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Bills Committee on Employment (Amendment) (No. 2) Bill 2000

Minutes of meeting
held on Friday, 12 January 2001 at 8:30 am
in Conference Room A of the Legislative Council Building

Members Present	:	Hon Andrew CHENG Kar-foo (Chairman) Hon Kenneth TING Woo-shou, JP Hon James TIEN Pei-chun, JP Hon LEE Cheuk-yan Dr Hon LUI Ming-wah, JP Hon CHAN Yuen-han Hon YEUNG Yiu-chung Hon LI Fung-ying, JP Hon Michael MAK Kwok-fung Hon LEUNG Fu-wah, MH, JP Hon Audrey EU Yuet-mee, SC, JP
Members Absent	:	Hon Cyd HO Sau-lan Hon Ambrose LAU Hon-chuen, JP Hon Emily LAU Wai-hing, JP
Public Officers Attending	:	Miss Erica NG Principal Assistant Secretary for Education and Manpower (4) Mrs DO PANG Wai-yee Assistant Secretary for Education and Manpower (4) Mrs Jennie CHOR Assistant Commissioner for Labour (Labour Relations)

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		Mr Geoffrey FOX Senior Assistant Law Draftsman
		Mr Sunny CHAN Senior Government Counsel
Clerk in Attendance	:	Ms Doris CHAN Chief Assistant Secretary (2) 4
Staff in Attendance	:	Mr Arthur CHEUNG Assistant Legal Adviser 5
		Ms Dora WAI Senior Assistant Secretary (2) 4

I. Election of Chairman

Nominated by Mr James TIEN and seconded by Miss LI Fung-ying, Mr Andrew CHENG was elected Chairman of the Bills Committee.

II. Meeting with the Administration

Briefing by the Administration

2. The Chairman welcomed the representatives of the Administration to the meeting. At the invitation of the Chairman, Principal Assistant Secretary for Education and Manpower (4) (PASEM) briefed members on the following main points in respect of the amendments proposed under the Bill -

(a) Under the Employment Ordinance (EO), employers were prohibited from dismissing pregnant employees and employees on paid sick leave under sections 6 and 7. Employers might dismiss such employees without notice or payment in lieu of notice only if the employees had committed serious misconduct, such as fraud, dishonesty or habitual neglect of duties, under section 9. However, sections 15(1) and 33 of the EO were now worded in such a way that while dismissals of employees during pregnancy or paid sick leave under section 6 or 7 were prohibited, dismissals made under section 9 but subsequently proved to be unsubstantiated were not covered. Therefore if an employer

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wrongfully invoked section 9 to dismiss an employee during pregnancy or paid sick leave and the summary dismissal was later found to be unsubstantiated, the employer could not be prosecuted. As this was not in line with the policy intention, the Administration considered it necessary to amend the wording of these provisions so as to make it clear that it was an offence for an employer to dismiss an employee during pregnancy or paid sick leave except in circumstances where the dismissal was justified under section 9 of the EO.

(b) The EO provided that an employee was eligible for an end of year payment if he had been employed under a continuous contract for a whole payment period. The EO also provided that an employee would be eligible for pro rata end of year payment if his contract was terminated before the end of the payment period by the employer. These provisions sought to ensure that an employee's entitlement would not be adversely affected by early termination of a continuous contract of employment in circumstances beyond his control. However, the wording of section 11F gave rise to a situation whereby an employee who wrongfully terminated his contract without giving the required notice or payment in lieu of notice might also be entitled to such payment. As this was not in line with the policy intention, the Administration proposed to amend the wording of section 11F to the effect that an employee who terminated his contract otherwise than in the special circumstances prescribed under section 10 (such as fear of violence and ill-treatment by the employer) shall not be entitled to pro rata end of year payment.

(c) Under the EO, an employer should pay to his employee any sum due to him on termination of contract not later than 7 days after the day of termination. The sum included wages in lieu of notice, long service payment and compensation for dismissal during paid sick leave. Failure to make such payment within the time limit was an offence. However, there was currently no provision in the EO stipulating the time limit for making payment of compensation for dismissals during pregnancy. The Administration therefore proposed to include this requirement in the Ordinance.

(d) Currently, acts of discrimination within the meaning of the Sex Discrimination Ordinance (SDO) and the Disability Discrimination Ordinance (DDO) were excluded from the employment protection provisions of the EO. The exclusion was to avoid subjecting an employer to double penalties under different ordinances in respect of a single act. For the same rationale, the Administration proposed that acts of discrimination within the meaning of the Family Status Discrimination Ordinance (FSDO) should also be excluded from the EO.

