Hong Kong Human Rights Monitor

Submission to LegCo on the Employees Retraining Ordinance (Amendment of Schedule 3) Notice

November 2008

1. This submission is to provide the views of Hong Kong Human Rights Monitor on the Employees Retraining Ordinance (Amendment of Schedule 3) Notice 2008 to be made under section 31(1) of the Employees Retraining Ordinance (ERO) (Cap. 423).

2. Basically, the Employees Retraining Levy was initially charged to employers employing large numbers of low skill labour for work in the construction industry imported under a quota system administered by the Government in the last days of British rule. They were mainly wealthy corporate employers like contractors responsible for lucrative multi-million projects like the construction of airport and other infrastructure works during the economic boom. The wage and levy paid by them in respect of the imported labour was deducted as part of their costs and therefore actually tax deductible.

3. After the completion of the key infrastructure works and the economic recession, there was a substantial reduction of imported labour after the Handover. In 2003, the Government cut the Minimum Allowable Wage (MAW) by $400 and, for the first time, required the employers of Migrant Domestic Workers ("Foreign Domestic Helpers", or "FDHs", in the Government's terminology) to pay an Employees Retraining Levy under the Ordinance as a consequence of the proposals by different people for taxing migrant workers or their employers,[1] especially those raised by the Task Force on Population Policy in its report. The cut in MAW has triggered a wave of premature terminations of Migrant Domestic Workers (MDWs) by their employers, who wanted to take advantage of the cut in MAW immediately. A research conducted by Asian Migrant Centre found that the actual wage level of the MDWs has dropped to a level close to the new MAW, indicating that MDWs have actually picked up a substantial share of the burden of the levy with their employers. It should be highlighted here that the problems of the wave of premature termination of MDW contracts and sharing of financial burden by MDWs is not unique to 2008. Similar problems occurred in 2003 and also 1999 when there were attempts to alleviate the financial difficulties of employers by MAW cuts.

4. According to the Government, "As at 31 July 2008, there were about 252,200 FDHs and 1,330 other imported labour such as care workers and farm workers working in Hong Kong under the Supplementary Labour Scheme."[2] The Government's move is basically for transferring the financial burden of retraining the Hong Kong employees to the MDWs and their employers.

5. The Government states in its paper to LegCo, "It is the Government's established policy that employers hiring low-skilled imported labour should contribute towards the training and retraining of the local workforce."[3] This is unfair, unjustly and discriminatory.

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[1] Like the charge of income task proposed by Choy So Yuk and levy proposed by James Tin.

[2] Para. 13, Administration's Response to Issues Raised at the Meeting on 21 October 2008 (LC Paper No. CB(2)142/08-09(01)).

[3] Ibid. para. 2.

6. First, retraining employees is an important public need of the whole society and therefore should be borne by the government, i.e. it should be funded by public revenue, rather than forcing it onto just one sector of the public. This is especially true after the expansion of the scope of employee retraining to "manpower development of Hong Kong" in December 2007. After the relaxation of eligibility criteria by the end of 2007, the target group of the Employees Retraining Board (ERB) has been expanded from those aged 30 or above with education level at Secondary 3 or below to cover those aged 15 and above, with education level at sub-degree level or below. The Government should ensure that the ERB will be given stable and adequate funding from public expenditure.

7. Secondly, the employers of other categories of imported labour are not covered by such a scheme. If it is for employers to bear the burden of employees retraining it is more reasonable for employers of imported skilled labour and talent to pay the levy than an average MDW employer. In contrast to the employers of MDWs, these employers are more likely to be corporate employers with better means. Also in their case the wage and levy payable in respect of their imported labour or talent is tax deductible. Yet, it is employers of MDWs who are required to pay the levy. This is a totally unjustified discrimination against them. They should not be singled out to shoulder the burden of retraining almost the entire work force in Hong Kong.

8. Thirdly, requiring the employers of MDWs to pay for the levy means that at least a substantial share of the burden is actually borne by the MDWs themselves due to their weak bargaining power which is in part a direct result of government policies affecting them like the two-week rule. This is particularly unfair to MDWs as well as discriminatory of them as, unlike the better paid imported construction workers building the airport and other infrastructure, MDWs receive the lowest wages in town.

9. The Hong Kong Human Rights Monitor strongly urges the permanent abolition of the levy. The Monitor thus requests the LegCo to delete Sections 1(2) and 2(2) of the Employees Retraining Ordinance (Amendment of Schedule 3) Notice 2008. Further amendments to the Employees Retraining Ordinance itself should be considered to make it impossible to pass the burden to MDWs.

10. If the levy is not permanently abolished, the potential for another wave of layoffs of MDWs still exists. The Monitor notes that whenever there is a new policy or government decision on MAW cuts or levy suspension, the MDWs always seem to be the victims.

11. The larger problem has been the adverse knock-on effects that the proposal has on the employees - premature termination, interruption of the continuity of their employment and its consequential effects on entitlements such as severance or terminal payments and long service payments.[4]

12. Given their vulnerable position, it is questionable whether a MDW would be able to claim the whole amount of what she is entitled to from her employer, including the compensation she ought to receive for her paid annual leave, statutory holidays, rest days and sickness allowances,[5] which the MDW might have accumulated over the years of service had the continuity of that service not been interrupted by her employer taking advantage of the suspension of the levy. They may feel compelled to forgo such rights to avoid confronting

[4] Ss.31B and 31R Employment Ordinance, Cap. 57.

[5] See Guidebook for the Employment of Domestic Helpers from Abroad (ID 969), available at http://www.immd.gov.hk/ehtml/ID(E)969.htm. ('the Guidebook')

their employers in the hope of preserving their chances of renewal or re-employment with their existing employers.

13. In addition, some MDWs who need contract renewal, particularly Indonesians, were forced by employment agencies to pay extortionate fees to process a new contract even with the same employer.

14. In none of the circumstances set out above, has the Government contemplated any provision to compensate the MDWs.

15. In terms of the reparations to be made to compensate the MDWs, the Government should first of all introduce legislative measures to enable the Labour Department to compensate for any premature terminations of employment contracts after the 16th July, 2008 (the date of announcement of the proposal) up to 1st August, 2008.

16. In respect of under-compensation on the part of the employers, the Government should introduce legislative amendments so as to enable the Labour Department to remedy MDWs in respect of the under-compensated amount, while at the same time enable the Department to set up a claim against the employer for that amount by way of a civil claim. This measure recognizes the unequal bargaining power between the MDWs and their employers in the course of negotiations as well as providing a quicker and more effective means of redress. It is important to stress here that criminal sanctions alone are not sufficient in this type of situation.

17. The failure on the part of the Government to take into account the interests of migrant workers in the formulation of their policies is yet another example of the general cultural insensitivity that persists within the Government bureaucracy.

Recommendations

18. The Monitor urges the LegCo to abolish the levy in respect of MDWs permanently by deleting paragraphs 1(2) and 2(2) of the Notice.

19. The LegCo should also urge the Government to compensate MDWs paid them ex gratio allowances for any loss suffered directly or indirectly or triggered by the ill-though out levy suspension.