

**Bills Committee on
Employment (Amendment) Bill 2009**

**Administration's Response
to Issues Raised by Members at the Bills Committee Meetings
held on 12 October and 27 October 2009**

Purpose

This paper provides and supplements the Administration's response to the issues raised by Members of the Bills Committee on the Employment (Amendment) Bill 2009 (the Bill) at the Bills Committee meetings held on 12 October and 27 October 2009.

Further information on listing all reasonable excuses in the proposed section 43P(1)(b)

2. At the meeting of 27 October 2009, some Members asked the Administration to look further into the feasibility of listing all reasonable excuses in the proposed section 43P(1)(b) with reference to similar provisions under other ordinances. However, some other Members considered the sole element of wilfulness a sufficient safeguard for innocent defaulting employers and suggested deletion of the element "without reasonable excuse".

3. Our research indicates that there are about 900 existing provisions under other ordinances that contain the expression "without reasonable excuse" or "without a reasonable excuse", and that in the overwhelming majority of these cases, there is no further elaboration on what constitutes, or does not constitute, a reasonable excuse, just as the proposed section 43P(1)(b) under the Bill that does not contain further elaboration. A Member suggested making reference to the Copyright Ordinance (Cap. 528) and section 124¹ of Cap. 528 contains "without

¹ According to section 124 (1)(c) of the Copyright Ordinance, any person who without reasonable excuse fails to give such authorised officer any other assistance he may reasonably require to be given for the purpose of exercising his power or performing duties under this Ordinance is guilty of an offence and is liable on conviction to a fine at level 4 and to imprisonment for 3 months.

reasonable excuse” but with no further elaboration.

4. We have identified only six provisions under other ordinances with elaborations on what may constitute a reasonable excuse, namely section 80(1AA) of the Inland Revenue Ordinance (Cap.112), section 17C(4) of the Immigration Ordinance (Cap. 115), section 30(3) of the Prevention of Bribery Ordinance (Cap. 201), section 5(8) of the Fire Safety (Commercial Premises) Ordinance (Cap. 502) and similar provision of section 5(9) of the Fire Safety (Buildings) Ordinance (Cap. 572), as well as section 9(6) of the Occupational Safety and Health Ordinance (Cap. 509). There are also three provisions which specify what does not constitute a reasonable excuse, viz section 3 in Schedule 3 of the Medical Practitioners (Electoral Provisions) (Procedure) Regulations (Cap. 161B), section 43B(1A) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) and section 6(7) of the Merchant Shipping (Local Vessels) (Certification and Licensing) Regulation (Cap. 548 sub. leg. D). More details of the provisions are at the Annex.

5. We note that the provisions quoted in paragraph 4 differ from the proposed section 43P(1)(b) in both construction and nature. The provisions quoted in paragraph 4² do not bear prerequisite to proving the mental element as “wilfully” on the part of the defendant. In other words, any person who fails to comply with the requirements will be liable subject to the availability of reasonable excuse. Also noteworthy is that these provisions concern very unusual circumstances where compliance of the statutory requirements may have important consequences for the public (e.g. fire safety direction that would prejudice the structure of the building; or the non-disclosure of investigation into a case of bribery that would cause a serious threat to public order, health or safety), where compliance is inherently impossible (e.g. unable to produce the proof of identity due to loss or destruction at the material time), or is more onerous than the general duty imposed.³ In the context of non-payment of a Labour Tribunal (LT) award, it is

² The offence under section 30 of the Prevention of Bribery Ordinance does refer to “knowing or suspecting that an investigation ...is taking place”. However, it hardly adds any additional mental element to the offence as a person cannot disclose to another something he does not know.

³ Section 6 of the Occupational Safety and Health Ordinance imposes a general duty on every employer, so far as reasonably practicable, to ensure the safety and health at work of all the employer’s employees. Section 9 of that Ordinance further confers a power on the Commissioner to issue an improvement notice in case of breach of such a duty. The elaboration in section 9(6) on “reasonable excuse” is in line with the general duty and ensures that the improvement notice will not require what is not reasonably practicable.

unlikely that situations involving grave jeopardy of public safety or order would arise. In addition, the circumstances of LT default very often vary greatly from case to case and every piece of material information, including any alleged reason put forward as defence, must be assessed against the facts and circumstances of the case in question.

6. To achieve the legislative intent, viz. to deter wilful defaults but to avoid netting in innocent employers, the proposed offence under section 43P does not rely solely on defence grounds put forward by the employers (including claims of reasonable excuses for failure to comply with the LT award). It remains necessary for the prosecution to provide proof of the employer's wilfulness. In other words, only in respect of cases where the prosecution can provide evidence to support wilful default on the part of the employer would the employer need to defend himself on grounds of reasonable excuse.

