《2000年僱傭（修訂）（第2號）條例草案》委員會：

政府對議員在二零零一年一月十二日所提問題的回應

在二零零一年一月十二日的條例草案委員會會議上，議員就政府倡議的《2000年僱傭（修訂）（第2號）條例草案》提出了一些問題和建議。我們現將政府的回應列述如下。

澄清有關保障懷孕或正在放取有薪病假的僱員免受解僱的條文（條例草案第5及8條）

2. 議員詢問爲何需要修訂有關保障懷孕或正在放取有薪病假的僱員免受解僱的條文，並要求提供導致需要作出相關修訂的訟案的詳情。

3. 根據《僱傭條例》（下簡稱“條例”）第9條，如僱員嚴重行爲不當，例如犯有欺詐或不忠實行爲或慣常疏忽職責，僱主可無須給予通知或代通知金而終止僱傭合約。條例第6及7條規定，僱主可給予適當通知或代通知金，以終止僱員的僱傭合約。不過，第15(1)條禁止僱主根據第6或7條解僱懷孕僱員。這項條文旨在禁止僱主解僱懷孕僱員；但若僱主具充分理由根據第9條的規定作出即時解僱的情況，則屬例外。

4. 根據條例第 15(2)條，任何僱主違反第 15(1)條，須對被解僱的僱員作出補償，其中包括代通知金，另加一筆相等於一個月工資的款項，以及十個星期的產假薪酬(如該僱員沒有被解僱，本應獲得該等款項)。此外，如僱主違反第 15(1)條的規定，可被檢控，一經定罪，可被判處罰款 10 萬元。如僱主未能提出第 32K 條所指的正當解僱理由，而法院或勞資審裁處又沒有作出復職或再次聘用的命令，則僱主除須支付終止僱傭金外，根據第 32P 條，還可能須支付高達 15 萬元的補償。

5. 條例第 33 條亦同樣禁止僱主根據第 6 或 7 條解僱正在放取有薪病假的僱員。任何僱主違反這項規定，除須對被解僱的僱員作出補償外，更可被檢控。

6. 一九九七年十月，原訟法庭法官在裁決一宗刑事上訴案時認爲，只有在僱主僅根據條例第 6 或 7 條終止僱員的僱傭合約的情況下，才屬違反條例第 15(1)條(有關的判決書副本及案情摘要載於附件 A，以供議員參考)。簡單來說，依據第 6 或 7 條終止僱員的合約，是第 15(1)條所訂罪行的要素。該條例並沒有規定不當解僱，可被視作依據第 6 或 7 條而作出的解僱。

7. 上述判決的影響是，如僱主一旦聲稱以條例第 9 條即時解僱懷孕僱員，即使其後證實他所聲稱的即時解僱理由並不成立，當局

亦不能以他違反第 15(1)條而將他檢控。問題的癥結在於第 15(1)條現行的撰寫方法。按照目前的措辭，該條文只禁止僱主根據第 6 或 7 條解僱懷孕的僱員，但並不涵蓋僱主在不符合第 9 條的規定下作出的不當解僱。這項裁定亦會對條例第 33 條有關保障僱員在放有薪病假期間免遭解僱的規定帶來影響，因爲該條文所用字句與第 15 條大致相同。

8. 政府的政策，向來都是禁止僱主解僱懷孕或正在放取有薪病假的僱員，但若僱主具充分理由根據《僱傭條例》第 9 條作出解僱的情況，則屬例外。繼法院作出上述判決後，若僱主聲稱以第 9 條解僱僱員，當局便不能就僱主非法解僱懷孕或正在放取有薪病假的僱員而將他檢控。這種情況既不可取，也不公平。我們不應容許僱主利用第 9 條作爲藉口，解僱懷孕或正在放取有薪病假的僱員。制定有關修訂的目的，是堵塞現行法例的漏洞，而這些修訂並不涉及政策上的修改。