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Questions from members

3. Mr James TIEN opined that employers might have difficulties in judging what kind of misconduct of a pregnant employee would be considered justified for summary dismissal under section 9 of the EO. He was worried that after the amendments, employers might easily be prosecuted against unintentional wrongful dismissals made under section 9. Assistant Commissioner for Labour (Labour Relations) (AC for L(LR)) pointed out that the amendments now proposed by the Administration only focused on improving the wording of the EO in order to remove the loopholes briefly described by PASEM. There was no change to the policy intention of the Ordinance. AC for L(LR) stated that if the court considered that the summary dismissal was justified under section 9, the employer would not be in breach of the law and in which case no payment of compensation for the employee would be required. AC for L(LR) also stated that clauses 5 and 8 of the Bill provided a defence for employers in proceedings for an offence under section 15 or 33. With the defence, an employer would not be convicted if the court accepted the employer's statement that he purported to terminate the employment contract in accordance with section 9 and that, at the time of such termination, he reasonably believed that he had a ground to do so. In the case that the dismissal was subsequently proved to be unsubstantiated, the employee might claim for payment of compensation under civil proceedings. Senior Assistant Law Draftsman (SALD) supported the statement made by AC for L(LR). He added that no amendment made under this Bill would affect the provisions originally provided for in section 9.

4. In view of Mr James TIEN's concern, the Chairman requested the Administration to give concrete examples to illustrate the kind of behaviour that would be considered as serious misconduct under section 9. AC for L(LR) explained that serious misconduct included wilful refusal of reasonable order, dishonesty, fraud and habitual neglect of duties.

5. Mr Kenneth TING was most concerned about the definition of habitual neglect of duties as it was not as straightforward as fraud or dishonesty. For this reason, an employer might hesitate to dismiss a pregnant employee even though he considered that she habitually neglected her duties. PASEM pointed out that the right of an employer to dismiss a pregnant employee under section 9 would not be undermined by the proposed amendments. It would be for the court to decide whether there were sufficient reasons for the dismissals. In view of the worry expressed by Mr TING, the Chairman requested the Administration to provide clearer explanation of the criteria of serious misconduct so that employers would be able to avoid committing an offence of wrongful dismissal of pregnant employees under section 9. AC for L(LR) reiterated that as the proposed amendments provided employers with a defence in proceedings for an offence under section 15 or 33, an employer would not be convicted if the court accepted his statement that he purported to terminate the contract in accordance with section 9 and that, at the time of such termination, he reasonably believed that he had a ground to do so.

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6. SALD quoted some examples to help interpret the meaning of habitual neglect of duties. He stated that a pregnant employee being unable to discharge part of her duties because of her physical state would not constitute habitual neglect of duties. However, a pregnant employee refusing to discharge some duties which she should be able to cope with or had coped with them well during pregnancy might be considered as habitual neglect of duties. Another example was that a pregnant employee working in service industry who carried out her duties well but was rude to the customers, it might amount to misconduct but not neglect of duties because her bad attitude might damage the business. SALD advised that if an employer suspected that his employee was wilfully neglectful of duties, action should be taken after observing over a period of time instead of basing on a single incident.

7. Dr LUI Ming-wah asked the Administration to brief members on the precedent cases of unsuccessful prosecutions in respect of dismissals of pregnant employees under section 9. AC for L(LR) cited an unsuccessful case in October 1997 in which the employer believed that he had sufficient grounds to dismiss the pregnant employee in accordance with section 9, but the judgement of the court was that the misconduct in question was not serious enough to fall within section 9, thus the case was not substantiated. In reply to the Chairman, AC for L(LR) said that after the 1997 case, there were 13 cases in relation to pregnancy and five in relation to sickness in which prosecution could not be taken out or had to be discontinued. These figures did not include those cases where no prosecution was made owing to insufficient evidence.

Adm As suggested by Dr LUI, the Chairman requested the Administration to provide the judgement of the October 1997 case as well as the information on other relevant cases for the Bills Committee's reference.

8. Ms Audrey EU invited members to refer to page 4 of the marked-up copy of the Bill. She pointed out that while section 15(1) of the Ordinance stipulated that an employer might not terminate the contract of a pregnant employee under section 6 or 7, section 15(1)(a) as proposed by the Administration clearly stated that an employer should not terminate the contract of a pregnant employee otherwise than in accordance with section 9. Moreover, the proposed section 15(1B) stipulated that an employer should be taken to terminate the contract otherwise than in accordance with section 9, unless the contrary was proved. However, under the defence clause in the proposed section 15(5)(b), an employer who was charged with the offence might prove that, at the time of the termination, he reasonably believed that he had a ground to do so.

