Wednesday, 9 December 2009, at 8:30 am
in Conference Room B of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action Required
000000 - 002240	Chairman Admin	Briefing by the Administration on the coverage of specified entitlements under the proposed section 43N(1) [Paragraphs 17 to 27 of LC Paper No. CB(2)80/09-10(01)]	
002241 - 005101	Hon IP Wai-ming Admin Chairman Hon LEE Cheuk-yan Hon Jeffrey LAM	<p>Members expressed the following views -</p> <p>(a) Hon IP Wai-ming opined that other terminal payments under section 32O (e.g. an award to an employee with 4.5 years' service for terminal payment of proportionate amount of long service payment (LSP)) and compensation under section 32P of the Employment Ordinance (EO) should be covered under the proposed section 43N(1);</p> <p>(b) Hon LEE Cheuk-yan suggested that non-payment of any Labour Tribunal (LT) award should be liable under the proposed new offence and the awards made under sections 32O and 32P related to unreasonable and unlawful dismissal should be covered; and</p> <p>(c) Hon Jeffrey LAM expressed concern about the meaning of "unreasonable dismissal" and held the view that the Administration should consider views of different stakeholders, including both employers and employees, on the criminalization of LT awards to avoid unnecessary disputes</p> <p>Response of the Administration that -</p> <p>(a) proportionate entitlements e.g. LSP under section 32O and compensation under section 32P were civil in nature and not entitlements underpinned by criminal sanction under EO and thus did not fall within the scope of</p>	

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		<p>specified entitlements under the proposed section 43N(1). Notwithstanding this, if the same award comprised any specified entitlement, the employer could still be held liable under the proposed new offence under the proposed section 43P for defaulting payment of any part of the award; and</p> <p>(b) there were policy and legal concerns about the read-across implication of the remedies for other parts of the civil adjudication system. Therefore, the proposed offence was confined to employee entitlements under EO the non-payment of which entailed criminal sanction. Nonetheless, the Labour Department (LD) would discuss with the Department of Justice (DoJ) in respect of members' suggestion and gauge views from stakeholders</p> <p>The Administration was requested to explain whether the proposed section 43P covered awards where the sum payable comprised specified entitlements and other payments such as those under sections 32O and 32P but not under the proposed section 43N(1)</p>	<p>Admin to provide a response</p>
005102 - 011622	Chairman Admin	Briefing by the Administration on the liability of directors and partners under the proposed section 43Q [Paragraphs 28 to 47 of and Annex C to LC Paper No. CB(2)80/09-10(01)]	
011623 - 012452	Hon LEE Cheuk-yan Admin Chairman	<p>Enquiries about the applicability of "rebuttable presumption" to wage offences and how it operated to determine the liability of the accused director or responsible person of the body corporate</p> <p>Response of the Administration that -</p> <p>(a) the enforcement experience and convictions in recent years showed that section 64B of EO was adequate for catching culpable company</p>	

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		<p>directors and responsible persons for wage offences and the Administration had no plan to amend section 64B. The proposed section 43Q(3), (4) and (5) were to cater for the different circumstances of defaulting LT awards; and</p> <p>(b) the proposed section 43Q(3) introduced a rebuttable presumption regarding consent, connivance or neglect on the part of a director or responsible person of the body corporate, if the prosecution could prove his involvement in the management of, or knowledge of the award made against, the body corporate by direct evidence or circumstantial evidence. Under section 43Q(5), the presumption would be rebutted if there was evidence raising an issue that he had not consented to, connived at or been neglectful of the non-payment, and the contrary could not be proved by the prosecution beyond reasonable doubt</p>	
<p>012453 - 013951</p>	<p>Hon Tommy CHEUNG Admin Chairman</p>	<p>Issues raised by Hon Tommy CHEUNG -</p> <p>(a) whether an exemption clause could be introduced given that the proposed section 43Q did not impose a strict liability;</p> <p>(b) what was the rationale for including the secretary of the body corporate as a responsible person who could be held liable for the proposed offence; and</p> <p>(c) whether a partner would be subject to two counts of offence under the proposed sections 43P and 43Q</p> <p>Response of the Administration that -</p> <p>(a) there was safeguard to protect the interest of the directors or responsible persons of a body corporate and a</p>	