9. 我們也明白，有些時候僱主確實相信在某些情況下，他有充分理由根據第 9 條解僱僱員而法院卻持不同意見。我們贊同議員的意見，如僱主確實相信他有權解僱僱員，便不應負上刑事法律責任。因此，我們已建議在條例草案中加入免責辯護條文。根據擬議的條例第 15(5)及 33(4BC)條(即條例草案第 5(d)及 8(c)條)，只要僱主能證明他把懷孕或正在放取有薪病假的僱員的僱傭合約終止時，合理地相信他有理由根據第 9 條終止有關僱員的合約，即可以此作爲免責辯護，

並且不會因擬議的第 15(4)及 33(4BB)條(即條例草案第 5(d)及 8(c)條)所訂的罪行而被撿控。

10. 有議員關注到，草案第 5(d)及 8(c)條所訂定的新增條文第 15(5)及 33(4BC)條的第一句，意味僱主只能在進行法律程序時才可提出免責辯護。爲消除這項疑慮，我們建議修訂有關字句，以便清楚表明，在援引第 15(4)或 33(4BB)條時，僱主提出的免責辯護已會獲得考慮，而不僅限於在進行法律程序時才予以考慮。附件 B 表內的第(ii)及(iii)項，詳述有關的修訂建議。

11. 立法會法律顧問關注到，我們就條例第 15(1B)及 33(4BAA)條(條例草案第 5(b)及 8(b)條)建議的措辭，會給予政府很大的壓力去檢控引用條例第 9 條解僱僱員的僱主。我們已詳細考慮上述意見。擬議的第 15(1B)及 33(4BAA)條規定僱主須證明以條例第 9 條解僱僱員。我們認爲對僱主施加這項規定是合理的。正如我們在二零零零年十二月十四日致張炳鑫先生的文件中解釋，以現時的個案看來，僱主應已掌握所需的知識、資料或證據，以支持其立場。律政司指出，假如沒有這項推定，控方便難以證明僱主並非依據條例第 9 條解僱僱員。

12. 律政司又指出，在決定是否提出檢控時，必須具備充足證據以確立控罪，同時須有使被告依法定罪的合理機會。倘僱主可提出證明他是根據第 9 條解僱懷孕或正在放取有薪病假的僱員及在作出解

僱時，他有充分理由相信他可以這樣做，則當局極不可能就此對他提出檢控。就這方面而言，特別是從免責辯護的角度來看，新增的第15(1B)及 33(4BAA)條不會導致草率檢控的情況或令僱主遭受不合理的困苦。事實上，根據以往的統計數字顯示，每年只有少數的檢控個案是涉及以第 9 條解僱懷孕或正在放取有薪病假的僱員的事宜(有關數字載於附件 C)。

13. 基於上述理由，我們決定保留條例草案第 5(b)及 8(b)條所載的建議。

有關僱員享有按比例計算的年終酬金的澄清條文(條例草案第 4 條)

14. 議員關注到，草案第 4 條有關何種情況下僱員會有資格領取按比例計算的年終酬金的寫法較難理解。我們在研究過有關的條文後，建議作出文字上的修訂，以更直接和更容易理解的方法，表達出我們的建議修訂。我們已擬備好新的修訂建議第 4 條，載於附件 B 表內的第(i)項，以供議員審議。

從《僱傭條例》第 VIA 部豁除《家庭崗位歧視條例》定義範圍內的歧視行爲(條例草案第 7 條)

15. 有議員詢問，我們爲何建議將《家庭崗位歧視條例》定義範圍內的歧視行爲摒除於《僱傭條例》第 VIA 部的適用範圍之外。

16. 現行《僱傭條例》第 32Q 條已把《性別歧視條例》所指的性別歧視行爲，及《殘疾歧視條例》所指的殘疾歧視行爲，摒除於《僱傭條例》第 VIA 部(僱傭保障條文)的適用範圍之外，理由有二：其一，政府的法律政策向來都是要避免因單一項行爲而作出重複的民事補救。由於《僱傭條例》第 VIA 部和上述兩條條例均可能涉及僱傭方面的歧視行爲，故必須從第 VIA 部豁除該兩條條例所指的歧視行爲，否則，申索人便可能根據兩項獨立的法例，向兩個不同的法院提出申索，以致有關僱主因單一項行爲而須面對兩次獨立的審訊，以及作出雙重補償。

