# The comments of Efling on the government bill from the minister of social affairs and children

The bill put forth by the minister of social affairs and children, Ásmundur Einar Daðason, to change laws no. 55 from 1980 was sent in an email by the office manager of the ministry of social affairs, Bjarnheiður Gautadóttir, to Drífa Snædal, president of ASÍ on February 2nd of 2021. The legislation will now be referred to as "the government bill." The document with the bill is marked "government bill."

In the view of Efling, there are flaws to the bill which keep its aims from being achievable, in addition to breaking the promises which the government has made to the labor movement in connection with the signing of the collective agreements and at other times. Therefore, the bill must undergo fundamental changes.

Dependable reference points must be set regarding compensation and penalty payments. The obvious avenues for guilty employers to escape consequences must be closed off, and at the same time the correction for future reference and the reclamation of provably unpaid wages during the past employment period must be ensured, along with late fees and compensation. Violations of the terms of employment must be assessed according to both the minimum wages of the current collective agreement and the individual employment contract wherever needed. The poor standing of a wage earner must be remedied and the directorate of labor must be truly empowered to rule on these matters so that its authority is not merely for show.

The following includes comments from Efling – union regarding specific parts of the bill and their flaws. There will not be coverage of all the chapters of the bill but only the ones pertaining to court procedure, expedients and penalties for violating the rights of wage earners.

First, there is a summary, followed by an overview of several articles in chapters IV. and V. which cover court procedure and penalties, respectively.

## 1. Summary

The clauses of the bill regarding the cases of victims of violations in the labor market and regarding the penalties for those violations are leaky and ineffectual. They include no penalty payments or objective compensation rules akin to those argued for and called for by the labor movement. The bill fails to live up to its own aim, described in the report, that is, to "counter social dumping and violations in the Icelandic labor market" (p. 13).

The conditions of court procedure provide guilty employers with avenues of escape from consequences and leave to continuation of cases up to themselves. This applies to the clauses regarding the consultation committee, negotiation for payments and the court of arbitration. The bill is therefore bound to be considered in a league of its own with respect to how delicately it treats perpetrators. Court procedure with the staff of unions in its current incarnation, with the admittedly weak weapons at their disposal, is still more likely to yield results than the procedure put forth in the bill.

The conditions of procedure place barely any obligations on the shoulders of the directorate of labor, for instance regarding the expansion of recommendations or the inspection of the general arrangement of wage payments in a workplace, placing the entire responsibility instead on the shoulders of each wage earner and limiting the penalties to his case alone. It's hard to understand why the directorate of

labor isn't given more expansive powers than these, if the institution is to be involved at all in the processing of wage claims.

The court procedure conditions require the wage earner to endanger his employment before his case can be considered and put him through the added humiliation of having to meet with the guilty employer to "negotiate" regarding whether the employer will see fit to pay the already overdue wages or not. This is emblematic of the perpetrator-friendly nature of the bill in its entirety and these terms make the proposed process even worse than the procedure which unions are currently able to offer their members.

The penalties which are on offer in the end, should the wage earner's case make it all the way through the narrow corridor of the court procedure conditions, only apply to a specific part of the problem and not at all to the behavior against which a deterrent is most urgently needed, that is, the non-payment of already overdue wages in accordance with the employment contract of a group of employees at a particular workplace. This begs the question of whether the authors of the bill really understand the problem which the bill is supposed to solve.

The bill, with the abovementioned avenues of escape for guilty employers, therefore, in no way puts wage earners who have suffered wage theft and other violations in the labor market in a better position. Thus, the minister of social affairs and children and the government have failed those people, in addition to having broken their own promises, made in a statement issued in connection to the finalization of a collective agreement in the open labor market in April of 2019 and repeated since then, for instance during a meeting with the chairmen of the member unions of ASÍ on August 25th.

It should be made clear that the assistant of the minister of social affairs and children, as well as the assistant of the prime minister, ignored and declined repeated requests from the managing. director of Efling to be given an opportunity to read the draft of the bill and make suggestions and comments in the autumn of 2020.

The following includes a closer examination of the clauses and articles of the bill.