9. Mr TIEN opined that it should be for the court but not the Labour Department (LD) to decide whether a case was substantiated or not. AC for L(LR) pointed out that LD only acted as a conciliator. If no consensus between an employer and an employee could be reached, the case would be referred to the Labour Tribunal if the claimant so wished. Mr TIEN was of the view that employers would face more prosecutions for dismissals made under section 9 after the proposed amendments. He asked whether an employer was allowed to dismiss employees, pregnant or otherwise, for misconduct in accordance with section 9. AC for L(LR) responded that an employer might dismiss his employees under section 9 provided the requirements

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stipulated in the relevant provision were complied with.

10. Assistant Legal Adviser 5 (ALA5) pointed out that after enactment of the Bill, if an employer dismissed a pregnant employee, the termination would be taken to have been made otherwise than in accordance with section 9. He questioned whether this might lead to an increase in the number of prosecutions as every such employer would be presumed to have made the dismissal wrongfully and could only raise the defence after proceedings were brought, whereas under the existing Ordinance, prosecution would not proceed unless there was a reasonable chance of winning. AC for L(LR) said that she did not foresee any increase in the number of prosecutions and the number of cases was expected to be more or less the same as that before October 1997. Mr YEUNG Yiu-chung asked the Administration to provide the number of successful criminal prosecutions before the October 1997 case. AC for L(LR) reported that the overall conviction rate for summonses issued by Labour Department was more than 90%. She undertook to provide more information later.

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11. Mr TIEN questioned whether it was the Administration's objective to stop employers from using section 9 to dismiss pregnant employees, as it was difficult for employers to judge what kind of misconduct was justifiable under the section. He was concerned whether the Administration would examine each case carefully before deciding whether to prosecute or not. AC for L(LR) explained that LD would always investigate each case carefully before making a decision to prosecute. The employer in question would be invited to explain his case before any decision was made. She stressed that prosecution would not proceed unless there was sufficient evidence and there was a reasonable chance of success to secure a conviction. The past records showed that dismissals of pregnant employees were mostly made under section 6 or 7 and dismissals made under section 9 were few.

12. Mr LEE Cheuk-yan enquired about the consequence of deleting the presumption and defence clauses in the proposed sections 15(1B) and 15(5). In reply to Mr LEE, SALD pointed out that section 15(1B) moved the onus from the prosecution to the employer to convince the court that he terminated the contract in accordance with section 9. SALD further explained that if the proposed sections 15(1B) and 15(5) were taken out, the prosecution had to introduce evidence to show that the employer terminated the contract otherwise than in accordance with section 9 and was thus in breach of section 15(4). There would be no defence for the employer and no explanation would prevent him from being convicted of the offence under section 15(4).

13. Mr LEE Cheuk-yan opined that the amendments were not purely technical amendments. By the addition of sections 15(1B) and 15(5), employers were given an additional defence which was not provided in the existing Ordinance. PASEM replied that the provision of the defence clause was suggested by the Department of Justice (DJ) after considering that there might be a possibility of unintentional wrongful use of section 9 by employers.

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14. ALA5 pointed out that there might be a risk that with the addition of the presumption clause, there would be increased pressure to take out prosecutions. AC for L(LR) pointed out that LD would, no matter whether prosecution would proceed or not, examine each case of dismissal of pregnant employee under section 6, 7 or 9. Therefore she believed that the number of cases for investigation should remain the same.

15. SALD added that the existence of section 15(1B) would not change any procedures before prosecution. He explained that prosecution would not proceed unless either the employer refused to explain the reason for the dismissal or his explanation was very unsatisfactory and unlikely to fall within section 9. SALD pointed out that an employer would be asked for an explanation of the dismissal before a decision to prosecute was made and therefore section 15(1B) would not apply pressure on the number of prosecutions. He stressed that in order not to waste the prosecution and court time, prosecution would only be initiated if the reason given by an employer was totally unreasonable and outside the ambit of section 9.

16. Mr James TIEN believed that 80 to 90% of the prosecutions would fail because employers could easily prove that they had a reasonable ground for the dismissals. The Chairman asked the Administration to carefully consider whether pressure would increase for more prosecutions and whether the proposed amendments would really help smoothen the implementation of the policy. At the request of the Chairman and Mr TIEN, AC for L(LR) undertook to provide the Bills Committee with exact figures and relevant information on the past court cases on dismissal of pregnant employees under section 6, 7 or 9.