17. 事實上，《勞資審裁處條例》規定，勞資審裁處如認爲該處不應聆訊和裁定某宗申索，則可拒絕行使司法管轄權，並將個案移交。自《性別歧視條例》和《殘疾歧視條例》制定後，歧視行爲(包括僱傭方面的歧視行爲)已交由區域法院聆訊，因爲區域法院擁有適當的司法管轄權，可聆訊有關歧視行爲的指控。至於《僱傭條例》就豁除事項作出規定，則可清楚界定有關聆訊歧視行爲申索的權限。

18. 條例草案第 7 條的目的，是基於上述的相同原因而把《家庭崗位歧視條例》列入豁除名單內。《家庭崗位歧視條例》其中一些條文，旨在保障僱員免因其家庭崗位而遭受不合法的歧視。該條例予以豁除後，實際上僱員如被僱主違反條例第 15(1)條或 33(4B)條的規定而解僱，即使有關解僱涉及《家庭崗位歧視條例》所規定的歧視行

爲，僱員仍可根據《僱傭條例》第 VIA 部向勞資審裁處提出申索。僱員可純粹指稱有關解僱違反條例第 15(1)條或 33(4B)條的規定，而僱主則須證明是基於條例第 32K 條所規定的正當理由而把僱員解僱。如僱員的申索涉及《性別歧視條例》、《殘疾歧視條例》及《家庭崗位歧視條例》所界定的歧視行爲申索，勞資審裁處便會把案件轉交區域法院審理。

教育統籌局

二零零一年二月

附件 A

涉及 S. Space Design (H.K.) Co. Ltd.的

檢控個案摘要

案件背景

X 自一九九五年六月十六日起便根據連續性合約，受僱於 S. Space Design (H.K.) Co. Ltd.（下稱 SSD）為會計員。

2. 在一九九六年四月九日，SSD 告知 X 她可獲增薪，並表示她的工作表現良好，公司向她致謝。

3. 在一九九六年四月十八日，X 通知 SSD 她須放取產假，兩日後，申請獲得批准。

4. 在一九九六年五月八日，X 遭即時解僱。翌日，她接到即時解僱信，信內表示，她被解僱是因為她在過去數月工作態度欠佳及表現未符理想。X 對有關指控提强烈反對。

5. X 向勞資審裁處提出民事申索，追討她在《僱傭條例》下應得的權益。案件在一九九六年九月十一日進行聆訊，X 獲判勝訴。SSD 雖然按照審裁處的裁決支付款項，卻就上述裁決申請上訴，申請獲得批准，但上訴最終亦被駁回。

6. 由於有表面證據證明 SSD 違反《僱傭條例》第 15(1)條的規定，因此，勞工處採取檢控行動，根據《僱傭條例》第 15(1)及第 15(4)條票控 SSD。

7. 案件在一九九六年十二月十六日進行第一次聆訊，SSD 否認控罪，但最後於一九九七年五月十九日在東區裁判法院，根據《僱傭條例》第 15(1)及第 15(4)條而被定罪。

8. 裁判官認為，根據《僱傭條例》第 9 條解僱 X 的理由並不充份，這宗由他審理的案件實屬不當解僱， SSD 並無足夠理據證明解僱該僱員，是因為她工作表現未符理想。

9. 裁判官在作出裁決時，並非不知道第 15(1)條是指根據第 6 及第 7 條解僱僱員，但這宗案件是根據《僱傭條例》第 9 條解僱僱員，故此，裁判官引用法例釋義規則中的補缺去弊規則，裁定僱主有罪。

高等法院判決的摘要

10. 僱主就裁判官的判決，向高等法院提出上訴。高等法院法官接納四項上訴理由的首兩項，並撤銷裁判官所作出的定罪判決。高等法院的判決在一九九七年十月二十四日宣告，判詞原文載於 Appendix。

