

EXECUTIVE COUNCIL

CONFIDENTIAL

Title of Report: Minimum Wage – Enforcement Options

Paper No: 270/12

Date: 21 November 2012

Report of: Head of Policy & Attorney General

1. Purpose

- 1.1 To provide recommendations regarding the enforcement of a Minimum Wage in the Falkland Islands.

2. Recommendations

- 2.1 It is recommended that Honourable Members:

- Approve that the Minimum Wage shall be enforced through the civil court;
- Approve the enforcement process as set out in this paper (paras 5.7-5.9);
- Approve the suggested system of restitution and damages as detailed in Section 6 of this paper;
- Request the Senior Magistrate to revise the Legal Aid Scheme to include matters related to Minimum Wage (and review the applicability of Legal Aid to other employment law matters);
- Approve that the Taxation Office be asked to provide telephone advice to employers and workers regarding the implementation and application of the Minimum Wage;
- Instruct the Attorney General to draft the necessary legislation to implement the Minimum Wage based on the policy instructions detailed in this paper and Paper 185/12.
- Advise the Attorney General on the level of priority to be given to drafting Minimum Wage legislation in the context of other needs and priorities already identified.

3. Summary of Financial Implications

3.1 None.

4. Background

4.1 ExCo Paper 185/12 presented detailed policy instructions regarding the implementation of a National Minimum Wage in the Falkland Islands. As noted in that paper, the one outstanding issue to be determined is the mechanism by which the Minimum Wage is to be enforced in the Islands.

4.2 This paper provides a discussion of a range of options and presents some clear recommendations to Honourable Members on the most suitable approach to enforcement. These recommendations have been informed by a discussion on the issues between all MLAs and the Head of Policy and Attorney General that took place on 24th October 2012. This meeting provided some clear direction on the preferred approach to enforcement and this is reflected in the recommendations contained in this paper.

4.3 The remainder of this paper considers the possible enforcement routes and the broader issue of the role of Government in the enforcement process.

5. Enforcement Routes

5.1 There are two possible primary routes for enforcement of the Minimum Wage – these being enforcement through the criminal courts; and enforcement through the civil courts. Each will have different implications in terms of process, where the responsibility for enforcement lies, and cost to FIG.

5.2 Whichever approach is adopted, there is an underlying principle that the first point of contact for any worker who thinks they are not being paid the minimum wage will be with their employer. Workers should seek to resolve disputes directly with their employer before any legal is taken. This principle should be enshrined in all publicity material regarding the Minimum Wage.

5.3 The merits of both civil and criminal routes are discussed below.

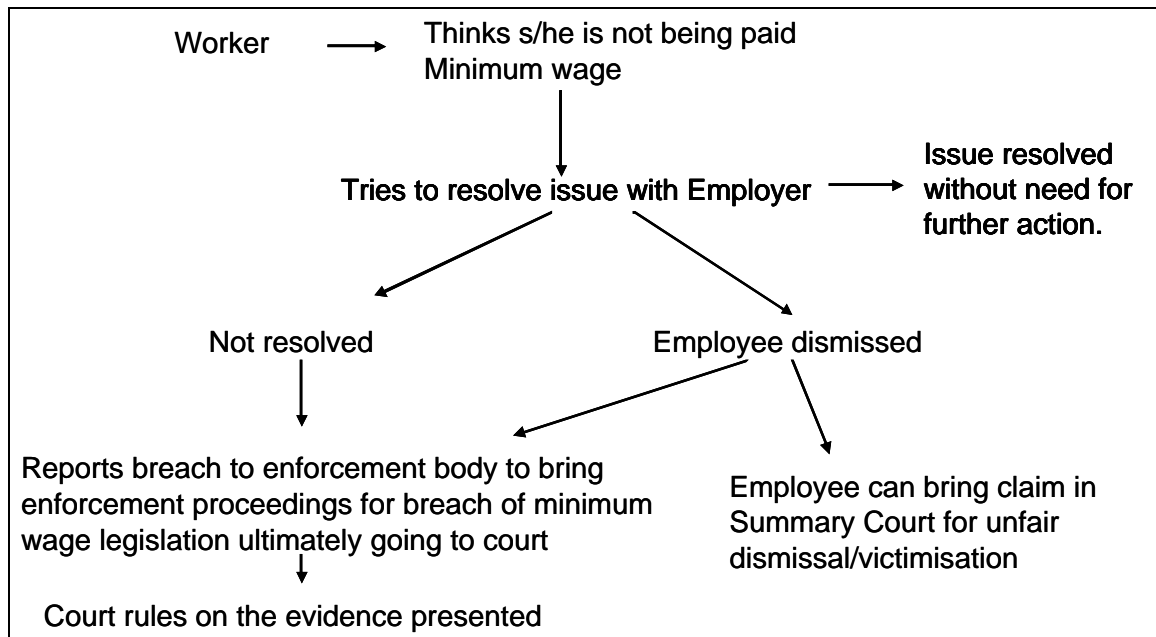
Enforcement through Criminal Courts

5.4 Enforcement of the Minimum Wage through the Criminal Court would entail workers reporting alleged breaches of the legislation to an FIG enforcement body. Given the subject matter and likely volume of complaints this would probably require training and designating an existing officer to carry out this role. It would be the responsibility of that enforcement body to present files for possible prosecution proceedings against employers for breach of the Minimum Wage, with such prosecutions being heard in the Summary or Magistrates Court.

