

立法會
Legislative Council

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

Purpose

This paper reports on the deliberations of the Bills Committee on Employment (Amendment) (No.2) Bill 2000.

The Bill

2. The Bill seeks to clarify certain provisions of the Employment Ordinance (Cap. 57) (the Ordinance) to better achieve the policy objectives as intended by the Administration. It also seeks to make some technical amendments consequential to the removal of all women-specific provisions and references to women in the Women and Young Persons (Industry) Regulations under the Ordinance.

The Bills Committee

3. The House Committee agreed at its meeting on 15 December 2000 to form a Bills Committee to study the Bill. Under the chairmanship of Hon Andrew CHENG Kar-foo, the Bills Committee held three meetings with the Administration. The membership of the Bills Committee is in **Appendix I**.

Deliberations of the Bills Committee

4. The main deliberations of the Bills Committee are set out in the following paragraphs.

Reason for amendments to provisions for protecting employees against dismissal during pregnancy or paid sick leave (clauses 5 and 8)

5. Section 9 of the Ordinance provides that an employer may terminate a contract of employment without notice or payment in lieu of notice if the employee has committed serious misconduct, such as fraud or dishonesty or habitual neglect of duties. Sections 6 and 7 provide that an employer may terminate the employment of his employee by giving the employee proper notice or wages in lieu of notice. However, sections 15(1) and 33(4B) prohibit an employer from dismissing a pregnant employee or an employee on paid sick leave under section 6 or 7. The intention of these provisions is to prohibit employers from dismissing pregnant employees or employees on paid sick leave, except in circumstances where summary dismissals are justified under section 9. An employer who contravenes section 15(1) or 33(4B) will be liable to pay compensation to the employee and be subject to prosecution.

6. In October 1997, a judge of the Court of First Instance held that an offence only occurred under section 15(1) of the Ordinance if the employer terminated the employee's contract of employment under section 6 or 7 of the Ordinance. The implication of the judgment is that once an employer alleges that he has dismissed a pregnant employee summarily under section 9 of the Ordinance, he cannot be prosecuted for contravention of section 15(1), even if the summary dismissal is subsequently proved to be unsubstantiated. The problem lies with the way in which section 15 is written. The section, as it is now worded, only prohibits dismissal of employees during pregnancy under section 6 or 7, without covering wrongful dismissals which are not justified under section 9.

7. According to the Administration, subsequent to the court ruling, no prosecution action can be taken out with regard to unlawful dismissal involving a pregnant employee or an employee on paid sick leave once an employer claims that the dismissal is made under section 9. As the situation is undesirable and inequitable, the Administration considers it necessary to introduce amendments to plug the loophole in the law. In view of the reason explained by the Administration, members agree that there is a need for amendments to be made.

Proposed new sections 15(1B) and 33(4BAA)

8. Members have expressed concern about the proposed wording of the new sections 15(1B) and 33(4BAA) (clauses 5(b) and 8(b) of the Bill) and the presumption therein. They note that with the proposed amendments in the Bill, if an employer dismisses a pregnant employee or an employee on paid sick leave, the termination will be taken to have been made otherwise than in accordance with section 9. They are worried that this presumption may create undue pressure on the Government to take out prosecutions against employers who have dismissed pregnant employees or employees on paid sick leave summarily

and will therefore cause undue hardship to employers.

9. The Administration has explained that the requirement in the proposed sections 15(1B) and 33(4BAA) for an employer to prove that the dismissal falls under section 9 is reasonable. This is because a defence has been provided for employers acting in good faith. The prosecution, in deciding whether to take action, would have to be satisfied that there is sufficient evidence to establish the offence charged and there is a reasonable prospect to secure a conviction. Therefore, in practice, if the employer can demonstrate that he dismissed a pregnant employee or an employee on paid sick leave under section 9 and that at the time of the dismissal he had sound reasons to believe he could do so, it is highly unlikely that prosecution would be initiated. Without the presumption, the prosecution would have difficulty to establish that an employer dismissed an employee otherwise than in accordance with section 9.

