

**立法會**  
**Legislative Council**

LC Paper No. CB(2)1416/00-01  
(These minutes have been  
seen by the Administration)

Ref : CB2/BC/7/00

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

**Minutes of meeting**  
**held on Monday, 12 February 2001 at 2:30 pm**  
**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 Cyd HO Sau-lan  
Dr Hon LUI Ming-wah, JP  
Hon CHAN Yuen-han  
Hon Ambrose LAU Hon-chuen, JP  
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 LEE Cheuk-yan  
Hon YEUNG Yiu-chung  
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 Vidy CHEUNG  
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

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**I. Meeting with the Administration**  
(LC Paper No. CB(2)767/00-01(01))

At the invitation of the Chairman, Principal Assistant Secretary for Education and Manpower (4) (PAS(EM)4) briefed members on the Administration's response to questions and suggestions raised by members at the last meeting as set out in the Administration's paper. Assistant Commissioner for Labour (Labour Relations) (ACL(LR)) then briefed members on the October 1997 case and its judgment (Annex A to the paper) as well as the statistics of prosecution cases involving dismissal of pregnant employees or employees on paid sick leave between 1995 and 2000 (Annex C to the paper).

2. Assistant Legal Adviser 5 (ALA5) pointed out that the Committee Stage amendments to sections 15(1B) and 33(4BAA) proposed by the Administration deleted the words "in proceedings" from but retained the word "charged" in the original version of the Bill. He opined that such an amendment would still require an employer to raise the statutory defence in court after having been charged with that offence. He opined that there seemed to be an incongruity in the Department of Justice's (DJ) advice given in paragraphs 11 and 12 of the paper. On the one hand, it advised that without the presumption, the prosecution would have difficulty in establishing that an employer dismissed an employee not in accordance with section 9. On the other hand, it advised that in deciding whether to take out a prosecution, sufficient evidence would be required to establish the offence charged and there was a reasonable prospect to secure a conviction. It seemed that the sufficient evidence

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required before taking out a prosecution would have to rely on the presumption.

3. Senior Assistant Law Draftsman (SALD) held the view that there would be no pressure on prosecution. He explained that prosecution would be initiated only if the Administration or the prosecution believed that there was a good reason or sufficient evidence to secure a conviction for a breach of the law. It would eventually be up to the court to decide whether to accept the employer's defence. If the reason given by an employer was believed to be good in court, no prosecution action would be taken out. Without this presumption, an employer would be convicted only if he admitted the guilt or did not raise a defence to the charge.

4. ALA5 said that it was relatively difficult to rebut the presumption by proving the contrary. Prosecution might be initiated without sufficient evidence. While he agreed that it would be difficult for the Administration or the prosecution to prove whether the dismissal was wrong, the employer would also have difficulty in convincing the prosecution that the dismissal was justified under section 9. However, after prosecution had been initiated, the employer could more easily defend himself in court by stating that he reasonably believed that he had a ground to do so at the time of the dismissal. ALA5 pointed out that the practice of not taking out prosecution for cases with insufficient evidence was only a prosecution policy which carried no legislative protection for employers under the Bill.

5. SALD considered that no further amendment to the presumption and defence clauses was necessary. He explained that an employer would not be convicted should he be able to convince the prosecution or the court that he reasonably believed that he had a ground to terminate the employment under section 9. With the presumption, all an employer had to do was to explain to the prosecution the reason for the dismissal of which he should be fully aware of.

Questions from members

6. Mr James TIEN expressed his worry that the amendments proposed by the Administration might cause hardship to employers. Employers might be prosecuted for every dismissal of pregnant employee or employee on paid sick leave under section 9. As currently there were provisions regulating five categories of dismissals of employees, he asked whether the wording of the provisions for dismissals of pregnant employees and employees on paid sick leave could follow the wording of the other three provisions as they seemed to be working well.

7. PAS(EM)4 reported that there had been internal discussions within the Administration with a view to finding a more moderate and neutral wording for the presumption clause. The present wording put the onus on employers. DJ's advice was that without the presumption, employers would have no responsibility to explain to the prosecution the reasons for the dismissals. Prosecution action against

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employers' wrongful dismissals could hardly be pursued as the prosecution would have difficulties in introducing evidence to prove that the dismissals were not justified under section 9. PAS(EM)4 said that the nature of the two categories of dismissals under the Bill was different from that of the other three categories. She pointed out that the wording of the provisions in respect of these five categories was basically the same except for the presumption clause. ALA5 confirmed that there was no similar presumption in the provisions in respect of the other three categories of dismissals.

8. Mr Kenneth TING queried why an employer could only raise a defence after he had been charged. This practice contradicted the principle of the common law that prosecution would not be initiated unless the Administration had gathered sufficient evidence. SALD stated that it should be a defence for an employer whether he was charged or not. He assured members that the defence of an employer would be considered before he was charged. An employer would not be charged if he was able to put up a reasonable defence.

9. ALA5 said that if the essential element of the defence clause was provided in the presumption, dismissals would not be taken so easily to have been made not in accordance with section 9. Instead the statutory defence of an employer could be considered before the presumption took effect. PAS(EM)4 undertook to consider ALA5's suggestion and would report the Administration's deliberation at the next meeting.

10. Miss CHAN Yuen-han recalled that there was a similar provision which dealt with discrimination against employees involved in trade union activities. In that provision, the burden of providing evidence to the contrary also rested with employers. She asked how the Bill compared with that ordinance. ACL(LR) said that she had to study the relevant section before she could answer Miss CHAN's question.

