



Research on Judicial Practice of Crime of Refusing to Pay Labor Remuneration: Case Study

Zhiguo Z¹, Na J^{2*} and Rong H³

¹Ph.D in Law, Beijing Normal University in China, China

²Law Professor, Beijing Normal University in China, China

³L.L.M. London School of Economics and Political Science, Beijing Normal University in China, China

*Corresponding author: Jiang Na, Law Professor, Beijing Normal University in China, Ph.D.

in Law (U.K.); Deputy General-Secretary of the International Association of Penal Law (AIDP) China, Email: na.jiang@bnu.edu.cn

Case Report

Volume 8 Issue 3

Received Date: June 12, 2023

Published Date: July 10, 2023

DOI: 10.23880/ijfsc-16000312

Abstract

The crime of refusal to pay labour remuneration has been implemented in China for more than a decade, but its standard of conviction and effects in practice are yet to be further examined. By analysing the judicial cases, this article finds that some constitutive elements of this crime are quite obscure and controversial and there is a lack of uniformity in the scale of penalties, resulting in a mismatch between the severity of crime and punishment. In order to achieve the goal of combating the behavior of malicious non-payment of wages, it is recommended that the subject of this crime should be expanded, the subject intent of the criminal should be underscored, and the penalties shall be appropriate to the severity of the criminal's behavior, so as to reach a balance between the combat of crimes and protect the legitimate interests of workers, as well as maintain the social economic order.

Keywords: Crime of Refusing to Pay Labour Remuneration; Constitutive Elements of Crime; Ability to Pay; Escape Pay Obligation for Labour Remuneration

Introduction

The malicious non-payment of wages is one of the market transgressions that have accompanied the booming development of the market economy in China. The amendment to the Criminal Law has brought the act of malicious non-payment of wages into the scope of criminal law since in 2011. Nevertheless, the application of this crime in judicial cases is quite controversial because of the ambiguity of the law, which include but not limited to: the scope of the subject of this crime; how to define the standard of refusing to pay wages; the calculation of the number of wages; whether the evasion of wage payment should be premised on the 'ability to pay'; whether the property status of the criminal shall be taken into account; whether the

'order to pay' element should be deleted in this offence, etc.

To response to these controversial issues, this paper will give some judicial perspectives and have a substantive analysis of criminal law norms, with an aim to unifying the operational standards of this crime in judicial practice.

Practical Implementation on the Conviction Crime of Refusing to Pay Labor Remuneration in China

Using the keyword 'refusal to pay labour remuneration', this article retrieved criminal judgments on this offence from the Chinese Judicial Documents website, which showed 2218 cases in 2019, 1059 cases in 2020, 590 cases in 2021 and 720

cases in 2022, showing a decline trend on the whole.

In terms of the subjects of the trial proceedings, the defendants were mainly natural persons, including contractors, legal representatives of companies, de facto controllers, managers and other subjects with obligations to pay wages. Among them, there were 961 cases in which only natural persons were defendants, and 57 cases in which natural persons and companies were co-defendants. From the statistics of the number of victims, the cases of refusal to pay labour remuneration were mostly collective cases, involving a large group of people who were usually working at the same construction site or the same company.

In terms of payment of labour remuneration, there were only 379 cases in which the defendant or his relatives paid all the unpaid labour remuneration before (or during) the filing of the indictment, 362 cases in which no payment was made, and 481 cases in which the government, landlord, contractor or others paid part of it or reached a settlement agreement to pay it.

The Scope of the Subject Matter of the Offence of Refusal to Pay Labour Remuneration

Based on the above-mentioned cases, the subject of the offence of refusal to pay labour remuneration is mainly private enterprises and individual economic organisations, thus the objects of punishment are mostly natural persons in judicial practice. Meanwhile, the labour-intensive industry is frequently occurred of this crime, with the construction industry being particularly involved. That is because the existence of a large number of contractors who employ illegal workers in this industry, the low level of knowledge of migrant workers, the imperfect legal system of China's construction industry in general, and the government's ineffective supervision of the illegal and disorderly phenomenon in the construction industry [1].

However, the scope of the subject of this crime is still not wide enough to cover some implicit wage evasion. This is especially true when it comes to the e-commerce industry, in which the entrepreneurs choose to broke according to law without paying wages. Take the Missfresh as an example, it went broke in the end of 2022, without paying around 800 workers' wage of nearly 813 million yuan because of the breakdown of funding chain [2]. By the same token, Kaikeba company also failed to pay around 4,000 employees wages, ending up with bankrupt in 2022 [3]. Even the above-mentioned two companies went bankrupt legally, the thing was that they still hired employees after knowing that they may not be able to pay the wages, and the managers or entrepreneurs were not held responsible in criminal cases.

Therefore, the subject of crime of refusing to pay labour remuneration should be further expanded to combat this kind of malicious wage evasion by taking advantage of loopholes of bankrupt law.

