

立法會 CB(2)2174/16-17(06)號文件
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HELP For Domestic Workers
Submission to the Legislative Council Bills Committee on
Employment (Amendment) (No.2) Bill 2017

1. Introduction

HELP for Domestic Workers (formerly *Helpers for Domestic Helpers (HDH)*) is a non-profit organisation that provides advice and assistance to domestic workers in Hong Kong..

Based on the cases that we have dealt with at HELP, exploitation by employment agencies (EAs) has been one of the common and perennial problems faced by foreign domestic workers (FDWs) in Hong Kong. EAs take advantage of the vulnerability of these migrant workers, the relative ease in setting up an EA business and lax enforcement of laws that regulate them.

In February 2014, HELP made a submission to the Panel on Manpower of the Legislative Council on Policies Relating to Foreign Domestic Workers and Regulation of Employment Agencies recommending measures to tackle illegal practices of EAs. Among our recommendations were the introduction of a Code of Ethics for EAs which has now been adopted in the form of a Code of Practice (CoP); and the increase in penalty imposed on agencies convicted of charging excessive placement commission, which now forms part of Employment (Amendment) (No. 2) Bill 2017. HELP commends the Labour Department for these efforts but wish to seek clarification on certain parts of the proposed Amendment and recommend further changes that we hope would strengthen existing legislations, and help further deter EAs from exploiting FDWs.

2. Views on Employment (Amendment) (No. 2) Bill 2017

2.1 Part Clause 3(2) – meaning of “associate” and related person

It is not clear under this clause whether the term “associate” and/or “related person” includes individuals who are agents but are not employed by the agency. Section 51(1)(b) of the Employment Ordinance Cap. 57 (EO) provides that “No person shall operate, manage or assist in the management of an of an employment agency unless – he is in the employment of the holder of license...” However, agencies often use “brokers” who recruit job applicants and introduce them to the EA in return for commission. These brokers or agents, are sometimes the ones tasked to inform the job applicants of the amount of fees charged by the EAs which are often excessive, and serve as conduits in collecting illegal fees. However, once a job seeker complains of being overcharged, the EA denies receiving the payments from or any connection with the broker or agent who then cuts all contacts with the job seeker. In such cases, under the proposed Amendment Bill 2017, would the EA be accountable for the unlawful action of the broker or agent

who is not employed by the EA? Or would the broker be regarded as operating an agency without a license?

There have also been cases where the operator of an EA used the bank account of a third party such as that of his/her domestic worker or other FDWs to receive illegal commission from a job seeker, in an attempt to cover up the collection of illegal fees and circumvent the law. The domestic worker may or may not have given her consent for her bank account to be used and may or may not have received pecuniary benefit. The responsibilities of such third parties need to be clarified.

EAs in Hong Kong are often family businesses, with relatives who may or may not be officially employed, helping run the EA. It must be ensured that licensees and management of the EA are accountable for the actions of anyone involved in the operation of the EA whether officially employed or not.

Recommendation: Further clarification or amendments to the meaning of “associate” and “related person” ought to be made to plug the above mentioned loopholes.

2.2 Collusion with Moneylenders

It is widely known that EAs often collude with moneylenders to disguise the collection of illegal commission by requiring FDWs to enter into loan agreements. In many cases the FDWs do not receive the proceeds of the loan as these are given directly by the moneylenders to the EAs, however, the FDWs are forced to pay these loans, creating situations of debt bondage. .

Recommendation: Moneylenders that collude with EAs to circumvent the law must also be held liable for aiding and abetting the contravention of EO and EAR.

2.3 Clause 4 – Prohibition in respect of the operation of employment agencies

As in clause 3 above, it needs to be clarified whether individuals who are not employees of a licensed EA and who recruit domestic workers in order to refer them to the EA in exchange for commission, or are involved in any way in the operation of the EA would be regarded either as an associate or a person operating an EA without a license for the purpose of prosecution or would he/she be simply prosecuted for contravention of section 51(1)(b) of the EO?

2.4 Threshold for revocation of or refusing to issue or renew EA licenses to agencies that “has not complied with a code of practice issued under section 62A(1)”

Clause 5(5) refers to the addition of non-compliance with the CoP to the list of grounds for revocation or refusal to issue a license. However, no specific threshold is provided. Section 4.1.4 of the CoP states that “LD may issue warning letters to EAs for rectification of irregularities

detected..” and that C for L may also consider, amongst other relevant factors, the relevant track record of the EAs... “ in deciding whether to revoke, issue or not renew EA licenses. This means that a contravention of CoP does not automatically result in revocation or refusal to issue or renew a license. There is no mention of maximum number of contraventions an EA may commit before such decision is made.

