

立法會

Legislative Council

LC Paper No. CB(2)766/09-10
(These minutes have been seen by
the Administration)

Ref : CB2/PL/MP

Panel on Manpower

Minutes of meeting
held on Thursday, 19 November 2009, at 2:30 pm
in the Chamber of the Legislative Council Building

Members present : Hon LI Fung-ying, BBS, JP (Chairman)
Hon IP Wai-ming, MH (Deputy Chairman)
Hon LEE Cheuk-yan
Hon LEUNG Yiu-chung
Hon Andrew CHENG Kar-foo
Hon Frederick FUNG Kin-kee, SBS, JP
Hon WONG Kwok-hing, MH
Hon Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung
Dr Hon LAM Tai-fai, BBS, JP
Hon CHAN Kin-por, JP
Hon WONG Sing-chi
Hon WONG Kwok-kin, BBS
Hon IP Kwok-him, GBS, JP
Dr Hon PAN Pey-chyou

Public Officers attending : Item III
Mr Matthew CHEUNG Kin-chung, GBS, JP
Secretary for Labour and Welfare
Mrs Cherry TSE LING Kit-ching, JP
Commissioner for Labour
Mr Byron NG Kwok-keung, JP
Assistant Commissioner for Labour (Labour Relations)
Mr Ernest IP Yee-cheung
Chief Labour Officer (Labour Relations)
Labour Department

Miss Candice CHENG Lai-fan
Senior Labour Officer (Labour Relations) (Special Duties)
Labour Department

Item IV

Mr Matthew CHEUNG Kin-chung, GBS, JP
Secretary for Labour and Welfare

Mrs Cherry TSE LING Kit-ching, JP
Commissioner for Labour

Mr Stanley NG Ka-kwong, JP
Assistant Commissioner for Labour (Employment
Services)

Ms Betty NG Shuk-fong
Senior Labour Officer (Employment Services)
(Transport Support Scheme)
Labour Department

Clerk in attendance : Mr Raymond LAM
Chief Council Secretary (2) 1

Staff in attendance : Ms Clara TAM
Assistant Legal Adviser 9

Mrs Eleanor CHOW
Senior Council Secretary (2) 4

Ms Kiwi NG
Legislative Assistant (2) 1

Action

I. Confirmation of minutes of previous meeting
(LC Paper No. CB(2)154/09-10)

The minutes of the meeting held on 15 October 2009 were confirmed.

II. Date of next meeting and items for discussion
(LC Paper Nos. CB(2)276/09-10(01) and (02))

2. Members agreed to discuss the following items proposed by the Administration at the next regular meeting to be held on 17 December 2009 at 2:30 pm -

Action

- (a) Measures taken by the Labour Department to promote youth employment; and
- (b) Thematic survey on the importance of age factor in employment.

(Post-meeting note: With the concurrence of the Chairman, the regular meeting originally scheduled for 17 December 2009 had been rescheduled to Monday, 14 December 2009, at 2:30 pm to avoid a possible clash with the Council Meeting on 16 December 2009, which would likely continue on 17 December 2009.)

III. "Employees" vis-à-vis "Self-employed persons"

(LC Paper Nos. CB(2)276/09-10(03) & (04) and CB(2)311/09-10(01))

3. Secretary for Labour and Welfare (SLW) took members through the Administration's paper which set out the rights and benefits of employees under the Employment Ordinance (Cap. 57) (EO) and the Employees' Compensation Ordinance (Cap. 282) (ECO), how the rights and obligations of employees and self-employed persons were determined, and the measures adopted by the Labour Department (LD) in tackling false self-employment.

4. Mr WONG Kwok-hing said that subsequent to the implementation of the Mandatory Provident Fund (MPF) Scheme in 2000, many unscrupulous employers, in a deliberate attempt to evade their responsibility for making MPF contributions, had arranged for their employees to become self-employed. As a result, these employees were deprived of their right to the MPF contributions which ought to be made by their employers, and the labour protection and benefit entitlement for employees provided under EO and ECO. Mr WONG further said that the malpractice of false self-employment was more prevalent among lower-skilled workers, such as cleaning workers or construction workers. Expressing concern about the effectiveness of the three-pronged approach adopted by LD in tackling false self-employment, he enquired about the possibility of introducing legislative amendments to prevent the proliferation of false self-employment.