10. However, to address the Bills Committee's concern, the Administration proposes to combine section 15(1B) with section 15(5) and section 33(4BAA) with section 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 section 9 would not be invoked for the purpose of a prosecution if he can prove that -

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

Members support the proposal and note the Administration's viewpoint that the practical effect of the amended version is the same as its original proposal because before initiating a prosecution, the defence that may be put forward by the employer would have already been taken into account.

Provision on employee's entitlement to pro-rata end of year payment (clause 4)

11. Under Part IIA of the Ordinance, an employee is eligible for an end of year payment if he has been employed under a continuous contract for a whole payment period and there is contractual agreement for such payment. Section 11F further provides for pro-rata end of year payment in early termination of contract. The intention of this provision is to ensure that an employee's entitlement to end of year payment will not be adversely affected by early termination of his contract by the employer. However, this provision, as it is now worded, gives rise to a situation whereby an employee who wrongfully terminates the contract without giving proper notice or payment of wages in lieu of notice may be entitled to pro-rata payment whilst an employee who has given proper notice or payment of wages in lieu of notice in accordance with section 6 or 7 would not. This is not in line with the policy intention. The

Administration therefore proposes to amend section 11F to the effect that an employee who terminates 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 proportional end of year payment.

12. A member has commented that the drafting of clause 4 does not make it immediately clear under what circumstances employees will be eligible for pro-rata end of year payment. On review, the Administration has proposed a new clause 4 which sets out its proposed amendment in a more direct and easily understood manner.

Committee Stage amendments

13. The Committee Stage amendments proposed by the Administration are in **Appendix II**. The proposed amendments are supported by the Bills Committee.

Consultation with the House Committee

14. The Bills Committee consulted the House Committee on 16 March 2001 and obtained its support for the Second Reading debate on the Bill to be resumed on 4 April 2001.

Legislative Council Secretariat
26 March 2001

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

Membership list

Chairman	Hon Andrew CHENG Kar-foo
Members	Hon Kenneth TING Woo-shou, JP Hon James TIEN Pei-chun, JP Hon Cyd HO Sau-lan Hon LEE Cheuk-yan Dr Hon LUI Ming-wah, JP Hon CHAN Yuen-han Hon YEUNG Yiu-chung 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

(Total : 13 Members)

Clerk	Ms Doris CHAN
Legal Adviser	Mr Arthur CHEUNG
Date	1 March 2001

EMPLOYMENT (AMENDMENT) (NO. 2) BILL 2000

COMMITTEE STAGE

Amendments to be moved by the Secretary for
Education and Manpower

Clause

Amendment Proposed

- 4 By deleting the clause and substituting -
- "4. Proportion of the end
of year payment**
Section 11F is amended -
- (a) in subsection (1) -
 - (i) by repealing "subsection (1A)" and substituting "subsections (1A) and (1B)";
 - (ii) by repealing paragraph (a) and substituting -
 - "(a) the contract of employment is terminated -
 - (i) at any time during the payment period;

or

- (ii) on the expiry of the payment period; or";

(b) by adding -

"(1B) Subsection (1) (a) shall not apply where a contract of employment is terminated -

- (a) by the employee (except such a termination which is in accordance with section 10); or
- (b) in accordance with section 9."."

5 (a) In paragraph (b), by deleting the proposed section 15(1B) and substituting -

"(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 reasonably believed that he had a ground to do so.

(1C) Subsection (1B) (b) shall not apply in the case of civil proceedings."

- (b) In paragraph (d) -
 - (i) in the proposed section 15(4), by deleting "Subject to subsection (5), any" and substituting "Any";
 - (ii) by deleting the proposed section 15(5).

- 8 (a) In paragraph (b), by deleting the proposed section 33(4BAA) and substituting -

"(4BAA) An employer who terminates the continuous contract of employment of an 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 -

- (a) unless the contrary is proved; or
- (b) subject to subsection (4BAB), 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 reasonably believed that he had a ground to do so.

(4BAB) Subsection (4BAA) (b) shall not apply in the case of civil proceedings."

- (b) In paragraph (c) -
 - (i) in the proposed section 33(4BB), by deleting "Subject to subsection (4BC), any" and substituting "Any";
 - (ii) by deleting the proposed section 33(4BC).

15 By deleting everything after the clause.