Criteria for Determining Non-Payment of Labour Remuneration

In practice, there is some debate about whether the factor of 'ability to pay' should be a prerequisite for the criminalisation of evasion of payment of labour remuneration. Some held that where possible, the defendant's property status should be ascertained, and the reason is that it is not the failure to pay in full and on time when the perpetrator is incapable of doing so that is punishable under criminal law, but rather the act of actively avoiding the payment of labour remuneration in such circumstances [4]. In addition, the essence of the offence of 'evading the payment of wages by transferring property or fleeing' is also the failure to pay despite the ability to do so [5]. Otherwise, those bankrupt enterprises might have the risk of being convicted, which is obviously not appropriate.

Nevertheless, many people's courts in China have held that 'ability to pay' should not be a prerequisite for the criminalisation of evasion of payment of labour remuneration. For example, in the case of Li Qiang's refusal to pay labour remuneration, the people's court held that it is the basic right of workers to be paid for their labour, and it is also the legal obligation and responsibility of the employer to perform, thus the employer must have a certain amount of solvency and should not rely entirely on the use of workers to obtain income before paying them, otherwise it is tantamount to transferring the business risks to the workers [6].

Therefore, many cases did not look into the property status of the defendants who escaped or lost in contact when they were not paying wages. Instead, the people's court put much emphasis on the intent factor of criminals. Take the case of Ren as an example, the court held that Renmoucheng should have actively tried to solve the problem of workers' wages in case of default, but he evaded the obligation to pay wages by fleeing, and he has not taken the initiative to deal with the problem of workers' wages during his absconding, which is in line with the objective manifestation of the crime of refusing to pay labour remuneration, and his conduct constitutes the crime of refusing to pay labour remuneration [7].

The Determination of the Amount of Unpaid Wages

Another important factor of this crime is the large amount of labor remunerations non-paid by criminals. The

interpretation of criminal law specified two standards, which are to refusal to pay labour remuneration to one worker for more than three months and the amount is between five thousand Yuan and more than twenty thousand Yuan, or refusal to pay labour remuneration to more than ten workers and the accumulated amount is between thirty thousand dollars and more than one hundred thousand Yuan. In determining whether the amount is 'large', the people's court will take account of the specific circumstances of the case, the local economic level, the market order, the total number and relative proportion of those who owe wages, and the average living standard in local area. In practice, most of the cases were involved in a large number of victims, thus the non-paid wage were usually more than 100,000 Yuan.

The generally high amount of criminalisation of non-payment of wages in judicial practice is the result of a combination of factors. From the employer's point of view, it is clear that a low amount of non-payment of wages is too costly and not a rational choice for it to trigger civil disputes, public opinion in the industry and investigations by the labour inspection authorities. From the labour's perspective, on the one hand, when the amount of wages owed by the employer is too small, very few workers will resort to criminal means to defend their rights, because if the employer is involved in a crime, production may not continue and they won't get the salary in the end. On the other hand, filing a civil lawsuit in court or applying for arbitration before a labour dispute arbitration body provides a more moderate remedy for workers to defend their right to remuneration.

Furthermore, the non-payment of wages to constitute this offence must be subject to an order from the relevant government authority. The problem is that the plurality of 'subjects ordered to pay' is quite confusing in judicial practice. In most cases, the bureau of Human Resources and Social Security is regarded as the subject to issue the payment order, and the Construction and Planning Bureau, the People's Government, the Public Security Bureau, the Law Enforcement Bureau and the Office for the Settlement of Arrears are also involved in a small number of cases as the subject of payment orders, but whether the people's court and labor dispute arbitration institution should be regarded as the relevant government authority is subjected to hot debate. Some believe that if a people's court at all levels serves a judgement or ruling that has come into effect and orders the payment of remuneration to workers within a certain period of time, but the subject refuses to pay, it is an imaginary competing offence between this offence and the offence of refusing to execute a judgement or ruling, and should be punished as a felony [8].

The Penalties of the Offence of Refusal to Pay Labour Remuneration

Whoever commits crime of refusing to pay labour remuneration without serious consequences but pays labor remunerations before a public prosecution is instituted and assumes the corresponding compensatory liability according to law may be given a mitigated penalty or exempted from penalty. In most cases, the perpetrator was granted a reduced or waived penalty because of statutory mitigating circumstances, such as their relatives had paid labor remuneration and made a settlement with victims. Take the case of Xiong Weijian's refusal to pay labour remuneration as an example, the people's court held that the defendant Xiong Weijian was able to surrender on his own initiative, with the circumstances of self-surrender, and pleaded guilty and punishment, and signed a confession of guilt and punishment, thus he could be punished lightly [9].

Nevertheless, the law only provides for the payment of labour remuneration at different stages of the proceedings and for the application of different sentencing circumstances, but does not specify the amount of paying labour remuneration. In the cases of mitigating penalties, only a small number of criminals paid off the labour remuneration, while others just paid a small part of the labour remuneration. By the same token, the definition of the serious consequences caused by the refusing to pay labour remuneration varies greatly in judicial cases. Some people's courts have taken into account major incidents such as group petitions, collective protests, individuals committing suicide to collect wages due to non-payment of wages as 'serious consequences' for the purposes of conviction and sentencing [10], while others not [11]. Therefore, it is necessary to establish the standard of penalty of this crime according to the proportion of the labour remuneration that the criminals had paid off.