5. In response, SLW said that the Administration had carefully considered the suggestion of amending the law to clearly distinguish an employee from those self-employed. The Labour Advisory Board (LAB) was also consulted on the subject on 4 November 2009. Both the employer and employee representatives shared the Administration's views regarding the practical difficulties in amending EO and ECO to clearly distinguish employees from those self-employed, as set out in paragraph 17 of the Administration's paper. SLW informed members that employee representatives of LAB had indicated that while they would not rule out the option of introducing legislative amendments in the future to tackle the problem of false self-employment, they agreed with LD and the employer representatives that, in the present

Action

circumstances, the three-pronged approach as proposed by LD would be a more pragmatic and fruitful way forward. Against this background, LAB had asked LD to step up promotional efforts with a view to encouraging employees to provide LD with intelligence to facilitate enforcement. LD was also asked to launch publicity programmes targeting small and medium enterprises (SMEs), especially those in sectors such as construction and logistics, where false self-employment might be more prevalent. At the request of LAB, LD had also undertaken to keep relevant statistics on cases relating to claims of false self-employment to facilitate better understanding of the problem.

6. Mr WONG Kwok-hing said that to his knowledge, many employees were reluctant to lodge complaints against their employers or report suspected false self-employment for fear of losing their jobs. He sought information on the number of cases in which employers were prosecuted for and convicted of employment-related offences due to their practising of false self-employment.

7. Commissioner for Labour (C for L) responded that the statistics kept by LD had been categorized by the claims of statutory entitlements involved rather than by claims of false self-employment. However, to facilitate better understanding of the problem, LD had started collecting the relevant data since October 2009.

8. Mr LEE Cheuk-yan referred to the cases highlighted in the submission from Hong Kong Confederation of Trade Unions (HKCTU). He held the view that the measures adopted by LD could in no way stop unscrupulous employers from labelling their employees as "self-employed" despite the fact that they had all the characteristics of an employee, and hence the Administration should introduce legislation against false self-employment without further delay. Mr LEE considered that inspectors of LD should conduct proactive inspections to workplaces to check employers' compliance with the law and to educate employees on the protection accorded to them under various labour laws. In cases where suspected breaches, including false self-employment, were detected, LD should actively follow up the matter to see whether there was sufficient evidence to institute prosecution against the employers.

9. Mr LEUNG Yiu-chung expressed disappointment that despite the repeated requests of members, the Administration had been slow in addressing the issue of legislating against false self-employment. He shared the view of Mr LEE Cheuk-yan that putting in place a specific piece of legislation against false self-employment was more effective than taking forward the three-pronged approach. In his view, the Administration should immediately review the need for legislation.

10. SLW responded that as explained in the Administration's paper, there was no single conclusive test to distinguish an "employee" from a "self-employed person"/"contractor", and all relevant factors of the case should be taken into account in differentiating these two identities. In case of unresolved

Action

dispute, it should be subject to the court's determination as to whether a worker had been engaged as a self-employed person/contractor or as an employee. At the current stage, the Administration was of the view that the three-pronged approach as proposed by LD would be a more pragmatic and fruitful way forward.

11. Regarding the cases as referred to in HKCTU's submission, SLW and Chief Labour Officer (Labour Relations) (CLO(LR)) said that the Administration had followed up on the cases quoted by Mr LEE Cheuk-yan and found that some of the allegations about the way how LD staff handled the disputes relating to claims of false self-employment when the parties concerned approached LD for assistance were not substantiated. Responding to Mr LEE's question on the prosecutions taken out in relation to false self-employment, CLO(LR) cited two precedent cases in which LD had taken prosecution action against employers who unilaterally changed the status of their employees to "contractor" or "self-employed person" and stressed that the Government had been making proactive efforts to safeguard the statutory rights and benefits of employees through rigorous enforcement of the law.

12. The Deputy Chairman, Mr WONG Kwok-kin and Mr LEUNG Kwok-hung expressed concern as to whether the implementation of a statutory minimum wage (SMW) would aggravate the problem of false self-employment. They asked about the measures to be taken by the Administration to tackle the problem.

13. SLW responded that the Administration was equally concerned about the proliferation of false self-employment, but it was difficult to anticipate at this stage what would happen if SMW was introduced. Meanwhile, the Administration would adopt a three-pronged approach to tackle the problem as follows -

- (a) strengthening promotion and publicity work in enhancing public awareness : in addition to the existing channels and activities to promote public awareness of the subject, LD would step up its promotional efforts targeting in particular employers of SMEs to enhance their awareness of the possible legal consequences of false self-employment;
- (b) providing a more user-friendly consultation and conciliation service to employees in false self-employment in case of disputes : LD always advised employees to be vigilant and clarify their employment status before entering into contract. They were welcomed to approach LD's Labour Relations Offices for advice in case of doubt. LD officers would explain to them the rights and benefits enjoyed by employees vis-à-vis the self-employed; and

Action

- (c) stepping up enforcement action to safeguard employees' statutory rights: LD had been sparing no effort in safeguarding the statutory rights and benefits of employees through rigorous enforcement of the law. Labour inspectors conducted active inspections to workplaces to check employers' compliance with the law and to educate employees on the protection accorded to them under labour laws. Suspected breaches, when detected, would be thoroughly investigated and prosecution would be instituted against the offending employers wherever there was sufficient evidence. LD encouraged employees who suspected that they were deprived of statutory rights and benefits to lodge complaints and to provide the details of their employment terms for investigation and a complaint hotline (2815 2200) was in place to facilitate the reporting of such cases.

