

立法會

Legislative Council

LC Paper No. LS27/00-01

**Paper for the House Committee Meeting
of the Legislative Council
on 15 December 2000**

**Legal Service Division Report on
Employment (Amendment) (No. 2) Bill 2000**

Object of the Bill

To clarify certain provisions and to repeal women-specific references remaining in the principal ordinance.

LegCo Brief Reference

2. EMBCR 10/6/3231/50 IV issued by the Education and Manpower Bureau and dated 23 November 2000.

Date of First Reading

3. 13 December 2000.

Comments

4. There are 4 areas in which amendments are proposed to better achieve the policy objectives as intended by the Administration -

- (a) at present, an employer is prohibited from dismissing an employee during her pregnancy or during his/her paid sick leave except in the case of summary dismissal under section 9 where the employee has committed serious misconduct such as fraud, dishonesty or habitual neglect of duties. However, it is not made clear that the summary dismissal has to be made bona fide or substantiated for the exception to operate. An amendment is now proposed to make this clear so that there would not be a loophole;
- (b) an employer is now required to pay to his employee not later than 7 days after the termination of employment any sum due to him, such as wages in lieu of notice, long service payment and compensation for dismissal during paid sick leave. However, the same time limit is not made to apply to the payment of compensation for dismissal of a pregnant employee. This would now be made so applicable by amendment;
- (c) an employee is now eligible for an end of year payment if employed under a continuous contract for a whole payment period and if there is contractual agreement for such payment. Pro-rata end of year payment is also payable in early termination of such employment. Unfortunately, contrary to the policy objective, the effect of the current provisions is such that an employee who wrongfully terminates the employment without proper notice or payment in lieu could be entitled to it. This will be rectified to reflect the true policy intention; and
- (d) consequent to the coming into operation on 21 November 1997 of the Family Status Discrimination Ordinance (Cap. 527), acts of discrimination covered by that ordinance should have been excluded from protection under the principal ordinance to avoid double jeopardy. An amendment will be made to provide the necessary exclusion.

5. The Bill will also 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 principal ordinance. The proposal is to amend the title of the said Regulations and such provisions in the principal ordinance that contain related references to "women".

Public Consultation

6. According to the LegCo Brief, the Labour Advisory Board has endorsed the amendments.

Consultation with LegCo Panel

7. The LegCo Panel on Manpower was consulted on the amendments on 16 November 2000.

Conclusion

8. Clarifications on certain drafting and legal points are being sought from the Administration (please see letter attached), response from which is still pending. A further report will be made in due course.

9. It is up to Members to consider now or at a later stage whether there is any important policy at stake requiring further study.

Encl

Prepared by

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Legislative Council Secretariat
13 December 2000

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14 December 2000

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Dear Mr Cheung,

Employment (Amendment) (No. 2) Bill 2000

I refer to your letter dated 6 December 2000. My comments on the points raised in the said letter are provided below.

Point (a)

2. The proposed amendment to section 11(F)(1)(a) is to clarify that an employee who initiates the termination of his contract of employment during or on the expiry of the payment period otherwise than in accordance with section 10 would not be entitled to pro-rata end of year payment. "Termination of contract by an employee otherwise than in accordance with section 10" includes termination by the employee by giving proper notice under section 6 or wages in lieu of notice under section 7 to the employer as well as wrongful termination (i.e. the employee terminates the contract without giving proper notice or wages in lieu of notice). We consider that the existing wordings of the Bill have fully reflected our policy intention. We have considered alternative drafting approaches but have been unable to find a drafting which can fully

reflect our policy intention. We are prepared to consider any suggestion you may have.

Point (b)

3. We are of the view that the proposed amendments to sections 15 and 33 of the Employment Ordinance (EO), Cap. 57, do not infringe the right to presumption of innocence guaranteed under Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) applicable to Hong Kong by virtue of Article 39 of the Basic Law and Article 11(1) of the Hong Kong Bill of Rights (HKBOR).

4. The rights guaranteed by Article 11(1) of the HKBOR are not absolute as can be seen from the judgements in *R v Sin Yau-ming* (1991) 1 HKPLR 88 and *AG v Lee Kwong-kut* (1993) 3 HKPLR 72. The test to be applied in determining whether a statutory presumption of fact is compatible with Article 11(1) is the test of **rationality** and **proportionality**. The presumption should also be for the purpose of achieving an important social objective.

