Bills Committee on Minimum Wage Bill

Administration's Response to
Hon LEE Cheuk-yan's List of Questions

Introduction

Further to our earlier paper submitted to the Bills Committee (LC Paper No. CB(2)212/09-10(01)), the ensuing paragraphs deal with the rest of the questions.

Application of the Ordinance: meaning of "employee"

Question 6

2. Regarding the case of *POON Chau-nam (Appellant) v YIM Siu-cheung trading as Yat Cheung Airconditioning & Electric Co (Respondent) (FACV No. 14 of 2006 (Civil))*, it is an appeal case from the District Court and the Court of Appeal. The appellant worker suffered from personal injury in a work-related accident at a building. He was welding a part in an air-conditioner when the welding rod suddenly shattered and a fragment struck his left eye. As a result of the accident, he sustained a 45% loss of earning capacity. The issue to be adjudged was whether the appellant worker was an employee of the respondent company at the time of the accident.

3. The Court of Final Appeal (CFA) considered that there was no single test that would conclusively point to the distinction between an employee and an independent contractor in all cases. The modern approach is to examine all the features of their relationship against the background of the indicia developed with a view to deciding whether, as a matter of overall impression, the relationship is one of employment. For the present case, the CFA found these facts:

(a) the air-conditioning business belonged to the respondent;

(b) the appellant's venture into an air-conditioning business on his own account had failed some years previously;

(c) the respondent decided which, if any, jobs should be assigned to the appellant and paid him to do them at the agreed daily rate, plus any overtime;

(d) all the profits and losses of the business were for the respondent's account;

(e) the appellant bore no financial risks and reaped no financial rewards beyond his daily-rated remuneration;

(f) the respondent managed the business and hired several other workers, some of whom would sometimes work alongside the appellant on a job;

(g) the appellant personally did the work assigned to him. He did not hire anyone to help;

(h) travel expenses incurred in the course of the work were borne by the respondent;

(i) whenever items had to be purchased by the appellant for work purposes, he was reimbursed by the respondent;

(j) the appellant was a skilled air-conditioning worker and, like the others who were undoubtedly the respondent's employees, did not require supervision or control over the manner of carrying out the work; and

(k) while the other indicia all point clearly to an employer-employee relationship entered into for each specific engagement, the main difference between the appellant and the other workers was that his employment was of a casual nature whereas theirs was permanent and paid on a monthly basis.

4. The CFA was of the view that the objective facts strongly supported the conclusion that the appellant was an employee at the time of the accident and the fact that he labelled himself a self-employed person for Mandatory Provident Fund purposes would not change the picture concerning the respondent's liability under the Employees' Compensation Ordinance (Cap. 282) (ECO).

Questions 7 and 10

5. The Administration has submitted a paper to the Legislative Council Panel on Manpower on the subject of "Employees vis-à-vis Self-employed Persons", which is attached at Annex A for reference. The paper sets out the rights and benefits of employees under the Employment Ordinance (Cap. 57) (EO) and the ECO, how the rights and obligations of employees and self-employed persons are determined, and the measures

adopted by the Labour Department (LD) in tackling false self-employment.

6. We have no information on the number of workers claiming to be providing cleaning or guarding services in self-employment in single block buildings. As explained in the Administration's paper above, there is no single conclusive test to distinguish an "employee" from a "self-employed person", and all relevant factors of the case should be taken into account in differentiating these two identities. In case of unresolved dispute, it should be subject to the court's determination as to whether a worker has been engaged as an employee and, if so, the identity of the employer. Depending on the facts of individual cases, for a building which is managed neither by a management company nor an owners' corporation, there may be situations where the owners and/or occupants of the flats in the building would be ruled by the court as the employer of the concerned worker.

Question 8

7. The Social Welfare Department (SWD) provides vocational rehabilitation services for persons with disabilities (PWD) who are not ready for open market so as to equip them with job skills that meet market requirements and assist them in securing suitable employment commensurate with their abilities. To meet the various needs of PWD, SWD invites non-governmental organisations (NGOs) to operate different vocational rehabilitation services, including sheltered workshops, supported employment, integrated vocational rehabilitation services centre, integrated vocational training centre, On the Job Training Programme for People with Disabilities and Sunnyway - On the Job Training Programme for Young People with Disabilities. All these vocational rehabilitation services are training-oriented. The NGO operators act as service providers and are required to formulate training plan for each individual participant. Through regular case review on the progress of performance and skill acquisition, the NGO operators will revise the training plan so as to best meet the social rehabilitation needs of individual participants.