14. C for L advised that when the matter was discussed by LAB, there was concern about how the Administration could encourage employees who might feel aggrieved by suspected false self-employment to report to LD. In the light of this, LD would step up promotional efforts with a view to enhancing employees' understanding that LD was obliged under the law to observe strict confidentiality of the identity of those who provided intelligence to facilitate enforcement. While employees might rest assured that provision of information to enable LD to conduct surprise inspections would not jeopardize their employment opportunity, LD would also proceed with the investigation of anonymous complaints which contained adequate information.

15. The Deputy Chairman said that even if LD would maintain the complainant's anonymity until he was required to be present at court, an employee might have practical difficulties to serve as prosecution witness. The Deputy Chairman enquired whether the Administration would take any measures to address the issue. He also asked about the factors that would be taken into account by the Administration when deciding whether prosecution should be initiated in a suspected case of false self-employment.

16. In response, SLW explained that without the consent of employees to serve as prosecution witnesses, it would be difficult for prosecution to be successfully brought against employers who committed offences under EO and ECO.

17. Referring to the two labour dispute cases cited earlier by CLO(LR) in which the employers who unilaterally changed the status of their employees to "self-employed" were convicted of having committed an offence under EO, Mr WONG Kwok-kin expressed disappointment that the employers concerned were only fined a few thousand dollars for not providing their employees the statutory rights and benefits. He asked whether the Administration would consider amending the law to increase the penalty level for offences related to false self-employment in order to enhance the deterrent effect against such

Action

malpractice. His view was echoed by Mr LEUNG Yiu-chung and Mr WONG Sing-chi.

18. In response, SLW and C for L made the following points -

- (a) EO was the main piece of legislation governing conditions of employment in Hong Kong. It covered a comprehensive range of employment protection for every employee engaged under a contract of employment. Such benefits included wage protection, rest days, holidays with pay, paid annual leave, sickness allowance, maternity protection, severance payment, long service payment, employment protection, protection against anti-union discrimination, etc;
- (b) ECO was applicable to all persons employed under a contract of service or apprenticeship. It operated on the basis of individual employer liability whereby an employer was liable to pay compensation to his employees who were injured by accidents or suffered from specified occupational diseases that arose out of and in the course of their employment;
- (c) the legal consequences for having committed an offence under EO or ECO could be severe. The present maximum penalty for wage offences under EO could be as high as a fine of \$350,000 and imprisonment of three years. An employer who failed to take out employees' compensation insurance would still be liable to pay compensation to an employee who sustained injury or died in an accident arising out of and in the course of employment;
- (d) it was noteworthy that the power to determine the penalty vested with the judge who would decide the exact amount of fine or the term of imprisonment based on the nature and seriousness of the breach; and
- (e) in situations where an employer was suspected of having forced his employees to become self-employed as a means to evade the responsibility of taking out employees' compensation insurance, the court would consider and decide whether an employer-employee relationship existed based on the facts of the case. If the court ruled that it was a false self-employment, the aggrieved employees would be fully protected under ECO and the employer concerned would have to pay compensation to employees who were falsely labelled as "self-employed". The employer might also have to bear the legal consequences for having committed an offence under EO or ECO, as the case might be.

Action

19. Assistant Commissioner for Labour (Labour Relations) supplemented that in some cases where the evidence was sufficient to prove the existence of an employer-employee relationship, LD might, upon advice of the Department of Justice, institute prosecution against the offending employers without seeking the court's ruling.

20. Mr WONG Sing-chi and Mr CHAN Kin-por asked how LD would step up its promotional efforts to enhance employers' and employees' understanding on the subject of false self-employment. Mr WONG considered that the Administration should make it a mandatory requirement for employers to display the specially designed posters and the complaint hotline at all workplaces at a prominent position.