5.5 In cases where a worker believes they have been treated unfairly or discriminated against as a result of trying to ensure that s/he is being paid the Minimum Wage, such cases would still be heard in the Civil Summary Court in

line with current practice for such complaints on other employment matters. A simplified representation of this approach is presented in the diagram below.

Figure 1: Criminal Enforcement Route



5.6 Enforcement through the Criminal Court has two key disadvantages which make this route particularly unattractive for the Falkland Islands:

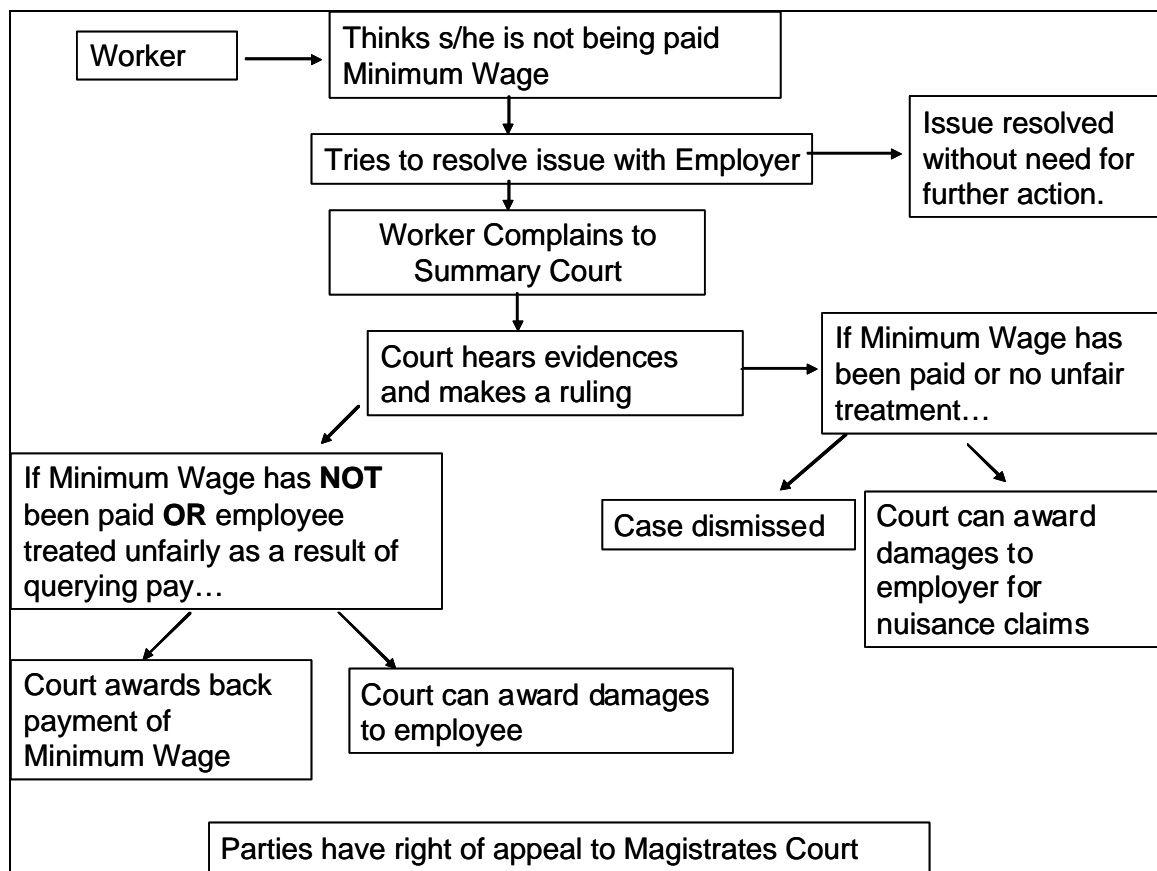
- This approach would criminalise an employment matter, whilst all other employment matters in the Islands are currently enforced through the civil courts;
- This approach places a significant burden on FIG in the enforcement process which will come at a cost, and will likely require additional resources within FIG. The requirement to investigate and bring criminal proceedings will place additional burdens FIG's capacity. In terms of the current structure the most obvious resource for undertaking investigations would be the Royal Falkland Islands Police, whilst prosecutions would be undertaken by the Attorney General's Chambers. This would place additional burdens on the capacity of both departments which could not be met within existing staffing levels.