## 2. Regarding clauses in chapter IV regarding "Court procedure in cases of disagreement"

*No objective rule for compensation (penalty payments)*

The bill includes new clauses which frame the previously unknown court procedure of the directorate of labor in so-called "disagreements" regarding whether the wage earner's rights to his wages have been respected by the employer. These clauses are included in chapter 4, under the heading of "Court procedure in cases of disagreement and the chapter includes five articles, number 9-13.

Should the narrow conditions described in the chapter be met, it may lead to the penalties described in chapter V ("Penalties"), particularly in articles 14 (per diem fines), 15 (temporary closure of the operation) and 16 (non-criminal fines).

The chapter, and in fact the bill, nowhere includes authorization for objective compensation rules or penalty payments on the form called for by the labor movement. There have been calls for the addition of such a compensation claim to the wage claims issued by the staff of the unions on behalf of victims for violations of collective agreements, as demonstrated for instance in article 1.43 of the current agreement of the Confederation of Icelandic Enterprise (Samtök atvinnulífsins) with the Icelandic Seamen's Federation (Sjómannasamband Íslands), and for the compensation to be paid to the victims. No concrete clause stipulating anything of the sort is to be found in the bill, but only weak authorizations with no repellence effect beyond that which is already available to the unions in the claims process.

### *The bill fails to achieve the intended aim*

The report speaks of the aim of the bill being to "counter social dumping and violations in the domestic labor market" (p. 13). The clauses of the bill will, however, have no such effect in their current incarnation, as it is quite easy for guilty employers to evade penalties, as has been outlined.

It is important to call attention to a distinction without a particularly clear explanation, which is made in the legislation, among other places in article 9, between the repayment of unpaid wages which are already overdue on the one hand and the correction in future of the erroneously calculated wages after the directorate of labor has issues a directive to that effect as in paragraph 3 of article 10. The wording of article 9 regarding "correcting wage payments" seems to apply to both, but the wording then goes on to specifically reference "unpaid wages", that is, unpaid past wages. This distinction is imperative in the latter chapters of the bull, for instance in chapter V, which covers penalties, but such penalties will only be available for use in response to neglecting to correct wage payments occurring after the directorate of labor has issued directives, not in response to "unpaid wages", that is, wages which were already overdue when the directorate of labor issued its directives.

### *Legally valid terms of employment not protected*

Article 9 reads as follows:

> 1 Should a wage earner believe that his employer is paying him, or has paid him, wages lower than those stipulated in the current collective agreement in the occupation in question in the area in which the work of the wage earner takes place, he is to demand, himself or via his union, with verifiable evidence that the employer in question correct the wages as of the next payment of wages, including unpaid wages, before the wage earner can request the assistance of the directorate of labor to have the wage payments corrected, as in article 10.

Two important comments are necessary regarding paragraph 1 of article 9, that is, the red-marked text. Firstly, the article assumes that the wage earners claim for a correction of unpaid wages (whether in the past of future) apply only to the minimum wages stipulated in the collective agreement, not to the wages in excess of the stipulations of the collective agreement which may have been negotiated in a legally valid employment contract between the employer and the wage earner. The great majority of wage earners in the open labor market in Iceland receives wages in accordance with employment contracts, which in many ways exceeds the minimum wage clauses of the collective agreements. Therefore, non-performance or contract violations must be evaluated from the standpoint of both the minimum wage clauses of the current collective agreement and the employment contract of the individual in question. This is a basic point.

The labor movement has expressed the view that protection against the non-payment of wages must and should apply to the negotiated wages of the wage earner in question in a legally valid employment contract, as they are the legally valid employment terms of the individual in question, and validate the responsibilities of the employer, not only to non-payments according to the minimum stipulations of collective agreements. About half of the members of Efling in the open labor market and a large majority of the members of VR and of the unions of craftsmen, to name a few, are paid in excess of the minimum wage stipulations of collective agreements. The clauses of the article provide no protection against non-payment or theft of this part of the wages of the wage earner in question. It is utterly mysterious why the legislature should thus limit the protection of the legislation to the part of the wages most often negotiated in a legally binding way between the employer and the wage earner in the employment contract. Explanations and arguments for this practice aren't forthcoming in the report attached to the bill.