21. In response, SLW and C for L advised that -

- (a) in addition to the existing channels and activities to promote public awareness of the subject, LD would step up its promotional efforts targeting in particular employers of SMEs to enhance their awareness of the possible legal consequences of false self-employment;
- (b) LD would produce specially designed posters to drive home the message to employers and employees of the importance of clarifying the nature of engagement before entering into a contract, highlighting the message that employee rights and benefits would not be forfeited even though a worker was called or labelled as a contractor or self-employed person in a contract if in essence there existed an employer-employee relationship;
- (c) the poster would be displayed at targeted locations and channels with a view to reaching out to those sectors where false self-employment was a more common practice;
- (d) as part of the education efforts aimed at the general public, Announcement of Public Interest (APIs) would be produced and launched on various out-of-home media. The APIs would be broadcast on outdoor video walls and TV panels on MTR trains and RoadShow buses to enhance public understanding on the subject of false self-employment; and
- (e) for the publicity and enforcement efforts made by the Administration to yield more effective results, employees who suspected that they were deprived of statutory rights and benefits were encouraged to come forward and provide the details to LD for investigation and prosecution.

Action

22. Referring to paragraph 26 of the Administration's paper which stated that "attempts to set out categorically in the law what constitutes self-employment may be counterproductive since it would provide inadvertently guidance for those who intend to exploit", the Chairman sought clarification on whether the Administration had ruled out the possibility of pursuing legislative change to tackle the problem of false self-employment.

23. SLW clarified that the Administration only held the view that there was no need to introduce any legislative change at this stage. SLW explained that notwithstanding the good intention behind the suggestion of amending the law to clearly distinguish an employee from those self-employed, an exhaustive list of criteria to define those on false self-employment might be counterproductive as unscrupulous employers might translate them into convenient clues to circumvent the law. Furthermore, an authoritative and legally-prescribed list of indicia to define people on genuine employment or false self-employment might fail to account for possible specific features in individual occupational groups and sectors. This might, in addition, inadvertently hinder the development of entrepreneurship, innovation and contractual freedom.

24. Noting that LD had started collating statistics on cases relating to claims of false self-employment, Mr WONG Kwok-hing requested the Administration to provide the Panel with the relevant statistics, together with an analysis of the problem in one year's time for follow-up discussion by the Panel. SLW agreed to revert to the Panel as requested on the Administration's review of the subject, alongside with the provision of the requested information.

25. Mr LEUNG Kwok-hung and Mr LEE Cheuk-yan said that they remained unconvinced of the practical difficulties involved in amending EO and ECO to cover people on false self-employment as presented by the Administration. Mr LEE considered that although there was no single conclusive test to distinguish an "employee" from a "self-employed person"/"contractor", the Administration could simply adopt the wider coverage rendered by the "business reality test" to determine whether an employer-employee relationship existed.

IV. Progress of the review of the Transport Support Scheme
(LC Paper Nos. CB(2)276/09-10(05) and (06))

26. SLW and C for L briefed members on the progress of the review of the Transport Support Scheme (TSS), as detailed in the Administration's paper.

27. Mr WONG Kwok-hing expressed disappointment that the Administration's paper gave no further information on the result of the review. He said that the transport allowance for needy job seekers and low-income employees living in the four designated remote districts, namely Yuen Long, Tuen Mun, North and Islands, had helped alleviate the financial burden of

Action

many admitted applicants. In his view, the scheme should continue to exist until the implementation of SMW, as it ensured a steady subsidy for low-income employees and provided them with an incentive for work without the need to resort to Comprehensive Social Security Assistance (CSSA).

28. SLW responded that the objective of TSS was to provide time-limited transport subsidy so as to encourage needy job seekers and low-income employees in the four designated remote districts to seek jobs or work across districts. In response to public demands, a number of relaxation measures were announced in the 2008-2009 Budget Speech and introduced subsequently in July 2008. The measures included expanding the scope of TSS to cover intra-district travels within the four designated districts and lowering the income threshold from \$5,600 to \$6,500 per month. The subsidy period was also extended from six to 12 months.

29. SLW said that at the time the relaxation measures were announced, the Administration undertook to conduct an overall review of TSS one year after the implementation of the relaxation measures, when detailed work statistics were available for an informed analysis. At present, the review was in full swing. It was the intention of the Administration to take all relevant factors into consideration before deciding the way forward for TSS. As the effectiveness of TSS had yet to be reviewed, the Administration was not in a position to give an undertaking that the scheme would continue. Given that the Administration aimed at completing the review before the end of the year, it would put in its best endeavours to finalize the review report and revert back to the Panel at the earliest opportunity.