7. Furthermore, the reasonable excuse clause without elaboration has long been adopted for offences for non-payment of wages and other statutory entitlements under the Employment Ordinance (EO) (Cap. 57). This, together with the overwhelming majority of precedents on "without reasonable excuse" that do not contain any elaboration, suggests that the merit of not fettering the court's judgment of the availability of reasonable excuse based on a fair and impartial assessment of all relevant circumstances of a particular case is generally recognised. Our enforcement experience of employment-related cases reveals that there is no hard and fast rule on what constitutes reasonable excuse and the same excuse may be considered reasonable in one case but not in another. As a further procedural safeguard, section 43S of the Bill provides that an accused employer must be assured of the opportunity to be heard before the initiation of prosecution. Members may further refer to paragraphs 10 to 16 of the paper on Administration's Response to Issues Raised by Members at the Bills Committee Meetings held on 16 July and 12 October 2009 (LC Paper No. CB(2)80/09-10(01)) on the subject of listing reasonable excuses.

8. Having regard to all the above considerations, the Administration is of the view that the present reasonable excuse clause under section 43P(1)(b), coupled with other elements of the Bill, is a practical and sufficient means to achieve deterrence while safeguarding the innocent employers against unjustified prosecution. Upon the enactment of the

Bill, we will spare no efforts in publicising the Bill through various channels, including, among others, production of leaflets/guidance on the reasonable excuse clause of the new offence with illustration of cases⁴ as appropriate to enhance the public's understanding.

Employers' failure to make Mandatory Provident Fund (MPF) contributions after making deduction from employees' wages

9. At the Bills Committee meeting on 27 October 2009, the Administration was asked to provide information on the means for an employee to make civil claims where his employer fails to make MPF contribution after deduction from his wages.

10. While payment and deduction of wages⁵ are governed by the EO, contribution for MPF is regulated by the Mandatory Provident Fund Schemes Ordinance (MPFSO) (Cap. 485). The LT and the Minor Employment Claims Adjudication Board (MECAB) have exclusive jurisdiction on claims arising from non-compliance of EO but not those arising from non-compliance of MPFSO. Nevertheless, where an employer has failed to enrol an employee in an MPF scheme and deducted the employee's wages, the employee may lodge a civil claim for the wages in arrears against the employer in LT or MECAB which will make adjudication as appropriate subject to the case circumstances.

11. The MPFSO requires every employer to ensure the enrolment of his employee in an MPF scheme. He is also required to remit both the employer mandatory contributions made from his own funds and the employee mandatory contributions deducted from the employee's wages to the MPF scheme for the benefit of the employee. If an employer has enrolled his employee into an MPF scheme but has failed to pay

⁴ The availability of reasonable excuse will be assessed based on a fair and impartial assessment of the circumstances of the case. There is no hard and fast rule to define reasonable excuses; the same excuse may be considered reasonable in one case but not in another. For example, a court case indicates that financial difficulties alleged by an employer was admitted as a reasonable excuse by the court taking into account the circumstances indicating that the employer had made genuine efforts to clear wages while struggling to keep the company afloat whereas, in another case, financial difficulty for poor business alleged by the employer was not accepted by court in the absence of concrete substantiating evidence.

⁵ Sections 23 and 25 of the EO require an employer to pay wages due within 7 days after the expiry of wage period or termination of employment. Section 32 of the EO stipulates that no deduction can be made by the employer from the wages of his employee otherwise than the allowable deductions under the section, which include deductions that are required or authorised under any enactment to be made from the wages of an employee (e.g. deductions required to be made under the MPFSO from the relevant income of an employee for mandatory contribution purpose).

mandatory contributions for the employee as required under the MPF legislation, the Mandatory Provident Fund Schemes Authority (“MPFA”) can take action against the employer to recover the outstanding mandatory contribution. Section 7AA of the MPFSO, effective from 1 December 2008, makes it clear that an employer who has failed to enrol an employee in an MPF scheme is still liable to pay mandatory contributions. As such, an employee who suspects that his employer has failed to make MPF contribution with the wages deducted for the alleged purpose may approach MPFA for assistance to pursue the defaulted contribution against the employer, irrespective of whether an employee has been enrolled in an MPF scheme.

Application of the proposed offence in various scenarios of LT defaults

12. The Administration was also asked to illustrate the application of the offence under various scenarios of award defaults in connection with partial payment and settlement.