The Ways to Improve the Application of the Crime of Refusing to Pay Labour Remuneration

The crime of refusing to pay labour remuneration did deter the malicious wage evasion, which has also been illustrated by the decline number of cases in the past four years. When it comes to improve its application in judicial cases, there are several aspects need to be further clarified.

Firstly, the coverage of subject of this crime should be expanded in two aspects. The first one is that the conviction of this crime should be entitled to labourer as well. Since this offence is solely depend on the bureau of Human Resources and Social Security and people's procuratorates which are responsible for the investigation and prosecution of this crime, so only the severe class suits were initiated. As a

result, many individual labourers are not able to sue their boss to pay their wages in criminal law, and it's often fruitless in the civil cases since their boss still refuse to fulfil the civil judgement. Therefore, by this way, individual labourer could skip the order of government departments to defend for their wage [12].

Another is that although this offence is aimed at those who have property and the ability to pay, but do not pay workers' wages, those companies which know they are not able to pay wages and still hire employees and then go bankrupt should be also held responsible. Meanwhile, those top managers who transfer property of the ongoing-bankrupt company, resulting to the failure payment of wages, shall also be convicted.

Secondly, the cooperation between the administrative enforcement and criminal justice should be further strengthened. Specifically, the labour administration and law enforcement departments coordinate with the public security departments to file and investigate cases of wage evasion and take compulsory measures in a timely manner, and promptly transfer clues and information on suspected crimes of wage evasion to the public security departments, so as to decrease the incidence of wage evasion [13]. Thus, the cooperation mechanism between the administration and the judiciary should be formed, forming an articulated relationship between the administration's relief of wage claims and the judiciary's punishment of crimes [14].

Furthermore, the payroll period should be shortened in labour law since the long payroll cycle in China is a trigger for wage evasion by business operators. In fact, the longest period of time for which wages are paid in China is now not just one month, but two months. As a result, where wage costs account for a high proportion of business operating costs and investment in fixed assets is low, are more likely to induce wage evasion. For example the construction industry does not pay wages on a monthly basis, construction companies and contractors have accumulated a large amount of unpaid wages to migrant construction workers, which makes it easier for them to act treacherously and not pay them. Thus, it is necessary to make it statutory for employers to pay wages on monthly basis.

Last but not least, the ultimate goal of this offence is to protect the workers' financial interests, thus the intent of the subject and their property status should be full examined in trial. Especially, the more wages the criminals or his relatives paid in the process of trial, the lighter of their sentence, and the earlier they paid off the wages, the less of the chance of being convicted, all of which should be used according to a uniform standard, so as to encourage defendants to pay off the unpaid wages.

Conclusion

Given the fact that the function of criminal law is to punish criminal behaviors, a proper definition of the conditions for criminalisation, ensuring the protection of vulnerable workers while avoiding excessive interference in criminal law, and seeking a balance between the protection of legal interests and the punishment of crime, should be the basic attitude and position of the current judicial operation on the criminalisation of malicious non-payment of labour remuneration.

References

1. Bei W, Miao L (2017) Research on the crime of refusal to pay labor remuneration from the perspective of legal big data. *Chinese Journal of Criminal Law* 3(2): 42-68.
2. 800 million in unpaid wages, 1,300 lawsuits, and 55 employees still standing by Missfresh,
3. With unpaid wages and 30% layoffs, can the 1.1 billion dollar company still 'teach'?
4. Chenxi X (2017) Empirical analysis of the conviction standard of the crime of refusing to pay labor remuneration. *Journal of Jiangxi Police Institute* 204(4): 109-115.
5. Haijun W (2013) The normative interpretation of the crime of refusal to pay labor remuneration. *Law Review* 5: 122-127.
6. (2020) Criminal Ruling of the Intermediate People's Court of Jinzhong City, Shanxi Province Jin 07 Xing Zhong 124.
7. (2014) Criminal Ruling of the People's Court of Huidong County, Guangdong Province Huidongfaxingerchuzi No 41.
8. Jianhua S, Wenzhen W (2012) Improve the linkage mechanism of administrative and judicial supervision of labour security. *China Labour* 7: 5-9.
9. (2020) Xinjiang Uygur Autonomous Region Chabuchar Xibe Autonomous County People's Court Criminal Judgment Xin 4022 Criminal Chu 100.
10. (2020) Jilin Intermediate People's Court of Jilin Province Criminal Ruling Ji 02 Criminal Zhong 98.
11. Bao'an District People's Court, Shenzhen, Guangdong Province Criminal Judgment (2015) Shen Bao Fa Long Xing Xing Chu Zi 98.
12. Liang L (2017) Study on the Attached Administrative

Regulation of the Crime Refusing to Pay Labor Remuneration. *Tribune of Political Science and Law* 35(5): 148-157.

13. Lingming K (2018) An Empirical Study on Labor Dispute of Escape for Labour Payment. *Journal of Wenzhou*

University (Social Science Edition) 31(3): 27-34.

14. Haiming L (2013) Some thoughts on the judicial interpretation of the refusal to pay labour remuneration. *Journal of Changchun University of Technology (Social Sciences Edition)* 25(3): 37-39.