11. 第一項上訴理由，是控方未能證明第 15(1)條罪行的要素，即僱主是根據《僱傭條例》第 6 或第 7 條終止僱傭合約。

12. 第二項上訴理由，是裁判官在法律上犯錯：第一，採用「補缺去弊規則」作為法例釋義方法；第二，在刑事訴訟中引用勞資審裁處所作出的一項判給補償的裁斷。

13. 第三項上訴理由，是裁判官過分干預對證人進行的訊問。第四項則是定罪判決是不穩妥和不令人滿意的。

14. 高等法院裁定，補缺去弊規則不適用於第 15(1)條。只有在所考慮的法例是含糊不清的情況下，法例釋義規則中的補缺去弊規則才具有或應當具有效力。

15. 高等法院亦裁定，第 15(1)條明確禁止僱主根據《僱傭條例》第 6 及第 7 條終止僱傭合約。該條文簡單清楚，並無含糊之處。

16. 判決書更闡釋，法院在解釋法例條文時，應考慮有關條文的用語。如果用語是清晰和毫不含糊的，法院便無須再考慮其他解釋。如果實施清晰而毫不含糊的法例用語，會引致一些不合理的後果，那就應由立法機關修訂有關法例。

Appendix

IN THE HIGH COURT OF HONG KONG
COURT OF FIRST INSTANCE
(Appellate Jurisdiction)
MAGISTRACY CRIMINAL APPEAL NO. 615 OF 1997

BETWEEN

HKSAR — Respondent

and

S. SPACE DESIGN (HK) CO. LTD. — Appellant

Coram: Deputy Judge McMahon in Court

Date of Hearing: 8th October 1997

Date of Delivery of Judgment: 24th October 1997

JUDGMENT

The Appellant, an incorporated company, appeals against its conviction at Eastern Magistracy on the 19th May 1997 for an offence of terminating the employment of an employee after she had given notice of her

intention to take maternity leave, contrary to sections 15(1) and 15(4) of the Employment Ordinance, Cap. 57.

Section 15(1) of the Ordinance is as follows:

> "Subject to sub-Section (1A), no employer shall terminate a contract of employment of a female employee under Section 6 or 7 during the period from the date on which she gives notice under Section 12(4) or (8); or of her confinement where she subsequently gives notice under Section 12(5), to the date on which she is due to return to work on the expiry of her maternity leave or the date of cessation of her pregnancy otherwise than by reasons of her confinement."

Sub-Section (4) provides that a breach of sub-Section (1) is an offence and imposes a certain level of penalty.

It can be seen from the terms of Section 15(1) that the provision on its face prohibits the termination of a pregnant employee's contract under Section 6 or 7 of the Ordinance. Section 6 provides for the termination of an employee's contract by either party by notice and further provides for the period of notice to be given. Section 7 provides for the termination of the employee's contract by either party without notice, but with payment made by the terminating party in lieu of notice and further provides as to the calculation of that payment.

The grounds of appeal advanced by the Appellant are:-

Firstly, that the prosecution failed to prove an essential ingredient of the offence, namely that the Defendant terminated the contract of employment of the female employee under Section 6 or Section 7 of the Ordinance.

Secondly, that the magistrate erred in law, firstly by applying the "mischief rule" as a method of statutory interpretation, and secondly, by finding that an award of compensation made by the Labour Tribunal in favour of the employee brought Sections 6 and 7 into play "indirectly".

Thirdly, that the magistrate interrupted and cross-examined the defence witnesses and in so doing, ...(i) indicated his disbelief of their evidence before the close of the defence case, and in so far as is relevant to this judgement, ... (v), made comments of a hostile and sarcastic nature in relation to their evidence.

Fourthly, that in all the circumstances, the conviction is unsafe and unsatisfactory.