13. Under the proposed section 43P(1), the offence is applicable if the LT or MECAB award concerned contains in whole or in part any specified entitlements under section 43N(1). If the employer fails to pay any sum payable under such an award wilfully and without reasonable excuse, he is liable to prosecution. To safeguard against irresponsible employers who may wish to escape liability by paying only part of the award, section 43P(2) makes it clear that an employer can be held liable for failing to pay any part of a sum payable under the award and in the case of a sum payable by instalments, any instalment or part of an instalment.

14. There are cases where an LT or MECAB award, made by consent or agreement, provides for the payment of a sum to settle the claims without further breakdown. The proposed section 43P(3) is thus added and reads “For the purposes of [section 43P(1)], if (a) an award of a tribunal provides for the payment of a sum but does not indicate whether or not that sum includes any specified entitlement; and (b) the claim to which the award relates consists, in whole or in part, of any specified entitlement, then, unless there is evidence to the contrary, the award is to be treated as providing for the payment of a specified entitlement.” If an award is treated as providing for the payment of a specified entitlement by virtue of section 43P(3), it falls within the proposed section 43P(1)

and an employer who wilfully and without reasonable excuse fails to pay any sum of the award will be committing an offence.

15. Under section 15 of the Labour Tribunal Ordinance (LTO) (Cap. 25) and section 14 of the Minor Employment Claims Adjudication Board Ordinance (MECABO) (Cap. 453), if a settlement of a claim is reached, the terms of the settlement shall be expressed in written form and signed by the parties to the settlement and then filed with LT or MECAB. By virtue of section 15(9) of the LTO and section 14(4) of the MECABO, such a settlement filed shall be treated for all purposes as if it were an LT or MECAB award. Therefore, the proposed section 43N(2) provides that such settlements also fall within the definition of an award. Accordingly, a failure to pay any sum under such a settlement that covers specified entitlements may also constitute the proposed offence under section 43P(1).

Protection to employees who would appear before court as prosecution witnesses

16. A Member asked about the protection to employees who would appear before court as prosecution witnesses. Relevant information is provided below.

17. In a criminal case, if the employer pleads guilty in the plea taking hearing, the case will be concluded and there is no need for the employee to testify in court. It is only when the employer pleads not guilty that the employee will be required to testify before court at the trial. In prosecution of EO offences, the direct evidence from the employee who failed to obtain the payments is crucial to the initiation of the prosecution action and successful conviction of the culpable employer. In the case of LT defaults, the employee is the only person who can testify the non-payment of the awarded sum by the employer and other facts such as any action that he has taken to pursue against the employer. According to our enforcement experience of EO offences, it is not uncommon for an employer to advance defence to the investigation authority or to the court that involves the employee as a crucial party (e.g. the employee having agreed with the employer for payment of lesser amount or at a later date). It is thus important to secure the employee's consent to act as prosecution witness for the investigation or prosecution

of the offences.

18. With the enactment of the proposed Bill, if a case involves an award which clearly indicates that wages or other statutory entitlements underpinned by criminal sanctions are payable by an employer, the prosecution will no longer need to go behind the award to ascertain the contractual intention and amount in dispute. As such, for employees who are required to testify at trial on such cases under the proposed offence, the time and efforts in giving evidence on the contractual intention and amount of entitlement that would otherwise be necessary under existing EO offences can be saved.

19. Besides, as the proposed offence is created under the EO, an employee will be accorded with the protection under section 72B of the EO from being terminated or discriminated by his employer by reason of giving evidence, or agreed to give evidence, in any proceedings for its enforcement. An employer who commits such act is liable to criminal prosecution and may also face civil claim of remedies by the employee under the EO.

20. Like other witnesses who testify in court to perform the duty as a citizen, the employee has access to the protection for the loss of remuneration or expenses incurred in the form of an allowance not exceeding \$360 for each day of attendance as determined by court⁶. The employee is also accorded with such other rights as the provision of proper facilities at court.

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⁶ By Rule 5 of the Criminal Procedure (Witnesses' Allowances) Rules (Cap. 221B), the court may allow in respect of a witness who attends to give evidence (other than professional or expert evidence), whether in one or more cases, and thereby loses remuneration or necessarily incurs expense (other than expense on account of lodging or subsistence) to which he would be otherwise have been subject, a loss allowance not exceeding \$360 for each day of attendance, in respect of that loss or expense. If the period during which the witness is necessarily absent from his place of residence, business or employment to attend to give evidence does not exceed 4 hours, his loss allowance shall not exceed \$180.