### *The most common form of wage theft is not addressed (non-payment of already overdue wages)*

Secondly, the article, in conjunction with articles 10, 11 and 12, further entrenches the existing arrangement in which no definite consequences result from non-payment of overdue wages up to the time at which comment is made and/or the directorate of labor issues a directive, as in paragraph 3 of

article 10. It is to be noted that authorizations of penalties for unpaid wages *after* the directive has been issued have been given (authorizations for fines in articles 14-16) in the bill, but one needs to bear in mind that wage theft in the labor market is most often characterized by the practice of underpaying as much as possible before the matter is brought to anyone's attention, not by continuing to underpay the employee in question after his practice is discovered.

The problem, therefore, is not that the wages aren't corrected after the practice of underpayment is discovered, but that before it was discovered, repeated theft on a large scale took place. The focus of the repellence effect must, therefore, be on the wages unpaid *before* the theft is discovered, not on the wages unpaid *after* a demand has been made for a correction. The bill reverses that emphasis exactly. In the view of Efling, this huge flaw to the bill will lead to no effect on the current situation regarding wage theft, and will provide its victims with no judicial reform. Guilty employers have avenues of evasion of wage claims as the bill is currently structured.

The wage affairs division of Efling is responsible for the collection of overdue unpaid wages which most often results in wages being paid, but not until a long process has taken place where the wage earners is at a significant disadvantage. The process which is proposed for the directorate of labor to institute does not improve the circumstances of wage earners in any way but offers new ways for employers to evade any consequences in the case of already overdue wages, including the minimum consequence of having to pay back the unpaid wages in full. The clauses regarding the consultation committee (article 10), the negotiation (article 11) and the court of arbitration (article 12) all create such avenues of escape.

The court procedure in the current form of the bill puts the victim at a significant disadvantage. As before, the wage earner bears the responsibility of raising the issue, demanding remuneration and waiting a long time for his case to be taken up. Compensation in full for unpaid wages and the costs accrued is not adequately ensured. Thus, the option is still open to the employer, should he choose to use it, to neglect wage payments to his entire staff without any costs beyond the wages already agreed upon in the collective agreement up to the point in time when the wage earner seeks the assistance of the directorate of labor. As before, it is most likely that such a turn of events leads to financial gains for the employer and incentivizes its continuation.

### *Wage theft is still incentivized*

Efling has called attention to cases where the employer neglects to pay many employees their wages but corrects this in the case of one employee or a few employees when and if they demand the correction. The behavior continues unabated, however, towards the other employees who didn't demand the correction. This is an indication that the practice is premeditated and ubiquitous. There is confidence that some part of the staff will always refrain from seeking a correction for some reason. The abovementioned legal stipulation does nothing to engender changes to this arrangement and it will likely become even further entrenched. In fact, the limitation of the legal stipulations to the minimum wage in the collective agreement provides further incentive for this, as the law grants no protection from the non-payment of the wages negotiated in the employment contract beyond the terms of the collective agreement. Many guilty employers, if caught in the act of underpayment of a particular wage-item, for instance the payment of a December bonus in accordance with the minimum of the collective agreement, will state that they have already paid a commensurate amount through overpayments.

The labor movement has repeatedly pointed out that to create the necessary repellence effect against the non-payment of wages, the option must be on the table to levy fines or penalty payments as soon as the violation of the stipulations of the collective agreement or the legally valid employment contract are discovered. There is no such clause in the entire bill and article 9 further entrenches the lack of consequences which penalty payments would have countered. While the employer doesn't encounter the appropriate consequences of his non-payment of wages, the wage earner is saddled with the

consequences of the delay of payment of the wages to which he is entitled, which can lead to him failing to meet his financial obligations at the beginning of the month. Wage theft thus continues to be a cash-cow for employers and a burden for wage earners.