Enforcement through Civil Courts

5.7 Enforcement of the Minimum Wage through the civil court offers a number of advantages over criminal enforcement. Under this approach, the burden of responsibility for bringing proceedings would be on the worker (with appropriate safeguards to ensure the accessibility of the law). Thus, there is far lower burden placed on the State, and the approach is consistent with the application of other employment laws in the Islands.

- 5.8 Under the civil enforcement route, the worker would bring claims related to breach of the minimum wage legislation to the Civil Summary Court (the Falkland Island equivalent of the Employment Tribunal in the UK), as summarised in the simplified diagram below. It would be the responsibility of the employer to prove that they had paid the Minimum Wage and it would be the responsibility of the Summary Court to make a determination as to whether this was proven or not. In the event of an employer being found to be in breach of the legislation, the Court would then have the power to make awards as detailed in Section 6 of this paper. Both parties would have the right of appeal to the Civil Magistrates Court.

Figure 2: Civil Enforcement Route



- 5.9 **Recommendation:** It is recommended that Hon. Members approve enforcement of the Minimum Wage through the Civil Court system. This approach is consistent with the application of existing employment law and places the burden of enforcement on employers and workers rather than the State (and would not require additional resources within FIG). Additional safeguards to ensure the accessibility of the law and to ensure its effectiveness under the civil route are discussed in Section 6 below.

Summary of Recommended Enforcement Mechanism (Civil Court)

Record Keeping
Requirement on employers to keep national Minimum Wage records
Workers have a right to access records
Enforcement Action
Workers have a right to recover unpaid national Minimum Wage through the Summary Court
The burden is on the employer to show that the Minimum Wage has been paid
Summary Court can award back payment of monies owed and damages as a result of not receiving the Minimum Wage
Summary Court can make further awards of damages for each breach of the legislation, such as failure to keep records, keeping or producing false records, and failure to produce records.
Safeguards and Controls
Workers shall be eligible for Legal Aid to pursue Minimum Wage claims (subject to the normal eligibility criteria for Legal Aid)
The Court shall <u>not</u> normally award costs to either party however the Court will have the power to award costs (at its discretion) to be paid by an employer or employee to the other party if either acts unreasonably or vexatiously in respect of any claim brought.
There shall be no fee to bring a claim to the Court,

6. Issues of Awards of Damages, Costs and Legal Aid

Awards of Damages

6.1 ***Recommendation:*** It is recommended that the Court shall have the power to require an employer found to be in breach of the law to make any or all of the following awards of damages to the worker:

- Back-payment of wages up to the level of the Minimum Wage for the period in which the employer has been found to be in breach, plus interest. This should be the minimum basic award;
- Exemplary damages for failure to pay the Minimum Wage (at the discretion of the Court and to be determined based on the severity and wilfulness of the behaviour of the employer). It is suggested this be applied in instances where the employer has either refused or wilfully neglected to pay the Minimum Wage;
- Exemplary damages for each of the following:
 - a. Failure to keep Minimum Wage records
 - b. Keeping false records

- c. Producing false records
- d. Refusing or neglecting to provide such records to a worker
- e. Unfair dismissal or victimisation of a worker i.e. if an employer sacks a worker or takes some other action against him/her for trying to ensure that he/she is paid the Minimum Wage.

Costs

- 6.2 **Recommendation:** It is recommended that the Court should not normally award costs to either party, but have the power to award costs (at its discretion) to be paid by an employer or worker to the other party if either acts unreasonably or vexatiously in respect of any claim brought. This is intended to safeguard against spurious or nuisance claims being brought against an employer and encourage employers to act reasonably and is recommended as a more effective deterrent than requiring workers to pay a fee to bring a claim to the court.

Legal Aid

- 6.3 With the onus for pursuit of claims resting on the worker under the civil route, there is a need to include safeguards to ensure that the law is accessible to individuals. Given the subject matter it is likely that individuals wishing to pursue a claim for breach of minimum wage will have limited financial resources at their disposal to acquire any legal advice or representation that they may need or desire to pursue a claim.
- 6.4 **Recommendation:** It is recommended that the Legal Aid Scheme be extended to include individuals pursuing claims related to alleged breaches of Minimum Wage legislation (whilst also subject to the current eligibility criteria).