This exercise of wide discretion even in cases of failure to comply with statutory requirements especially if the process lacks transparency, may result in weak enforcement of the CoP and even the EO and the Employment Agency Regulations (EAR).

In addition, it is rare for paper trails to exist that would prove the commission of overcharging by EAs as, for obvious reasons, they would not issue receipts. As a result very few EAs are being convicted for overcharging even though such practice is rampant. In the absence of convictions, the C fo L would have to rely on complaints from FDWs and the result of its own investigation which may not yield hard evidence.

Recommendation: A specific threshold need to be stated in the Amendment Bill 2017 taking into consideration a minimum number of complaints against an EA within a given period in deciding whether to revoke or refuse to issue or renew an EA’s license.

2.5 Time limit for filing complaints against EAs

Currently, breaches of the EO and the EAR are regarded as summary offences which have prosecution time limits of 6 months. Such time limit weakens the enforceability of the EO and the EAR and creates an enabling environment for impunity as EAs are aware that domestic workers would not normally risk their job by filing complaints against them within the first few months of their employment. It is also not uncommon for domestic workers to be denied rest days during that period leaving them little opportunity to seek advice and assistance or file complaints.

In 2016, twenty Madagascan domestic workers complained to HELP that they have all been required to pay \$24,000 to their Hong Kong EA over the first 8 months of their employment, through various means, including through salary deductions, direct payment to the agency or via 7-Eleven stores. Some of those who stopped paying were dismissed from their job while a number of them left their employment after having paid the full placement fee, due to abuse or ill treatment. HELP assisted nine of them in filing complaints with the Employment Agencies Administration (EAA) and in pursuing claims to recover the excessive fees they have paid. All but one case have since been settled, with the complainants recovering most if not the full amount they have paid to the EA. However, the EA has yet to be prosecuted and continue to operate with impunity. Part of the reasons given was that most of the cases were time barred.

Part 2, clause 7 of the Amendment Bill 2017, proposes to increase the penalties for operating without a license and overcharging of commission from a fine of \$50,000 to a fine of \$350,000

and 3 years imprisonment. It is not clear whether this increase would make such offences indictable.

Under section 26 of the Magistrates Ordinance Cap 227, *"In any case of an offence, other than an indictable offence, where no time is limited by any enactment for making any complaint or laying any information in respect of such offence, such complaint shall be made or such information laid within 6 months from the time when the matter of such complaint or information respectively arose."*

Recommendation: Enact a time limit of not less than 2 years for prosecuting persons who contravene section 51(1) of the EO (overcharging offences).

2.6 Education of employers

Many employers aid and abet EAs in the collection of unlawful placement commission either because they are unaware of the maximum amount of commission that EA's are legally permitted to charge or may have been offered benefits by EAs. However, few employers are prosecuted for colluding with EAs, and some are only given warnings.

HELP has assisted numerous FDWs in filing complaints against EAs for malpractices but in many of those cases, investigations were hindered because complainants were not permitted by their employers to attend the offices of EAA to provide statements.

Recommendations:

- a) Greater efforts must be made to raise awareness among employers about the maximum fees that EAs are permitted to charge FDWs and about issues of debt bondage and human trafficking.
- b) Make it compulsory for employers to allow their domestic workers to attend the EAA when needed during investigations, on a mutually agreed date and time.
- c) Employers should be prohibited from paying domestic workers' wages through employment agencies to minimize the opportunities for EA to deduct unlawful commission.
- d) Employers who collude with EAs in deducting illegal commission from FDWs wages must be prosecuted for aiding and abetting to deter others.

3. Further Recommendations

In addition to the above recommendations and those made in our 2014 submission to tackle illegal practices by EAs, in order improve enforcement of the existing laws and the proposed Employment Amendment Bill, we recommend further measures as follows:

- 3.1 The Labour Department must commit greater resources to the EAA to increase its capacity to deal with unscrupulous EAs and shorten the investigation period so that FDWs are not

discouraged from pursuing their complaints.

- 3.2 FDWs who agree to testify against EAs must be permitted to take up employment during the investigation and prosecution proceedings which generally take a long time.
- 3.3 There should be greater coordination between the Employment Agencies Administration (EAA), the Police, the Justice Department and the Immigration Department to ensure that in suitable cases, investigations can be fully conducted and victims are able to stay to provide relevant information and if necessary, testify in court.

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