

Bills Committee on Minimum Wage Bill
Clarifications sought by members in meetings on 4 and 13 May 2010

Submission from the Equal Opportunities Commission

Introduction

1. This paper provides clarification on matters raised in the letter dated 18 May 2010 to the Equal Opportunities Commission (“EOC”) from the Clerk to the Bills Committee.

Dismissal of a PWD on account of the outcome of a productivity assessment

2. Clarification is sought on the relevance of inherent requirement.
3. The assessment under Schedule 2 concerns the productivity of a PWD in performing the work required under the contract of employment.
4. The Courts have held that, under the Disability Discrimination Ordinance (“DDO”), the inherent requirement of a job should be determined by reference to the function which the worker performs as part of the employer’s undertaking, and includes, for example, matters such as the time needed to complete the work or the volume of work. Therefore, inherent requirement and level of productivity are connected issues and cannot be completely divorced. The inherent requirement of a job may include a minimum level of acceptable productivity.
5. Under Schedule 2, the productivity of a PWD worker is measured against a benchmark, and a percentage of that benchmark is then given. The PWD worker’s minimum hourly wage rate is derived from the statutory minimum wage by applying this percentage. In most instances, the benchmark is likely to be the productivity level corresponding to the minimum wage.
6. The minimum acceptable productivity for a job is, among other factors, largely determined by the way the employer organizes his undertaking. If a statutory minimum wage is required to be paid, and if a job requires a minimum productivity level lower than the level corresponding to the minimum wage (the benchmark), the worker could be doing less than what the employer must pay

him by law. Therefore, employers operating on economic principles may make the benchmark an inherent requirement of a job. If in any specific case the benchmark is accepted by the Court as an inherent requirement, a PWD worker assessed to have a productivity level below the benchmark may be regarded as unable to meet the inherent requirement. If the employer dismisses this PWD worker, it may not be in breach of the DDO. The assessment mechanism comes into play by providing a way for the employer and the PWD worker to agree to work for a wage below the minimum wage, and at a productivity level below the benchmark.

7. As for cases where inherent requirement is not a factor, there would not be any discrimination so long as PWD and non-PWD workers in materially the same situation are treated in the same way. Whether there is discrimination has to be decided by comparing a PWD worker with a non-PWD worker. For example, if a PWD worker is dismissed because his productivity is assessed at a certain level, whereas a non-PWD worker would not be dismissed with the same level of productivity, there could be discrimination; but if, at same level of productivity, both the PWD and non-PWD workers would be dismissed, there may not be discrimination (even without the exemption in Clause 23 of the Bill).

Clause 23

8. The second matter for clarification relates to the effect of Clause 23 of the Bill in cases where inherent requirement is not a factor. It is reiterated that the issue of whether there is discrimination has to be decided by comparing an employer's treatment of the PWD worker with a non-PWD worker. If the intended effect of Clause 23 is that any dismissal of a PWD worker, on account of the outcome of an assessment, would be exempted from the DDO, regardless of any comparison with a non-PWD worker, this may limit recourse to the DDO which may otherwise be open to the PWD worker. In any specific case, the actual analysis and conclusion must be subject to the facts and evidence, but provisions which may give recourse to a PWD worker who is dismissed on the ground of disability are section 11(2)(c) read with section 6(a) of the DDO.

The Administration's view on clause 23

9. The third matter for clarification relates to the Administration's view on the effect of Clause 23 of the Bill. As pointed out above, if Clause 23 is interpreted as

exempting from the DDO any dismissal of a PWD worker on account of assessment outcome without regard to the treatment of a non-PWD worker, this may limit the PWD worker's recourse to the DDO. Besides, if the assessment mechanism is meant to reduce "the possible adverse impact of SMW on the employment opportunities of some PWDs whose productivity is impaired by their disabilities" by enabling a lower than SMW to be paid, it is difficult to see how exempting a dismissal on account of assessment outcome from the DDO could help to achieve this objective, and the necessity and reasonableness of this exemption may be called into question.

Equal Opportunities Commission

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