### *Weak obligations of the directorate of labor – heavy obligations on the wage earner*

The first paragraph of article 10, "Correction of wage payments" reads as follows:

> 1 If the employer has not met the demand of the wage earner for a correction of wage payments, in accordance with article 9, the wage earner can request the assistance of the directorate of labor in getting his wage payments corrected. If the wage earner hasn't demanded that the employer correct the wage payments before he requests the assistance of the directorate of labor in getting his wage payments corrected, the directorate of labor is obligated to dismiss the case. The directorate of labor is also obligated to dismiss the case if the employment has been terminated before the wage earner demanded a correction of his wage payments from the employer.

There are two problems with the article. Firstly, the obligations which it places on the shoulders of the directorate of labor are startlingly weak. There is no stipulation of an obligation to take up a case, much less within a given timeframe, but only demands for the wage earner to prepare his case and then a directive to the directorate of labor to dismiss cases under certain circumstances. The clauses seem designed to limit the obligations of the directorate of labor, create the most leeway possible for the dismissal of cases and saddle the victims of wage theft with the heaviest possible obligations. The ruling authority of the directorate of labor in the draft of the bill is in fact a mirage.

### *Incentive to dismiss*

Secondly, the article demands that the wage earner put forth a demand for a wage correction before the end of the employment relationship. In other words, the wage earner cannot seek a wage correction after he has been fired. This legal provision provides the guilty employer with the weapon of using dismissal even more effectively than before to protect his wage theft. If the wage earner should go to his employer in good faith with a verbal request for the correction of unpaid wages, the provision now creates an incentive for the employer to simply fire the wage earner, thereby evading all the little penalties which this bill contains and rendering the wage earner utterly unable to seek further restitution at the directorate of labor. No protection from dismissal is in place.

### *The own judgment of employers (consultation committee)*

The second paragraph of article 10 reads as follows:

> 2 Should there be some doubt as to whether the employer is paying lower wages than the amount stipulated by the collective agreement, the directorate of labor is obligated to request the assessment of a consultation committee to resolve any differences, in accordance with article 6, as to whether the provisions of article 5 have been violated. Such a request is to be put forth along with the data which the directorate of labor deems necessary in order to evaluate whether wages under the amount stipulated by the collective agreement are being paid or have been paid. Should the directorate of labor request the assessment of the consultation committee and the findings of the members of the committee fail to come to a unanimous decision, the directorate is obligated to dismiss the case.

There were already legal provisions for consultation committees between management and labor in the open labor market. They have never been put to work and therefore there is total uncertainty regarding this forum, especially in the face of a new and demanding task of countering wage theft. There is no reason to weigh down and complicate the court procedure with the involvement of consultation committees when it would be wiser to grant the directorate of labor real authority to rule in these cases. The request of the confederation of employers to refer discussions regarding penalties for wage theft during the wage negotiations of 2018-2019 to the legislature does not indicate a willingness to reach satisfactory solutions in the forum of consultation committees.

As in paragraph 1 of the article, the leeway which the directorate of labor is given to refer matters elsewhere is evidently great. The only requirement for the directorate of labor to be able to refer a case

to a consultation committee is that there be “some doubt” about its merit. Guilty employers will presumably always be able to claim that there is “some doubt” about the merits of a case and, on that basis, be able to pressure the directorate of labor to refer the matter to a consultation committee, weighing down the process and making the procedure more difficult for the victim. It’s even possible that all matters might end up being referred to the consultation committee. As outlined above, guilty employers have a vested interest in this becoming the case, as the consultation committee will grant them the authority to decide for themselves how the cases will proceed.

The largest and most problematic flaw of the article is precisely this, that appeal to a consultation committee is on offer, where the employers are in fact granted the right to judge for themselves and a veto on all procedure and penalties. There is a demand that the consultation committee reach a unanimous conclusion and if that should fail to happen, the directorate of labor is obligated to dismiss the case. This provides guilty employers with yet another weapon to evade the responsibility of paying contractual wages. It’s obvious that all employers who so wish will always use this veto, thereby eliminating entirely the efficacy of this legislation with regards to the restitution of already overdue unpaid wages.

### *The lack of recourse of those who have already been cheated out of their overdue wages*

The third paragraph reads as follows:

> 3 Should the directorate of labor reach the conclusion that the employer is paying the wage earner a lower wage than the amount stipulated in the collective agreement, the directorate is to issue a directive to the employer that, as of the next wage payment, he should not pay lower wages than the amount stipulated in the collective agreement. The directorate of labor shall also notify the wage earner in question, as well as the union, should the wage earner so request, that the directorate has issued the abovementioned directive to the employer in question.