Provisions and the nature of offence	Conditions in the elaboration of reasonable excuse
Elaboration of what constitutes reasonable excuse	
<p>Inland Revenue Ordinance (Cap. 112), section 80(1AA)</p> <ul style="list-style-type: none"> • Failure to comply with the requirement in sections 52(4), (5), (6) and (7) to give notice in writing to the Commissioner of the commencement of employment in Hong Kong of an individual chargeable to tax and departure of the employee from Hong Kong without reasonable excuse 	<ul style="list-style-type: none"> • In respect of a person treated as an employer under section 9A (i.e. a relevant person taken as the employer of a relevant individual if the relevant person carries on a trade, profession or business and has entered into an agreement under which any remuneration for any services by that individual is paid to a corporation controlled by the individual etc.), he shows that he did not comply with those requirements because (a) he relied upon a statement in writing by that individual and in the form specified under section 80(1AC); and (b) it was reasonable for him to rely upon that statement.
<p>Immigration Ordinance (Cap. 115), section 17C(4)</p> <ul style="list-style-type: none"> • Failure to produce proof of identity, provided that it shall be a defence for the person charged to prove he had reasonable excuse 	<ul style="list-style-type: none"> • At the date of the alleged offence, the person had no proof of identity with him because (a) all proof of identity had been lost or destroyed; and (b) he had reported the loss or destruction or he had no opportunity to report.
<p>Prevention of Bribery Ordinance (Cap.201), section 30(3)</p> <ul style="list-style-type: none"> • Disclosing investigation of offence to the person who is subject of investigation or to the public without lawful authority or reasonable excuse 	<ul style="list-style-type: none"> • The disclosure, and only to the extent of which, reveals (a) any unlawful activity, abuse of power, serious neglect of duty, or other serious misconduct of the Commissioner, Duty Commissioner or any officer of the ICAC; or (b) a serious threat to public order or to the security of Hong Kong or to the health or safety of the public.

Provisions and the nature of offence	Conditions in the elaboration of reasonable excuse
<p>Fire Safety (Commercial Premises) Ordinance (Cap. 502), section 5(8) and Fire Safety (Buildings) Ordinance (Cap.572), section 5(9)</p> <ul style="list-style-type: none"> • Failure by an owner or occupier to comply with a fire safety direction or fire safety improvement direction without reasonable excuse 	<ul style="list-style-type: none"> • It is not reasonable to expect the owner or occupier of the premises or building to comply with the direction because of <ul style="list-style-type: none"> (a) the risk of prejudicially affecting the structural integrity of the building; or (b) the technology required to comply is not reasonably available.
<p>Occupational Safety and Health Ordinance (Cap. 509), section 9(6)</p> <ul style="list-style-type: none"> • Failure by an employer or occupier, without reasonable excuse, to comply with a requirement of an improvement notice 	<ul style="list-style-type: none"> • It was not reasonably practicable to comply with the requirement (under section 6, the general duty imposed on an employer is to ensure the safety and health at work of all the employees as far as reasonably practicable).
Elaboration of what does <u>not</u> constitute reasonable excuse	
<p>Medical Practitioners (Electoral Provisions) (Procedure) Regulations (Cap. 161B), Schedule 3, section 3</p> <ul style="list-style-type: none"> • Using or publishing the name or device of any person or organisation for promoting or procuring election without reasonable excuse in the absence of the prior consent in writing from that person or organisation 	<ul style="list-style-type: none"> • Oral consent or permission obtained from any person or organisation

Provisions and the nature of offence	Conditions in the elaboration of reasonable excuse
<p>Mandatory Provident Fund Schemes Ordinance (Cap. 485), section 43B(1A)</p> <ul style="list-style-type: none"> • Failure of an employer, without reasonable excuse, to comply with a requirement imposed on employers by section 7 (i.e. employer to arrange for employees to become scheme members, etc.) 	<ul style="list-style-type: none"> • The relevant employee's not becoming or continuing to be a member of a registered scheme was wholly or partly due to the fault of the employee.
<p>Merchant Shipping (Local Vessels) (Certification and Licensing) Regulation (Cap. 548 sub. leg. D), section 6(7)</p> <ul style="list-style-type: none"> • The person to whom a Class IV vessel is let failing without reasonable excuse to ensure that throughout the period when the person is in possession of the vessel certain documents are kept on board the vessel. 	<ul style="list-style-type: none"> • The contravention is attributable to the failure of the owner, his agent and the coxswain to ensure that other documents are kept on board the vessel.