Grounds 1 and 2 are interrelated and I will deal with them together. It was common ground at trial that the Appellant company had not attempted to terminate the employment of the dismissed employee pursuant to the provisions of Section 6 or Section 7 of the Ordinance but had instead dismissed her summarily on the grounds that she was not satisfactorily performing her duties as an employee. That summary dismissal, it seems to have been accepted, was either pursuant to Section 9(a) of the Ordinance which sets out specific provisions relating to the employee's misconducting himself in his employment which, if satisfied, allows the employer to dismiss him, or

pursuant to the employer's rights of summary dismissal at common law which are preserved by Section 9(b) of the Ordinance.

The magistrate, in his statement of findings, came to the conclusion that there was no basis in fact for the appellant to have terminated the employment of the employee because of her work performance being unsatisfactory. He accepted the employee's evidence to the effect that she had performed her duty satisfactorily. He rejected the evidence called on behalf of the appellant to the contrary. His findings of fact in this regard are not challenged by the Appellant.

The magistrate, in his findings, goes on to deal with the law. At paragraph 13, he said, inter alia, of Section 15(1):

> "The Section was designed to protect employees from being dismissed under Section 6 and 7, namely by notice or payment of wages in lieu of notice. In this case, the method of dismissal was by summary dismissal based on PW1 that is the employee's misconduct. So at first sight, the instant offence appeared not to be appropriate."

With that statement of the law the Appellant takes no issue. The magistrate immediately goes on as follows:

> "However, looking at Section 15 it is necessary to apply the so called Mischief Rule of statutory interpretation and look at what mischief the law was trying to prevent."

With this statement the Appellant takes issue. Mr. Plowman S.C. submitted on behalf of the Appellant that there was no scope for the application of what the magistrate calls the Mischief Rule. He says that rule or principle of

statutory interpretation has or should have effect only when the legislation under consideration is ambiguous, and that the legislation in this case is in no way ambiguous.

In *Johnson v. Moreton* [1980] AC 37, the court adopted earlier statements contained in, firstly, *Vacher and Sons Limited v. The London Society of Compositors* [1913] AC at p. 107 to the effect that

> "If the language of a statute is plain, admitting of only one meaning, the legislature must be taken to have meant and intended what it has plainly expressed and whatever it has in clear terms enacted must be enforced even though it should lead to absurd or mischief results."

And secondly, in *Gladstone v. Bowen* [1962] QB at p. 384 to the effect that

> "the courts have no power to fill in a gap in a statute even if satisfied that it had been overlooked by the legislature and that if the legislature had been aware of the gap would have filled it in."

Thirdly, that if the words of a statute are capable, without being distorted, of more than one meaning the court should prefer the meaning which leads to a sensible and just result complying with the statutory objective and reject the meaning which leads to absurdity or injustice and is repugnant to the statutory objective: *Stock v. Frank Jones* [1978] 1 WLR at p. 231.

Those principles as stated are in my view correct. The true and proper approach of a court in dealing with the meaning of a statutory provision before it is to, firstly, look at the terms of the relevant provision.

If those terms are clear and unequivocal then the court need go no further. If in applying the clear and unambiguous terms of the legislation, some absurdity may result, then that is a matter for the legislature to cure. Though no doubt a court would adopt whatever procedural means it could to avoid unfairness. If on looking at the legislation, its terms, on a fair and plain reading, are found to be ambiguous or equivocal then the court then and only then should apply the principle referred to by the learned magistrate as the Mischief Rule in determining what the true intention of the legislature was in passing the statutory provision in question.

On the face of Section 15(1), its terms are plain and unambiguous. It specifically prohibits the termination of the employees contract of employment under Section 6 or Section 7 of the Ordinance. There is simply no ambiguity there.

That being so the principle expounded in *Vachers* case (supra) and adopted in *Johnson v. Morton* (supra) applies and the court need have gone no further.

In any event, I am happy the legislature may well have meant Section 15(1) to apply only to contractual terminations pursuant to Section 6 and Section 7 and that it is not an absurdity that it does not apply to Section 9 and summary dismissals.