The paragraph here reiterates the lack of penalties or consequences in the bill for having cheated wage earners of their already overdue wages. However, the paragraph of law provides the option that the directorate of labor issue a claim, in the form of a directive, that the wage payments of a certain employer be corrected in the future and provides along with it the option of activating authorization for per diem fines (article 14), the temporary closure of operations (article 15) and non-criminal fines (article 16). Such directives only apply to minimum wages as outlined in collective agreements, as previously stated, and only apply to the case of the individual employee who sought the assistance of the directorate of labor, and the precondition must be met that there is a current employment relationship and that a written comment has been made.

The fourth and fifth paragraphs of article 10 in no way eliminate the flaws already mentioned.

### *The own judgment of employers (negotiation)*

In article 11 of the bill there are two paragraphs. The former reads as follows:

> 1 Within ten working days after the directorate of labor has issued the directive to the employer that he correct the wage payments, in accordance with article 10, the directorate shall call a meeting with the wage earner and the employer where they are given an opportunity of negotiating amongst themselves, either on their own or with the involvement of a consultation committee, to resolve their disagreement, as in article 6, regarding the payment of unpaid wages, as well as the payment of interest and any compensation owed to the wage earner. Such an agreement is to be sent to the directorate of labor within 15 working days of said meeting and the directorate is to approve the agreement.

This paragraph states that even though the directorate of labor has, at the end of a process which already contains too many built-in defenses and evasions for guilty employers, concluded that a violation of a collective agreement has indeed taken place, there will *not* be quick and dependable consequences as one might expect. On the contrary, there is the option of a negotiation between the victim of the wage theft and the guilty employer, where the employer is “given the opportunity” to

agree to pay the unpaid wages. Also, there is the option of appealing the matter to the consultation committee in accordance with paragraph 2 of article 10, where the employers have a full veto and can therefore judge the matter for themselves as outlined above.

It's clear that any guilty employer can, based on this clause, equipped himself with total impunity and can escape consequences simply by refusing to engage in negotiations over said consequences and, as a last resort, he can delegate the total elimination of the case to the abovementioned consultation committee, which includes his representative with veto power. It's interesting that the employer can thus not only avoid paying interest and compensation but also the payment of the already overdue wages. This resort is therefore exceptionally ineffectual for the victims of wage theft in every detail. Not only does it not add any defenses to the current process available to unions for the collection of wage claims but creates a situation where the situation of the victim is worse than in the process currently available to the unions.

### *The own judgment of employers (a court of arbitration)*

Paragraph 1 of article 12 regarding the court of arbitration reads as follows:

> 1 Should an agreement not be reached in accordance with article 11, the wage earner and employer can reach an agreement to appeal the disagreement over unpaid wages to a court of arbitration which will rule on the case, among other things on the period of time which should be considered, on the amount of unpaid wages as well as on interest accrued since the payments were due, in accordance with laws on interest and indexation. The court of arbitration is also authorized to rule that the employer should pay the wage earner special compensation in addition to the unpaid wages and interest, should there be a request for that, as the employer is guilty of extensive and/or repeated violations.

The stipulations of the article regarding the court of arbitration seem designed to create a means of appeal for cases where agreement is not reached, either during a meeting, as in paragraph 1 of article 11 or within the consultation committee as in article 10. The structure of the stipulations regarding the abovementioned meeting and the consultation committee, as has been outlined, allows for employers to have a full veto and, thus, the power to decide the outcome for themselves. Therefore, one might hope that the court of arbitration provides a safety valve where the guilty employer is unable to evade a reasonable overview.