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		<p>partner in a firm given that the burden of proof generally rested with the prosecution, and the rebuttable nature and effect of the presumption was explicitly spelt out in the proposed section 43Q(5);</p> <p>(b) the proposed section 43Q(1) applied to any director, manager, secretary or other similar officer of the body corporate so that the de facto responsible person who was proved to have consented to, connived at or been neglectful of the wilful non-payment of an award by his body corporate would also be guilty of the same offence. A director, manager or secretary would not be convicted merely because he held the post, should he have no part to play in the offence committed; and</p> <p>(c) if there was sufficient evidence to establish the proposed offences under both proposed sections 43P and 43Q(2), alternative charge might be laid against a partner. However, a partner would not be guilty under both sections in respect of the same entitlement of the same employee in view of the rule against double jeopardy (i.e. if the accused was guilty of one count of offence (e.g. under section 43P), the other count of offence (e.g. under section 43Q) would be dropped)</p>	
013952 - 015327	Hon Paul TSE Admin	<p>Issues raised by Hon Paul TSE -</p> <p>(a) how to avoid potential risks of prosecuting persons who were not the actual responsible persons under the proposed section 43Q (e.g. the director of a body corporate might request an employee holding the post of director, manager, secretary or other similar officer of the body corporate to admit the commission of an offence in order to protect the actual responsible person) or the</p>	

Time marker	Speaker	Subject(s)	Action Required
		<p>manager who was not the actual responsible person paying the award in order to avoid prosecution against the body corporate; and</p> <p>(b) whether the information given by an employer under the proposed section 43S would be used by the prosecution as evidence for establishing the offence against the employer concerned</p> <p>Response of the Administration that -</p> <p>(a) LD would target the actual responsible person of a body corporate that had wilfully defaulted the award. The prosecution would ascertain sufficiency of evidence and reasonable prospect of conviction in accordance with the guidelines issued by DoJ before instituting prosecution; and</p> <p>(b) the proposed section 43S sought to provide the accused an opportunity of being heard before prosecution was instituted. While it was the responsibility of the prosecution to prove beyond reasonable doubt in performing the prosecution function, the accused person would be informed that he could decide to give cautioned statement or not and it might be presented to the court</p>	
015328 - 015638	Hon Tommy CHEUNG Chairman Admin	<p>Hon Tommy CHEUNG was unconvinced that alternative charge could be laid against the partner under both sections 43P and 43Q given that it was the responsibility of the prosecution to prove beyond reasonable doubt in establishing an offence</p> <p>Response of the Administration that the laying of alternative charge, which was permitted under the general criminal law, was not laid down in the Bill</p>	

Time marker	Speaker	Subject(s)	Action Required
015639 - 020732	Hon LEE Cheuk-yan Chairman Admin Hon Paul TSE	<p>Extension of meeting for 15 minutes</p> <p>Whether the local management would be prosecuted if the director or responsible person, who had consented to, connived at, or been neglectful to the wilful non-payment of an award, was not in Hong Kong</p> <p>Response of the Administration that whether the local management of the body corporate would be prosecuted would depend on the circumstances of individual cases, having regard to various factors, e.g. whether he was the responsible person for the case and whether he could raise a reasonable doubt that he did not consent to or connive at the body corporate's wilful non-payment of an award and the wilful non-payment was not attributable to his neglect</p> <p>Whether the Administration would consider providing a policy statement in respect of principles in performing the prosecution function, e.g. safeguards to the directors and partners, sufficiency of evidence before instituting prosecution</p> <p>The Administration was requested to provide information on the enforcement actions and measures against the aforesaid overseas director and middle management who had consented to, connived at, or been neglectful of the wilful non-payment of an award</p>	Admin to provide a response
020733 - 021021	Chairman	Date of next meeting	