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17. Ms Audrey EU shared the view of ALA5. She pointed out that the wording "In proceedings for an offence under subsection (4)" in the proposed section 15(5) would lead to an interpretation that the Administration should always initiate proceedings for cases of dismissal of pregnant employees under section 9. Thus the employer would always be required to explain in court and let the judge decide. She added that as most workers were backed by unions nowadays, pressure for prosecution could be applied on the basis of section 15(5). She suggested the Administration to consider a slight change to the wording so as to avoid unnecessary prosecutions. SALD replied that DJ would not pursue cases with reasons provided by employers which fell within section 9 or believed to fall within section 15(5). Ms EU opined that it would be more palatable if the wording of section 15(5) could be slightly amended, e.g. "In proceedings for an offence under subsection (4)" was replaced by "For the purposes of this section". She pointed out that she fully agreed to the principle that DJ would not prosecute unless there was a reasonable chance of winning. However, section 15(5) as currently worded might lead to pressure for prosecution, waste of resources and difficulty for the Administration.

18. ALA5 suggested that consideration be given for deleting the presumption clause so that prosecutions would only be made when there was sufficient evidence. Mr LEE Cheuk-yan said that he would prefer to delete both clauses. Miss CHAN

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Yuen-han opined that the Administration should provide relevant figures and information as soon as possible so that the Bills Committee could decide the way forward. The Chairman rounded up the discussion by asking the Administration to consider the amendment to the wording of section 15(5) as proposed by Ms Audrey EU. He also reminded the Administration to provide the additional information requested by members during the meeting as soon as possible.

19. Miss LI Fung-ying opined that the exclusion of the acts of discrimination within the meaning of the FSDO from the EO might narrow the protection for employees against unlawful discrimination on the ground of family status. She could not see the need for such exclusion as protection for pregnant employees was also provided in the EO, and protection for employees receiving ill-treatment from employers was also covered in the SDO. PASEM explained that this exclusion would not narrow the protection for employees against acts of discrimination within the meaning of the FSDO. This exclusion was, in principle, the same as the exclusion applied to the SDO and DDO. Miss LI reiterated that this exclusion obviously narrowed the protection for employees. She pointed out that issues about an employee's marital status and pregnancy were also covered in the SDO now, and there was inconsistency in Government policies. AC for L(LR) explained that the main reason for the exclusion was to avoid subjecting an employer to double penalties under different ordinances in respect of a single act. She pointed out that the acts of discrimination within the meaning of the SDO and DDO had already been excluded from the employment protection provisions of the EO. Therefore the same principle should apply to the FSDO. The reason for not having done so was that the FSDO was enacted after these two ordinances. Miss LI remarked that the principle seemed to be workable, but the explanation in paragraph 7 of the LegCo Brief was too simple and was different from that explained by the Administration at the meeting. She requested the Administration to provide more detailed information in this regard for members' consideration.

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20. Mr LEE Cheuk-yan pointed out that currently a pregnant employee could prosecute her employer against wrongful treatment by either seeking assistance from the Equal Opportunities Commission or by resorting to the EO and she would not be awarded double compensation. He believed that members' worries could be alleviated if the Administration could -

(a) inform members of the reasons why the protection of pregnant employees could be covered in more than one ordinances; and

(b) assure members that the protection of employees in relation to the FSDO would not be minimized by the proposed exclusion.

At the request of Mr LEE and Miss LI, PASEM undertook to provide more information to the Bills Committee on this issue.

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21. Ms Audrey EU invited members to refer to the Chinese version of section 11F.

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She opined that the wording "且該合約並非…… (…….除外)" in (A) under (ii) of section 11F(1)(a) was too clumsy and suggested to replace it with "且該合約並非由僱員按照第10條終止". Senior Government Counsel explained that the Chinese wording followed the structure of the English version which adopted a double negative approach using "otherwise than" and "other than". He further explained that if the Chinese wording of the provision was to be changed, the structure of the provision in terms of paragraphing would also have to be changed. In view of this, the Chairman suggested that the Administration should consider changing the style of writing the English version of ordinances so that the Chinese version would be easier to understand.

22. Members agreed to continue discussion on the Bill at the next meeting when all the additional information to be provided by the Administration was available. Mr LEE Cheuk-yan hoped that all the queries raised at this meeting could be sorted out by next meeting.

23. ALA5 referred to clause 8 of the Bill and pointed out that all the views expressed by members in relation to pregnancy should also apply to section 33 of the EO which dealt with sickness allowance. SALD confirmed that issues relating to pregnancy and sickness allowance would be accorded the same treatment.

III. Date of next meeting

24. Members agreed that the next meeting of the Bills Committee would be held on Thursday, 1 February 2001 at 2:30 pm.

(*Post-meeting note* : the meeting was subsequently re-scheduled to Monday, 12 February 2001 at 2:30 pm.)

25. The meeting ended at 10:10 am.

Legislative Council Secretariat
27 February 2001