That is not the case, however. The wording of paragraph 1 of article 12 is so structured as to once more preclude any influence not approved by the guilty employer, as he and the victim are made to "reach an agreement" about referring the matter to the court of arbitration. It's hard to understand why a guilty employer should choose to come to an agreement about such a course of action after he has already rejected the agreement, as in in article 11. As with the previously mentioned stipulations of the bill regarding the consultation committee (article 10) it's clear that each guilty employer can, by his own decision alone, evade a comprehensive overview of his case by the court of arbitration and at the same time avoid having to pay compensation. The article in question thus further entrenches the total weakness and ineffectuality of the legislation in dealing with the non-payment of already overdue wages.

## **1.** Of the clauses in chapter V regarding "Penalties"

### *A strict exterior – ineffectual content*

Chapter V includes three articles authorizing the directorate of labor to use penalties, specifically per diem fines (article 14), temporary closure of operations (article 15) and non-criminal fines (article 16) in case the directives of paragraph 3 in article 10, regarding the correction of an employee's wages in the future, are ignored.

Although these penalty stipulations may sound strict and give the impression that they will cause guilty employers to have to accept serious consequences for their actions, these authorizations must be viewed in conjunction with the numerous limitations and conditions in chapter IV which have been

covered here. On the one hand there are very strict court procedure demands which severely disadvantage the victims of violations and on the other hand it should be noted that the directives which the directorate of labor is authorized to issue are quite limited from the very start and only apply to a few specific types of violations.

*Limitations to court procedure before penalties come into play*

Before there is a possibility of the directorate of labor making use of the abovementioned penalty prerogatives in accordance with paragraph 3 of article 10, the following court procedure conditions must be fulfilled, according to chapter IV:

1. The wage earner must have made a comment himself to his employer, taking on himself the inherent risk to his employment and his status in the workplace (see article 9 and the comments outlined above).
2. The comment must be in writing or submitted in a provable fashion (see article 9 and the comments outlined above).
3. The wage earner must have had an active employment relationship with the employer at the time when he made the comment (see paragraph 1 of article 10. and the comments outlined above).
4. The directorate of labor must have evaluated the case and come to the conclusion that there is no "doubt" that the laws regarding minimum wages in a collective agreement have been violated; otherwise, the directorate of labor is obligated to refer the case to a consultation committee where the guilty employer is free to reject the continuation of proceedings and will in all likelihood do so. Stipulations regarding a court of arbitration don't improve that situation. (See paragraph 2 of article 10 and the comments outlined above.)

Despite the content of the penalty prerogatives, clearly the strict conditions for the proceedings render the odds of them being used rather slight.

*Limitations of the directives which the penalties are meant to enforce*

Not only is it quite unlikely, according to the bill, that a case ever reaches the stage of penalties being levied, because of the cumbersome procedural conditions, but the limitations of the directives of the directorate of labor, in accordance with paragraph 3 of article 10, which the penalty prerogatives in question are meant to enforce, should also be noted. The limitations apply to the types of violations for which correction directives can be issued and they are the following:

1. The directorate of labor can only issue a directive for a correction of wages to the amount stipulated by the minimum wage clause of the collective agreement, not for a correction of wages in accordance with a legally valid employment contract. The vast majority of wage earners in the open labor market are paid according to employment contracts, which exceed the minimum wage requirements of collective agreements. Such contractual wages are entirely unprotected by the penalty prerogatives of the bill. (See the comments outlined above.)
2. The directorate of labor can only issue a directive for a correction of wages which are due after the directive has been issued, not for a correction of already overdue unpaid wages – however, the theft of already overdue wages before the practice is discovered is the most common kind of wage theft in the Icelandic labor market. The guilty employer will presumably react to the directive of the directorate labor of correcting the future wages of a particular employee by complying with it, while continuing to perpetrate comparable violations against others in his staff. (See the next item and the comments outlined above.)
3. The directorate of labor can, according to the wording of the chapter and the conditions of the bill, generally only issue directives for the correction of the future wages of the employee who

sought its help in that case and fulfilled the cumbersome conditions set in chapter IV regarding the court procedure. There is no possibility of directives for the correction of the wages of others among the employer's staff, even though experience has taught Efling that there may be ample reason to suspect that the other employees suffer comparable wrongs in the workplace in question. Therefore, the penalties cannot be used to protect them even though there are reliable indications that widespread wage fraud is taking place in the workplace in question. (See the comments outlined above.)

Efling – union
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