The purpose of Section 15(1) is to prevent an employer dismissing a pregnant employee simply because she is pregnant by using the provisions of Section 6 and Section 7 which gives him a right to dismiss employees generally and without cause. By omitting Section 9 from the provision of Section 15(1), I am sure that the legislature may have intended to preserve the employer's right to dismiss, for cause, employees who were in breach of their duties as employees and who conceivably could be damaging the employer's business or who otherwise had offended against the employer or his business. The scope of an employee's misbehaviour is potentially so wide in Section 9 that the legislature may well, in balancing both the employer and the employee's interests, have deemed it inappropriate for inclusion in Section 15(1).

Accordingly, through the operation of sub-Section 4, in my view, an offence only comes into being pursuant to Section 15(1), given proof of the other required elements of Section 15(1), if the employer terminates the employee's contract of employment only under either Section 6 or Section 7 of the Ordinance. And I have no doubt that, on its plain terms, the termination of the employee's contract pursuant to Section 6 or Section 7 is a necessary element of the offence created by Section 15(1) through Section 15(4).

There was no evidence whatsoever before the magistrate that the Appellant had terminated the employee's contract pursuant to Section 6 or Section 7 of the Ordinance and in his oral reasons for verdict the magistrate said that he accepted the contract was not terminated by way of Section 6 or Section 7 of the Ordinance. Accordingly, even though, oddly, the charge did not particularise the termination of contract pursuant of Section 6 or Section 7

of the Ordinance an omission which, however, could have been cured by amendment even in this court, there was at the end of the day no proof of an essential element of the offence.

In his statement of findings, however, the magistrate proceeds by purported [illegible] the Mischief Rule to import into his findings of fact a finding of fact that the dismissal of the employee was, constructively, pursuant to Section 6 or Section 7 of the Ordinance. In those findings, the magistrate says concerning Section 15

> "that the mischief that Section 15 is trying to prevent is to protect employees from being dismissed after notice of maternity leave has been submitted whilst allowing them to be dismissed by other ways, provided these other ways, presumably Section 9 and common law will reasonably and fairly be established and not just used as a vehicle to avoid legal liabilities. That is why the mechanism of law is such that should the employer fail to establish his case for summary dismissal, the employee will be entitled to compensation."

As a general statement of the purpose of the legislation I do not think this portion of the magistrate's findings can be faulted, and the magistrate obviously appreciate contracts can be terminated pursuant to provisions other than Section 6 or Section 7 of the Ordinance.

He then goes on to find that the purported termination of the employee's contract in the case before him was a mere vehicle to evade the law and that it was a wrongful termination.

He says that this finding was supported by the fact that

> "the Appellant company had to compensate PW1, that is the employee, (presumably before the Labour Tribunal as set out in the admitted facts of the case) and such compensation included wages in lieu of notice, so bringing Section 6 and 7 into play indirectly."

He thereby seemingly imports into the facts of the case before him a constructive termination of the employee's contract under Section 6 and Section 7 when those facts plainly, and as previously accepted by him, established that the termination was not pursuant to Section 6 or Section 7 of the Ordinance.

Leaving aside the question as to whether the learned magistrate could ever be right to base a finding of fact in the criminal proceedings before him on facts found before and by another tribunal, it is most certainly not the case that that tribunal's calculation of the compensation payable to the employee for wrongful dismissal under Section 9, by partial reference to the same matters included in Section 6 and Section 7 of the Ordinance, can be taken as importing into the facts of the criminal case before the magistrate a constructive termination of contract pursuant to Section 6 or Section 7 of the Ordinance.

There is simply no basis on the facts before the magistrate, or the law applicable to those facts, for such a finding. There is no provision anywhere in Chapter 57 or any where else as far as I am aware that a wrongful dismissal pursuant to Section 9 of the Ordinance, that is a wrongful summary dismissal, is deemed to be a dismissal pursuant to Section 6 or Section 7 of the Ordinance.

To import such an implied provision into the terms of Section 15 is to usurp the function of the legislature.