8. Corresponding to the service delivery mode of the vocational rehabilitation services as stated above, participants are service users who receive training from the NGO operators for enhancement of their personal capabilities.

9. To sum up, vocational rehabilitation services are welfare services funded by SWD's recurrent subvention allocation to NGO operators and the relationship between the NGO operators of vocational rehabilitation services and the participants is one of service providers and service users.

Question 9

10. Our paper on the Administration's Response to Issues Raised at the Bills Committee Meeting Held on 5 November 2009 would provide information in respect of Question 9.

Application of the Ordinance: live-in domestic workers

Question 11

11. We propose to exclude all live-in domestic workers from the coverage of the Minimum Wage Bill (the Bill), regardless of their sex or race. According to legal advice, the proposed exclusion is legally in order as there are justifiable differences, mainly in working patterns and provision of in-kind benefits arising from dwelling in the households of their employers, between live-in domestic workers and other employees who would be covered by the Bill.

Question 12

12. The Government attaches great importance to protecting the rights and benefits of foreign domestic helpers (FDHs). To this end, since the early 1970s, the Government has prescribed the Minimum Allowable Wage (MAW) and a standard employment contract ("Employment Contract (For a Domestic Helper recruited from abroad)") especially for FDHs. The said contract sets out key employment terms for hiring FDHs in Hong Kong, including wages not lower than the prevailing MAW, free passage from and to the FDH's place of origin, free accommodation and free food (or food allowance), free medical treatment, etc. These benefits are not usually available to local workers. To prevent exploitation of FDHs, the standard employment contract is mandatory in nature, and employers and their FDHs are not allowed to agree on any contractual terms that fall short of the requirements set out therein and the statutory entitlements under labour legislation such as the

EO. It is also specified in the standard employment contract that any variation to the terms of the contract shall be void unless made with the prior consent of the Commissioner for Labour.

13. An employer cannot agree with an FDH to pay a lower level of wage than the MAW. Approval for the importation of FDHs is based on facts submitted to the Director of Immigration, whereby the employer has agreed to pay not less than the MAW. Even if an FDH has knowingly and voluntarily entered into another contract of employment with the employer to accept a lower wage, the latter is still liable, upon conviction under the EO, to a maximum fine of $350,000 and three years' imprisonment. The employer would also be committing serious offences of making false representation to an Immigration Officer and conspiracy to defraud. Any employer who is guilty of making false representation to an Immigration Officer is liable: (a) on conviction on indictment, to a maximum fine of $150,000 and imprisonment for 14 years; and (b) on summary conviction, to a maximum fine of $100,000 and imprisonment for two years. Any employer convicted of the offence of conspiracy to defraud is liable to imprisonment for 14 years.

14. Where there is sufficient evidence that employers have committed wage offences by paying FDHs at a monthly rate lower than the MAW, LD would take prosecution action. From January to October 2009, there were 92 convicted summonses against FDH employers for wage offences, an increase of 124% over the same period in 2008. One of the employers received a three-month jail term.

15. Notwithstanding that an FDH has knowingly and voluntarily entered into another contract of employment with the employer to accept a lower wage, the helper is still entitled to be paid at a wage rate as stipulated in the standard employment contract. As for other relevant court judgments for reference as requested in the question, we have consulted the Department of Justice and are not aware of them.

Question 13

16. The Administration regularly reviews the MAW. In accordance with the long-established mechanism in reviewing the MAW and deciding whether the level is to be adjusted, the Administration takes into account the prevailing general economic condition and employment situation, as reflected through economic indicators which include the

relevant income movement, price change and labour market situation. The outcome of the review will be made public.

17. The list of the MAW levels and the press releases in the past 10 years (1999 to 2009) are at Annex B.

Labour and Welfare Bureau/Labour Department
November 2009

Annex B

Year	Minimum Allowable Wage
1999	$3,670
2000	$3,670
2001	$3,670
2002	$3,670
2003	$3,270
2004	$3,270
2005	$3,320
2006	$3,400
2007	$3,480
2008	$3,580
2009	$3,580