

**Employment (Amendment) (No.2) Bill 2000:
Administration's response to questions raised by Members at the
second Bills Committee meeting**

At the second meeting of the Bills Committee on the Employment (Amendment) (No.2) Bill 2000 held on 12 February 2001, Members expressed their acceptance of the need to make such amendments as proposed under the Bill.

The Presumption Clause

2. Several Members were however concerned about the proposed wording of sections 15(1B) and 33(4BAA) and the presumption therein. Members were concerned that this presumption would create undue pressure for the Government to take out prosecutions against employers who have dismissed pregnant or sick employees summarily, as well as creating undue hardship on the part of employers. Members and the Legal Adviser also suggested that the Administration consider redrafting the sections by, for instance, setting conditions for the prosecution or making the presumption less difficult to rebut.

3. In our reply to Members after the first Bills Committee meeting as well as during the second Committee meeting held on 12 February 2001, we explained that as advised by the Department of Justice, in view of the existence of the defence given to employers (clauses 5(d) and 8(c)), if an employer can demonstrate that he dismisses a pregnant employee or an employee on paid sick leave under s.9 and that at the time of the dismissal he has sound reasons to believe he can do so, it is highly unlikely that prosecution would be initiated. However, to address Members and the Legal Adviser's concern, we propose to combine s.15(1B) with s.15(5) and s.33(4BAA) with s.33(4BC). The revised sections 15(1B) and 33(4BAA) effectively mean that the presumption that an employer has dismissed his employee otherwise than in accordance with s.9 would not be invoked for the purposes of a prosecution if he can prove -

- (a) that the termination was made in accordance with s.9; or
- (b) that he purported to terminate the contract in accordance with s.9 and, at the time of termination, he reasonably believed he had a ground to do so.

We believe the new wording could help address Members' concern about frivolous prosecution, although we must emphasize that the Administration's viewpoint is that the practical effect of the amended version is the same as our original proposal because, as explained, before initiating a prosecution, the defence that may be put forward by the employer would have already been taken into account. The new sections 15(1C) and 33(4BAB) make it clear that the new sections 15(1B)(b) and 33(4BAA)(b) as described in (b) above should not apply to civil proceedings.

4. A table showing the latest proposed amendments in the Employment (Amendment) (No. 2) Bill 2000 as compared with the previous proposed amendments is prepared at Annex. The amendments referred to in paragraph 3 above are set out in items (ii) and (iii) of the table.

Education and Manpower Bureau
February 2001

Employment (Amendment) (No. 2) Bill 2000

Items	Existing Provision	Proposed amendments in the Bill	1 st Proposed Committee Stage Amendments	2 nd Proposed Committee Stage Amendments	
(i)	Section 11F	(1) Subject to subsection (1A), where, in the case of an employee to whom this Part applies who has not been employed by the same employer for the whole of a payment period but has been so employed for a period of not less than 3 months in the payment period – (a) the contract of employment is terminated – (i) at any time during the payment	(1) Subject to subsection (1A) , where, in the case of an employee to whom this Part applies who has not been employed by the same employer for the whole of a payment period but has been so employed for a period of not less than 3 months in the payment period – (a) the contract of employment is terminated – (i) at any time during the payment	(1) Subject to subsections (1A) and (1B) , where, in the case of an employee to whom this Part applies who has not been employed by the same employer for the whole of a payment period but has been so employed for a period of not less than 3 months in the payment period – (a) the contract of employment is terminated – (i) at any time	No change from 1 st proposed Committee Stage Amendments.

		<p>period; or (ii) on the expiry of the payment period, otherwise than by the employee under section 6 or 7 or by the employer under section 9; or</p>	<p>period; or (ii) on the expiry of the payment period, otherwise than – (A) by the employee other than in accordance with section 10; or (B) by the employer under section 9; or</p>	<p>during the payment period; or (ii) on the expiry of the payment period; or (1B) Subsection (1)(a) does not apply to a contract of employment which is terminated – (a) by the employee except such a contract which is terminated in accordance with section 10; or (b) by the employer under section 9.</p>	
--	--	---	--	--	--

(ii)	Section 15		(1B)An employer who terminates the contract of employment of a pregnant employee shall, unless the contrary is proved, be taken for the purpose of subsection (1) (a) or (b) to terminate such contract otherwise than in accordance with section 9.		(1B) An employer who terminates the continuous contract of employment of a pregnant employee shall be taken for the purposes of subsection (1)(a) or (b) to terminate the contract otherwise than in accordance with section 9 - (a) unless the contrary is proved; or (b) subject to subsection (1C), unless the employer proves that – (i) he purported to terminate the contract in accordance with that section; and (ii) at the time of such termination, he
------	------------	--	--	--	--