7. Role of FIG in Minimum Wage Enforcement

- 7.1 Another issue to be considered in the enforcement of the Minimum Wage is the role of Government. There are numerous ways in which FIG could engage in enforcement of the minimum wage law ranging from a very light touch to those that are much more proactive (and much more resource intensive).
- 7.2 Elsewhere in the world, there a number of different approaches have been taken, driven in large by part by the extent to which non-compliance with Minimum Wage is perceived to be a problem. By way of example:
- In the USA and Canada the respective Governments take a very pro-active role in enforcement with teams of inspectors employed by the Government to undertake investigations and inspections of employers' records and practices. In the USA efforts are targeted on what have been identified as 'low wage' industries.
 - The UK approach includes Government appointed teams of Minimum Wage enforcement officers who are authorised to undertake investigations into alleged breaches of the Minimum Wage, and have powers to issue

enforcement notices and impose fines on employers prior to the matter reaching the Courts. The UK Government also provides an advice helpline for anyone seeking further information regarding their rights or obligations under the Minimum Wage legislation.

- In the Netherlands, the role of Government is minimal with the Government providing advice and guidance but the onus is placed on the worker to pursue any legal claims for breaches of the legislation.

7.3 **Recommendation:** Given the limited resources of FIG and to avoid unnecessary expenditure on pro-active investigation on a matter which is not believed to be an endemic problem in the Islands, it is recommended that the role of FIG in the enforcement process be kept to a minimum – with its primary role being in the provision of information and advice on the Minimum Wage legislation with pursuit of legal claims being left to the worker to pursue through the Summary Court.

7.4 Following discussions with the Financial Secretary, it is proposed that the Taxation Office perform the role of the Government’s advice service on the Minimum Wage. This will require officers to be fully familiar with the Minimum Wage legislation and the detailed criteria. Their role will only be to advise on matters related to eligibility, minimum wage rates, and advice on what does and does not count as minimum wage pay. They will have no powers of enforcement and it will remain the responsibility of the worker to take forward any claim.

7.5 It is also recommended that FIG produce two separate guidance notes regarding the Minimum Wage. One should be tailored to employers to ensure that they understand their obligations and the second tailored towards workers to ensure they understand their rights. These documents can be produced by the Policy Unit in consultation with the Attorney General’s Office and the Taxation Office.

8. Other Necessary Provisions with Respect to Record Keeping

8.1 In seeking to implement the Minimum Wage the process assumes that the starting point for any worker who believes that they are not being paid the Minimum Wage will be to resolve the matter directly with their employer before the matter reaches the Courts.

8.2 In order to ensure that this first stage of the process is effective the legislation should ensure that employers are required to keep records sufficient to prove they are paying the minimum wage (as set out in para. 12.1 of ExCo 185-12).

8.3 In addition, the legislation should require the employer to provide such records to the worker upon any reasonable request. The legislation should also stipulate that the employer produce such records within 28 days of a written request from a worker.

8.4 Complaints to the contrary should be taken by the employee to the Summary Court as described in the process detailed above.

- 8.5 It is recommended above in paragraph 6.1 that the Court have the power to award exemplary damages to the employee should the employer be found to be in breach of the record keeping requirements. Such damages shall be at the discretion of the Court and shall be payable to the worker who has raised the claim. In such circumstances, the employer will still also be liable to further action with respect to any dispute over actual pay and hours.

9. Financial Implications

- 9.1 None directly from this paper. The proposed extension of the Legal Aid scheme will potentially have financial implications following enactment of the legislation.

10. Legal Implications

- 10.1 The purpose of this paper is to provide the specific policy instructions to enable drafting of Minimum Wage legislation (in tandem with paper 185-12).
- 10.2 In the legislative priorities agreed by ExCo for 2012/13 the Minimum Wage legislation was not identified as a priority for this year. At the time there existed no policy instructions and no indication when instructions were likely to be forthcoming. Executive Council will need to decide what priority this matter is given in relation to the other agreed priorities and decide what matters are no longer a priority for this year taking into account available drafting resources.

11. Human Resources Implications

- 11.1 The implementation of the Minimum Wage with Taxation office staff providing advice and guidance to workers and employers will mean that such individuals will be required to assume additional responsibilities. The officers concerned would need to be fully familiar with the Minimum Wage legislation so as to be able to advise employers and workers as to their obligations/rights. Discussions with the Financial Secretary have indicated that this would be acceptable.
- 11.2 At this point it is impossible to establish how many enquiries might be received by the Tax Office however it is not anticipated that additional staff would be required.
- 11.3 Given the uncertainty regarding the possible workload involved, contingencies for dealing with high levels of enquiries should be planned for, for example, additional staff from other departments (such as Customs and Immigration) could potentially be asked to assist in dealing with enquiries.

Addendum

By way of an update, Hon. Members are informed that the Policy Unit has commenced work on a project to determine the true level of a 'living wage' in the Falkland Islands. This will help inform future decisions regarding the level of the Minimum Wage. Further details of this work will be presented to ExCo in 2013 once there are substantive findings to report.