30. Noting that an overwhelming majority (90.8%) of the admitted applicants were in employment at the time their applications for admission to TSS were approved, Mr CHAN Kin-por expressed concern about the effectiveness of the scheme in encouraging needy job seekers to "go out" and seek jobs. He considered that the allowances payable under TSS might not be sufficient and appealing enough to encourage the unemployed to "go out" and seek jobs. He asked whether the Administration was aware of the situation and had come up with any measures to address the issue.

31. Mr LEE Cheuk-yan and Mr LEUNG Kwok-hung said that they were in support of the continuation of the scheme, since it could help solve the problem of in-work poverty. Mr LEE pointed out that the difficulty in securing employment during the economic downturn was not restricted to residents of the four designated districts. The Administration should therefore consider extending TSS to all districts and relaxing its coverage to include part-time workers. Regarding the Job Search Allowance (JSA) of up to \$600 payable on a reimbursement basis to cover transport expenses incurred in job search, he held the view that the Administration should consider enhancing its support to the unemployed by increasing the amount of JSA to \$1,000.

Action

32. In response, SLW advised that the Administration had not taken a position on TSS at this stage. He assured members that the Administration would take all relevant factors, including members' views and concerns, into consideration in deciding the way forward for TSS.

33. Mr LEUNG Yiu-chung enquired about the purpose of the Administration's review of TSS. Mr WONG Sing-chi and Mr Alan LEONG also enquired about the direction of the review.

34. In response, SLW reiterated that the Administration did not have any pre-determined position and view over the way forward for the scheme. The review would focus on the implementation experience of TSS from June 2007 when the scheme was first launched to the end of June 2009. Among other things, the review would aim at evaluating whether the policy objective of TSS had been achieved. It would also assess the overall effectiveness of TSS, the case processing procedures and practices of the non-governmental organizations that had been enlisted as service providers (the TSS Operators), the modus operandi and control and monitoring measures of TSS.

35. Senior Labour Officer (Employment Services) said that other than feedbacks from admitted applicants, LD would also analyze the views expressed by various stakeholders to help assess the effectiveness of TSS. She explained the methodology adopted for the review, as set out in paragraph 9 of the Administration's paper.

36. Mr WONG Sing-chi considered that the Administration should take the opportunity to review whether TSS should be operated on a long-term basis and extended to cover all low-income workers in the territory. Echoing Mr WONG's view, Mr IP Kwok-him said that to enable more people, including self-employed persons, to benefit from the scheme, the Administration should also review whether the eligibility and the personal asset limit requirement should be relaxed.

37. Given the favourable financial position of the Government in recent years, the Deputy Chairman requested the Administration to seriously consider the possibility of continuing TSS and extending the scheme to the entire territory. He suggested that the Administration should study the share of transport expenses as compared with other living expenses in the overall spending or income of admitted applicants, so as to determine the level of adjustment to the allowances payable under the scheme.

38. In response, SLW and Assistant Commissioner for Labour (Employment Services) made the following points -

- (a) should TSS be extended to all other districts and run on a long-term basis, this would in effect turn the subsidy into another form of income supplement, over and above the low-income CSSA for

Action

eligible low-income employees. This would depart from the policy intention of TSS, which was originally designed as a purpose-specific scheme to encourage, through the provision of time-limited transport subsidy, needy job seekers and low-income employees in the four designated remote districts to seek jobs or work across districts;

- (b) the threshold on personal assets of value not exceeding \$44,000 was far less stringent than that under the CSSA Scheme which was set at \$22,500; and
- (c) regarding the conduct of the two telephone surveys, LD had collected data from survey subjects, including average transport costs incurred for both intra-district and inter-districts travels, to assess the financial burden of admitted applicants. In addition, the analysis of performance statistics of TSS would cover the trends of the number of applications and claims, types and amounts of allowances approved, profiles of the admitted applicants, and performance of the TSS Operators.

39. The Deputy Chairman, Mr WONG Kwok-hing and Mr LEE Cheuk-yan considered that the Administration should provide the Panel with its report on the review of TSS as early as possible and a special meeting of the Panel should be held shortly for members to discuss the issue. Mr WONG further said that the Administration should expedite the review with a view to recommending to the Financial Secretary, who was preparing the 2010-2011 Budget, to continue with the implementation of the scheme.

40. The Chairman suggested and members agreed that deputations should be invited to present their views on TSS at the special meeting. The Clerk was requested to liaise with the Administration and arrange for a special meeting on an early date.

(Post-meeting note: With the concurrence of the Chairman, the special meeting had been scheduled for Thursday, 14 January 2010, from 5:00 pm to 7:00 pm to receive public views on TSS. Members were informed of the meeting arrangements vide LC Paper No. CB(2)390/09-10 issued on 27 November 2009.)

41. The meeting ended at 4:32 pm.