In short, the magistrate's finding that the dismissal, although apparently pursuant to Section 9(a) and Section 9(b) of the Ordinance, is to be constructively regarded as a termination of contract pursuant to either Section 6 or Section 7 is wrong in law.

Accordingly, I am satisfied that the Appellant has made out both Grounds 1 and Grounds 2(i) and (ii) of its Grounds of appeal and thereby Ground 4 and its conviction is quashed and sentence set aside.

I further add that had I not allowed this appeal for the reasons I have given on Grounds 1 and 2, I would have done so on the Appellant's Ground 3.

It is fair to say that particularly regarding DW1, the first defence witness, who was the assistant general manager of the Appellant, the magistrate interrupted his evidence to the extent that he conducted a significant part of both examination in chief and cross-examination of the witness. Many of these interruptions were to clarify matters given in evidence, but a significant number were either to contradict the witness or to belittle him.

Typical examples are, firstly, as to the contents of a form the witness was being questioned about,

> "So you, so now in addition to playing doctor you are playing lawyer as well. Just now by looking at

somebody's face you know somebody has not done something. And now you know what is not going to be accepted by the court, amazing."

Earlier the magistrate in response to the same witness's evidence that he had not thought the dismissed employee had been as sick on a particular occasion as she said she had been commented:

"Since when you become a doctor. Answer, since when you had become a doctor."

And when the witness said he could now recall a person whom the employee had quarrelled with commented:

"now you have the fantastic memory recall system, only a minute ago you could not remember and now you can remember. How nice."

One more example. When commenting on the bad English contained in the document made by the witness, the magistrate said to the witness,

"no matter what the outcome of this case is, I think you ought to go to Sogo and buy yourself an English dictionary. Do you get a staff discount."

The witness's company, the Appellant, was apparently related to Sogo.

All in all, the magistrates comments contained considerable sarcasm and could give no other impression than that he disbelieved the witness. Other

defence witnesses were treated on occasion in a similar manner but not as frequently so. There is no doubt on the transcript of evidence provided the learned magistrate went too far into the arena.

I have no doubt given the magistrate's experience and thorough approach to the evidence he wished only to arrive at a proper decision. Indeed, his findings that the defence witnesses before him were not worthy of belief are not challenged.

Unfortunately in dealing with those witnesses, in the defence case, he went further than intervening merely to clarify the evidence and from the contents and tone of his questions and comments, showed at an early stage of the defence case that he simply did not believe the defence witnesses or accept its case.

The Appellant has in my judgment made out the third ground of appeal also.

(M. A. McMahon)
Deputy Judge of the Court of First Instance

Mr. Eddie Sean, S.G.C. for HKSAR/Respondent

Mr. Gary Plowman, S.C., Keith Yeung & Maurice Chan instructed by Elizabeth Ho of Kwok & Yin for Appellant.

《2000 年僱傭(修訂)(第 2 號)條例草案》

項目		現行條文	條例草案內的建議修訂	委員會審議階段的建議修訂
(i)	第11F條	(1) 在符合第(1A)款的規定下，凡本部所適用的僱員並非於整段酬金期由同一僱主僱用，但於該期間內由同一僱主僱用不少於 3 個月— (a) 而其僱傭合約於以下時間終止— (i) 酬金期內任何時間；或 (ii) 酬金期屆滿時， 且該合約並非由僱員根據第 6 或 7 條終止，亦非由僱主根據第 9 條終止；或	(1) 在符合**第(1A)款**的規定下，凡本部所適用的僱員並非於整段酬金期由同一僱主僱用，但於該期間內由同一僱主僱用不少於 3 個月— (a) 而其僱傭合約於以下時間終止— (i) 酬金期內任何時間；或 (ii) 酬金期屆滿時， **且該合約並非—** **(A) 由僱員終止(由僱員按照第 10 條終止者除外)；或** **(B) 由僱主根據第 9 條終止；或**	(1) 在符合**第(1A)規定下及除第(1B)款另有規定外**，凡本部所適用的僱員並非於整段酬金期由同一僱主僱用，但於該期間內由同一僱主僱用不少於 3 個月而— (a) 其僱傭合約於以下時間終止— (i) 酬金期內任何時間；或 (ii) 酬金期屆滿時；或 **(1B) 第(1)(a)款不適用於—** **(a) 由僱員並非按照第 10 條終止的僱傭合約；或** **(b) 由僱主根據第 9 條終止的僱傭合約。**

