Bills Committee on Minimum Wage Bill

Administration's Response to Issues Raised at the Bills Committee Meeting Held on 19 March 2010

Introduction

This paper provides information requested by Members of the Bills Committee at its meeting held on 19 March 2010 in examining the Minimum Wage Bill (the Bill).

Provisions on hours worked in the Bill

2. A Member asked whether the working hours of an employee under the contract of employment should be counted as hours worked for computing statutory minimum wage (SMW) under the Bill. The Member cited an example in which the contractual working hours of an employee run from 9 a.m. to 6 p.m. and on a day the employer directed the employee to be off duty from 4 p.m. to 6 p.m..

3. As we have explained in our previous papers submitted to the Bills Committee and during the discussions at previous Bills Committee meetings, given the multifarious work patterns of employees, clause 3 of the Bill does not seek to give an exhaustive list of the precise circumstances of hours worked for the purpose of computing SMW. Apart from clause 3, the question as to whether any time or period is hours worked by the employee for the computation of SMW has to be decided by reference to any agreement or contract between the employer and the employee and to all other relevant circumstances of the case. If the time or period in question is regarded as hours worked by the employee under the employment contract or agreement with the employer, it is included in computing SMW under the Bill notwithstanding that it is not covered by clause 3. In the example cited by the Member in paragraph 2 above, the time from 4 p.m. to 6 p.m. does not fall within clause 3. However, if the employer and the employee, by virtue of the contract of employment or their agreement, regard this period as hours worked by the employee, then it is included in the computation of SMW. In this connection, we have conducted desktop research on the Internet on

SMW jurisdictions like the United Kingdom, Australia, France and Japan and have not found specific provisions on such a situation in their SMW legislation.

4. It should also be noted that SMW, as a wage floor, would not detract from the existing rights and benefits of employees under the contract of employment and the Employment Ordinance (EO). Therefore, apart from the requirement to pay not less than the SMW rate, the employer must pay to the employee any wages due under the contract of employment in compliance with the wage provisions of the EO.

Counting of commission payment

5. A Member asked which provision under the Bill enables the employer to apportion commission in some wage periods to meet the SMW level and correspondingly reduce such commission in other wage periods. It is noted that there is a wide variety of commission systems in practice, depending on the terms in the contract of employment. Employers and employees are free to agree on when and how commission is payable under the contract of employment. Therefore, whether commission is apportioned and payable in different wage periods is subject to the contract of employment and not the provisions in the Bill. When the commission is so apportioned and payable under the contract of employment, the amount of commission paid would be counted in respect of the relevant wage period under the Bill when determining whether the employee is remunerated not less than the SMW.

6. Another Member asked whether a term in the contract of employment in making the commission apportioned and payable in different wage periods would contradict clause 14 and clause 5(2), (3) and (4). The Bill confers on the employee a right to be paid no less than the SMW rate for each hour worked. In making the commission apportioned and payable in different wage periods to meet the SMW level, such a contractual provision does not reduce the obligation of the employer to pay not below SMW, and thus we do not see it as contracting out under clause 14. For clause 5(2), it concerns payment for hours not worked by the employee. As the commission is not a payment for hours not worked, it does not call clause 5(2) into play. Clause 5(3) and clause 5(4) respectively on advance or over-payment of wages and arrears of wages are also not relevant because the commission is payable and paid according to the contract of employment.

7. We appreciate Members' concerns that it is important for the Bill to ensure clarity and certainty to employers and employees in reckoning commission payment for the purpose of SMW computation. Indeed, given the great diversity of commission systems, the intention of having clause 5(5) is to provide clear guiding principles with which to determine whether the employer has remunerated the employee not below the SMW level. We would carefully consider Members' views and suggestions on the drafting of the provision.

8. A Member asked about the specific wording to be written into a contract of employment to apportion commission payable among different wage periods. As a matter of fact, employers and employees are free to agree on the arrangement of commission depending on their respective circumstances. Different trades and establishments may also adopt varying commission systems to cater for their individual needs and characteristics. The Administration is not in an appropriate position to provide specific wording on commission payment to be written into a contract of employment as this may fail to account for possible specific features in individual sectors and occupational groups. Our publicity materials would however include illustrative examples to show how the amount of commission payable and paid according to the contract of employment is counted under the Bill when determining the employee's entitlement to SMW.

Clause 7(1) and (2) of the Bill

9. A Member asked whether any other jurisdiction with SMW denominated on an hourly basis as in clause 7(1) and (2) of the Bill also operates under a framework of monthly wage payment.

10. Under the Bill, the SMW rate is expressed as an hourly rate to help ensure that employees' pay would be commensurate with the duration that they are at work. According to clause 7(1) and (2), the employee is entitled to be paid wages in respect of any wage period of not less than the minimum wage, and the minimum wage for a wage period is derived by multiplying the total number of hours worked by the employee in the wage period by the SMW rate. As closely aligned with the EO, the wage period is taken to be one month unless the contrary is proved. Taking a monthly wage period as an example, the employee is entitled, for a specific month, to wages not below the amount of multiplying the total number of hours worked in the month by the SMW rate. In the case of a weekly wage period, then the employee is entitled, for a specific

week, to wages not below the amount of multiplying the total number of hours worked in the week by the SMW rate.

11. While the circumstances of Hong Kong should be the prime consideration in designing the provisions of the Bill, it is noted that under the National Minimum Wage Regulations 1999 in the United Kingdom, national minimum wage is expressed as an hourly rate and the pay reference period (i.e. wage period) is a month (or, in the case of a worker who is paid wages by reference to a period shorter than a month, that period).

Clause 14 of the Bill

12. The Administration was requested to consider limiting clause 14 of the Bill only to the employee's right to be paid not less than the amount of SMW. According to clause 14, a provision of a contract of employment that purports to extinguish or reduce any right, benefit or protection conferred on the employee by the Bill is void. Clause 14 is modelled on section 70 of the EO which renders void any term of a contract of employment which purports to extinguish or reduce any right, benefit or protection conferred on the employee by the EO. As we have explained at the Bills Committee meeting, clause 14 goes beyond the amount of SMW. For instance, if a provision in the contract of employment excludes the time during which the employee has worked from hours worked for computing SMW, clause 14 would operate to render the provision void. We must therefore be cautious as to whether the suggestion would derogate from the effectiveness of clause 14 in preventing the parties to a contract of employment from contracting out of the provisions of the Bill.

Labour and Welfare Bureau
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