					<p>reasonably believed that he had a ground to do so.</p> <p>(1C) Subsection (1B)(b) shall not apply in the case of civil proceedings.</p>
		<p>(4) Any employer who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine at level 6.</p>	<p>(4) Subject to subsection (5), any employer who contravenes subsection (1)(a) or (b) shall be guilty of an offence and shall be liable on conviction to a fine at level 6.</p> <p>(5) In proceedings for an offence under subsection (4) (and without prejudice to the operation of subsection (1B)), it shall be a defence</p>	<p>(4) Subject to subsection (5), any employer who contravenes subsection (1)(a) or (b) shall be guilty of an offence and shall be liable on conviction to a fine at level 6.</p> <p>(5) Without prejudice to the operation of subsection (1B), it shall be a defence for an employer charged with an offence under</p>	<p>(4) Any employer who contravenes subsection (1)(a) or (b) shall be guilty of an offence and shall be liable on conviction to a fine at level 6.</p> <p>(5) In proceedings for an offence under subsection (4) (and without prejudice to the operation of subsection (1B)), it shall be a defence for the employer</p>

			<p>for the employer charged with the offence to prove that –</p> <p>(a) he purported to terminate the continuous contract of employment of the pregnant employee concerned in accordance with section 9; and</p> <p>(b) at the time of such termination, he reasonably believed that he had a ground to do so.</p>	<p>subsection (4) to prove that –</p> <p>(a) he purported to terminate the continuous contract of employment of the pregnant employee concerned in accordance with section 9; and</p> <p>(b) at the time of such termination, he reasonably believed that he had a ground to do so.</p>	<p>charged with the offence to prove that –</p> <p>(a) he purported to terminate the continuous contract of employment of the pregnant employee concerned in accordance with section 9; and</p> <p>(b) at the time of such termination, he reasonably believed that he had a ground to do so.</p>
(iii)	Section 33		(4BAA) An employer who terminates the contract of employment of		(4BAA) An employer who terminates the continuous contract of employment of an

			<p>an employee on any sickness day taken by the employee in respect of which sickness allowance is payable under this section shall, unless the contrary is proved, be taken for the purpose of subsection (4B) to terminate such contract otherwise than in accordance with section 9.</p>		<p>employee on any sickness day taken by the employee in respect of which sickness allowance is payable under this section shall be taken for the purposes of subsection (4B) to terminate the contract otherwise than in accordance with section 9 –</p> <p>(a) unless the contrary is proved; or</p> <p>(b) subject to subsection (4BAB), unless the employer proves that -</p> <p>(i) he purported to terminate the contract in</p>
--	--	--	---	--	--

					<p>accordance with that section; and</p> <p>(ii) at the time of such termination, he reasonably believed that he had a ground to do so.</p> <p>(4BAB) Subsection (4BAA) (b) shall not apply in the case of civil proceedings.</p> <p>(4BB) Any employer who contravenes subsection (4B) shall be guilty of an offence and shall be liable on conviction to a fine at level 6.</p>
		(4BB)An employer who contravenes subsection (4B) shall be guilty of an offence and shall be liable on	(4BB) Subject to subsection (4BC), any employer who contravenes subsection (4B)	(4BB) Subject to subsection (4BC), any employer who contravenes subsection (4B)	

		<p>conviction to a fine at level 6.</p>	<p>shall be guilty of an offence and shall be liable on conviction to a fine at level 6.</p> <p>(4BC) In proceedings for an offence under subsection (4BB) (and without prejudice to the operation of subsection (4BAA)), it shall be a defence for the employer charged with the offence to prove that –</p> <p>(a) he purported to terminate the continuous contract of employment</p>	<p>shall be guilty of an offence and shall be liable on conviction to a fine at level 6.</p> <p>(4BC) Without prejudice to the operation of subsection (4BAA), it shall be a defence for an employer charged with an offence under subsection (4BB) to prove that –</p> <p>(a) he purported to terminate the continuous contract of employment of the employee concerned in</p>	<p>(4BC) In proceedings for an offence under subsection (4BB) (and without prejudice to the operation of subsection (4BAA)), it shall be a defence for the employer charged with the offence to prove that –</p> <p>(a) he purported to terminate the continuous contract of employment of the employee concerned in accordance with section 9; and</p> <p>(b) at the time of such termination, he reasonably believed that he had a ground</p>
--	--	---	---	--	---

			of the employee concerned in accordance with section 9; and (b) at the time of such termination, he reasonably believed that he had a ground to do so.	accordance with section 9; and (b) at the time of such termination, he reasonably believed that he had a ground to do so.	to do so.
--	--	--	---	--	----------------------