11. Ms Audrey EU was of the view that the policy of having the presumption clause should be discussed before the wording of the provisions was considered. She cited a recent successful civil case in which a pregnant employee who was summarily dismissed by her employer under section 9 had introduced evidence to prove that the dismissal was wrong and she was awarded compensation. Ms EU asked why it was necessary to have a presumption in criminal proceedings when it was not necessary in civil proceedings. As for the wording of the provisions, she agreed that ALA5's suggestion could be considered. ACL(LR) explained that when the Labour Tribunal dealt with this case, it adopted its usual practice to invite both the employer and the employee to provide information about the case before a decision was made and the employer was required under the Employment Protection part of the Ordinance to show a valid reason for the dismissal.

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12. Ms Audrey EU further asked whether the presumption clause in the Bill was necessary because employers had no responsibility to provide evidence to the prosecution in criminal proceedings whereas they had this responsibility in civil proceedings and therefore no presumption was necessary. ACL(LR) said that in criminal proceedings, an employer who summarily dismissed a pregnant employee or an employee on paid sick leave would also be asked for an explanation of the dismissal before prosecution was taken out. If the defence was reasonable, prosecution would not be initiated. Prosecution was contemplated in the 13 cases quoted in the paper because the reasons given by the employers were so flimsy that it was believed that the court would not accept them.

13. Ms Audrey EU cited one of the cases quoted in the Administration's paper in which a pregnant employee was dismissed by her employer for the reason of poor performance though she had been given a good performance appraisal just one month before the dismissal. Ms EU opined that this kind of circumstantial evidence should also be considered as evidence. She asked the Administration whether it would consider deleting the presumption clause.

14. PAS(EM)4 pointed out that DJ maintained the view that it would be difficult for the Administration or the prosecution to introduce sufficient evidence to take out prosecution should there be no presumption provision. She undertook to further review the defence and presumption provisions and would try to explore possible ways to achieve the suggestion put forward by ALA5.

15. SALD said that from legal policy viewpoint, a defence provision was made to provide an incentive for a person to comply with the law. Without the presumption, the prosecution believed that conviction would only be secured if an employer did not raise a defence or admitted the guilt.

16. Mr James TIEN said that he would not support the proposed amendments if they were made only for the purpose of facilitating DJ to take out prosecution. He pointed out that the example referred to by Miss CHAN Yuen-han earlier was a special arrangement pursuant to the recommendation of the International Labour Organization. This arrangement was only applicable to dismissals of employees involved in trade union activities. It should not be an established practice for employers to introduce evidence to prove themselves not guilty in all kinds of dismissals. He added that if the Administration maintained its stance, members might have to ask ALA5 to prepare amendment to ensure that the rights of both employers and employees were protected.

17. Dr LUI Ming-wah asked the Administration to consider amending section 9 by listing the possible conditions which were justified under the section so as to facilitate better understanding of the provision. He opined that the law should be written as simple as possible so that it would be more comprehensible. SALD considered that a

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presumption might not be required if an employer was required to provide the employee with a notice stating the reason and particulars of the dismissal under section 9. PAS(EM)4 said that the Administration might not be able to compile an exhaustive list of all possible conditions under section 9. As the objective of the Bill was to plug the existing loophole arising from the wording of the provision, the Administration would prefer to deal with these suggestions at a later date.

18. ACL(LR) pointed out that the problem did not lie with section 9, but with the wording of section 15 which precluded the Administration from taking out prosecution on those wrongful dismissals made under section 9. She held the view that the suggestion made by SALD might not help ease the problem as LD still had to investigate whether the reason for the dismissal stated in the notice was true or not.

19. Ms LI Fung-ying expressed support for the Administration's proposed amendments to plug the existing loophole. She also agreed to the views expressed by members and ALA5. As the original policy intention was to deter employers from using section 9 as a pretext to dismiss pregnant employees or employees on paid sick leave, she held the view that proper wording for the provisions should be explored so that a right balance for both sides could be struck.

20. Mr LEUNG Fu-wah pointed out that in reality there was a certain extent of imbalance between employers and employees e.g. dismissals were initiated by employers. In his view, employers were in a better position to explain the reason for the dismissals whilst it would be difficult for employees to introduce evidence to prove that the dismissals were unlawful. He opined that the protection for employees provided for in the Bill was appropriate.

21. Ms Audrey EU expressed support for Dr LUI Ming-wah's suggestion to have the possible conditions for dismissals under section 9 set out in the legislation. She was also in support of SALD's suggestion that employers should give a written notice to employees stating the reason for the dismissals under section 9. She asked whether the presumption provision could be replaced by a proviso which would include a subjective belief and objective conditions. The presumption would not be invoked if an employer could demonstrate that he had a reasonable ground to believe that he could do so at the time of the dismissal or he could provide circumstantial evidence to support the dismissal.

22. SALD said that requiring an employer to provide the employee with a prescribed notice stating the ground and the particulars of the dismissal would enable the employee and other relevant parties to know why the employee was dismissed. By so doing, the employer would also be pinned to that reason in future proceedings.

Adm 23. The Chairman asked the Administration to consider the suggestions of Dr LUI Ming-wah and SALD and to explore ways to address the concerns raised by members

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and ALA5. He said that a right balance should be struck between protection of pregnant employees or employees on paid sick leave against unreasonable dismissals and the rights of employers to dismiss employees with serious misconduct or other problems genuinely justified under section 9.

**II. Date of next meeting**

24. Members agreed that the next meeting of the Bills Committee be held on Thursday, 1 March 2001 at either 10:45 am or 2:30 pm. The Secretariat would confirm the time of the meeting after checking with other Bills Committee members.

*(Post-meeting note : The meeting was scheduled to be held on Thursday, 1 March 2001 at 2:30 pm.)*

25. The meeting ended at 3:55 pm.

Legislative Council Secretariat  
27 April 2001