5. In the present case, the pregnant employees specified in section 15 would be entitled to a period of maternity leave together with other statutory entitlements under the EO. The employees referred to in section 33 are those who are on sick leave with sickness allowance being payable to them. Employees who are on maternity leave or paid sick leave would not be making any contributions at work during the period and will increase the cost of doing business and might cause considerable inconvenience to the employer. There is therefore sufficient basis to presume that a pregnant employee or an employee who is on sick leave with sickness allowance is dismissed for reasons other than those specified under section 9 of the EO.

6. On the other hand, it is not unreasonable to require the employer to prove that the dismissal is justifiable under section 9 of the EO as the employer is likely to have the necessary knowledge, information or evidence required to substantiate his position. Statutory defence to the respective offences have also been included under sections 15(5) and 34(3BC) of the EO.

7. So far as the purpose of the presumption is concerned, it is

for the protection of the rights of the employees who are either pregnant or sick which therefore constitutes an important social objective.

8. As such, we are of the view that the presumptions under 15(1B) and 33(4BAA) are rational and proportional and are for the purpose of achieving an important social objective. They are consistent with Article 11(1) of HKBOR and Article 14(2) of the ICCPR.

9. Another reason for coming to such a view is that the above provisions fall within the class of offences arising from legislation which prohibits the doing of an act save in specified circumstances or subject to provisos or exemptions referred to in *R v Edwards* [1975] QB 27 and *AG v Lee Kwong-kut* (ibid). In those cases, the prosecution can rely on the exception of not being required to prove every element of the offence while the accused is given the burden of establishing the special circumstances, the exemptions or the provisos. Under the situation, the placing of the burden on the employer to prove that the termination of the employment contract is in accordance with the special circumstances specified in section 9 is not likely to infringe the right to presumption of innocence guaranteed under Article 11(1) of the HKBOR and Article 14(2) of the ICCPR.

Point (c)

10. "Any consequent amendments to the forms specified by the Commissioner" in clause 15 of the Bill refers to consequent amendments to be made to the old titles in existing notices/register specified under section 49 of the EO by the Commissioner for the purposes of regulations 9, 15(1) and 16 of the Women and Young Persons (Industry) Regulations. Clause 15 of the Bill is necessary to ensure that such notices /register which are kept in the old specified form published in gazette can remain valid for the purposes of the Regulations. We consider it more desirable to make an express transitional/saving provision than to rely on sections 23 and 37 of the Interpretation and General Clauses Ordinance. As to whether it would be necessary to have savings and transitional provisions on every occasion that the Commissioner amends existing form under section 49 of the principal ordinance, it would depend on what the amendments are and the effect thereof.

11. I hope the above clarifications have addressed your concern.

Please contact me if you have any further queries.

Yours sincerely,

(Miss Erica Ng)
for Secretary for Education and Manpower

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By Fax (2801 7825) & By Post

6 December 2000

Dear Madam,

Employment (Amendment) (No. 2) Bill 2000

I would be grateful for your clarification of the following by close of play on 11 December 2000 to facilitate my reporting to Members -

- (a) the effect of the proposed amendment to section 11F(1)(a) of the principal ordinance is not easily discernible. For instance, if an employee terminates the contract of employment in accordance with section 6 or 7 of the principal ordinance, could it be said that the contract is terminated "by the employee other than in accordance with section 10". If so, what would "**otherwise than** by the employee other than in accordance with section 10" mean in relation to such an employee? Could the Chinese text be also reviewed to make its effect equally clear?
- (b) Would not the presumptions in the proposed amendment to sections 15 and 33 of the principal ordinance, which could be tantamount to a presumption of guilt, violate Article 11(1) of the Hong Kong Bill of Rights?

- (c) What does "consequent amendment to the forms specified by the Commissioner" in clause 15 refer to? Is it envisaged that on every occasion that the Commissioner amends any existing form under section 49 of the principal ordinance, savings and transitional provisions would become necessary?

Yours faithfully,

(Arthur CHEUNG)
Assistant Legal Adviser