註：條例草案的建議修訂及委員會審議階段的建議修訂的不同之處以粗體顯示。

(ii)	第15條	(4) 任何僱主違反第(1)款，即屬犯罪，一經定罪，可處第 6 級罰款。	(4) 在第(5)款的規限下，任何僱主違反第(1)(a)或(b)款，即屬犯罪，一經定罪，可處第 6 級罰款。 **(5) 在不損害第(1B)款的實施的原則下，在就第(4)款所訂罪行而進行的法律程序中，被控犯了該罪行的僱主如證明以下事項，即可以此作為免責辯護—** (a) 該僱主的本意是按照第 9 條終止有關懷孕僱員的連續性僱傭合約的；而且 (b) 在終止該合約時，他合理地相信自己有理由如此終止該合約。	(4) 在第(5)款的規限下，任何僱主違反第(1)(a)或(b)款，即屬犯罪，一經定罪，可處第 6 級罰款。 **(5) 在不損害第(1B)款的實施的原則下，被控犯了第(4)款所訂罪行的僱主如證明以下事項，即可以此作為免責辯護—** (a) 該僱主的本意是按照第 9 條終止有關懷孕僱員的連續性僱傭合約的；而且 (b) 在終止該合約時，他合理地相信自己有理由如此終止該合約。
(iii)	第33條	(4BB)任何僱主如違反第(4B)款的規定，即屬犯罪，一經定罪，可處第 6 級罰款。	(4BB)在第(4BC)款的規限下，任何僱主違反第(4B)款，即屬犯罪，一經定罪，可處第 6 級罰款。 **(4BC)在不損害第(4BAA)款的實施的原則下，在就第(4BB)款所訂罪行而進行的法律程序中，被控犯了該罪行的僱主如證明以下事項，即可以此作為免責辯**	(4BB)在第(4BC)款的規限下，任何僱主違反第(4B)款，即屬犯罪，一經定罪，可處第 6 級罰款。 **(4BC)在不損害第(4BAA)款的實施的原則下，被控犯了第(4BB)款所訂罪行的僱主如證明以下事項，即可以此作為免責辯護—** (a) 該僱主的本意是按照第 9

註：條例草案的建議修訂及委員會審議階段的建議修訂的不同之處以粗體顯示。

			護— (a) 該僱主的本意是按照第 9 條終止有關僱員的連續性僱傭合約的；而且 (b) 在終止該合約時，他合理地相信自己有理由如此終止該合約。	條終止有關僱員的連續性僱傭合約的；而且 (b) 在終止該合約時，他合理地相信自己有理由如此終止該合約。

註：條例草案的建議修訂及委員會審議階段的建議修訂的不同之處以粗體顯示。

附件 C

年度	成功定罪個案數目		受 S. Space Design (HK) Co. Ltd. 的裁決所影響的檢控個案數目[1]	
	s.15(1)	s.33	s.15(1)	s.33
1995	5	0	N/A	N/A
1996	13	0	N/A	N/A
1997	6	0	1	0
1998	2	0	3	1
1999	4	0	3	2
2000	2	0	6	2

註: 在高等法院一九九七年十月的裁決之前，勞工處曾有兩宗根據《僱傭條例》第 15(1)條提出檢控僱主解僱懷孕僱員的個案，可能是涉及第 9 條的不當解僱，僱主均向法庭承認控罪。

[1] 這些個案是指未能提出檢控或須終止檢控的案件。高等法院就S. Space Design (HK) Co. Ltd 的裁決是在一九九七年十月二十四日宣告。受有關裁決影響的個案，都不是按照《僱傭條例》第6條或第7條終止僱傭合約的。