

**President's ruling on
Employment (Amendment) (No. 2) Bill 2001
proposed by Hon CHAN Kwok-keung,
Hon LI Fung-ying, JP and Hon LEUNG Fu-wah, MH, JP**

Hon CHAN Kwok-keung, Hon LI Fung-ying and Hon LEUNG Fu-wah, who intend to jointly introduce into the Council their proposed Employment (Amendment) (No. 2) Bill 2001, have requested me to rule whether the Bill relates to the restrictions prescribed in Rule 51(3) and (4) of the Council's Rules of Procedure.

2. I have invited the Secretary for the Education and Manpower (SEM) to offer her comments on the Bill. Mr CHAN, Ms LI and Mr LEUNG have subsequently been invited to respond to SEM's comments. In the light of the Members' response, SEM has been asked to provide further information and explanation to assist me in my ruling. I have also sought the advice of Counsel to the Legislature.

Purpose of the Bill

3. The Bill essentially consists of one clause, with the object of making the Employment Ordinance (Cap. 57) applicable to non-civil service contract staff employed by the Government. The term "non-civil service contract (NCSC) staff" is not defined in the Bill. According to the Administration's reply to a question asked in the Council at its meeting on 6 March 2002, NCSC staff are those employed by the Government under the NCSC Staff Scheme introduced in 1999. They are employed on fixed-term contracts up to three years outside the Civil Service to meet service needs which are short-term, part-time or under review.

Rule 51(3) and (4) of the Rules of Procedure

4. Rule 51(3) and (4) reads as follows:

"51(3) Members may not either individually or jointly introduce a bill which, in the opinion of the President, relates to public expenditure or political structure or the operation of the Government."

"51(4) In the case of a bill which, in the opinion of the President, relates to Government policies, the notice shall be accompanied by the written consent of the Chief Executive in respect of the bill."

The Administration's comments

5. SEM is of the view that the Bill relates to public expenditure, the operation of the government and government policies, for the following reasons:

(a) Public Expenditure

As at 30 June 2001, there were about 12,000 NCSC staff (10,100 full-time and 1,900 part-time) and about 3,700 staff engaged under specially approved schemes or packages. If the Employment Ordinance is extended to cover Government's contract employees, it will have resource implications for both the Labour Department and the Labour Tribunal. The Labour Department will need to provide more consultation services (about 715 consultations per year) to government bureaux and departments and NCSC staff regarding the interpretation and application of the Employment Ordinance. At least one Labour Officer and four Assistant Labour Officers I will be required for these services. Besides, it will have to additionally inspect government bureaux/departments to check compliance with the Employment Ordinance (about 600 inspections per year), to answer enquiries (about 4,500 per year), and to receive complaints (about 75 per year) from NCSC staff. For these, 5 Labour Inspectors I and 1 Labour Inspector II will be required. A total of \$7.6 million needs to be incurred by the Labour Department per year.

As for the Labour Tribunal, it will need to handle more cases from NCSC staff on allegation of breaches of the Employment Ordinance. In Judiciary Administrator's estimation, there would be about 168 such cases per year for the Labour Tribunal, with an estimated financial implication of \$1.6 million per year.

Therefore, a total of some \$9.5 million per year will be incurred additionally to cope with the work arising from implementing the Bill.

(b) Operation of the government

The employment contracts of NCSC staff have been drawn up having regard to the provisions in the Employment Ordinance as far as practical. On the other hand, to maintain a clean, trusted and respectable workforce, Government requires NCSC

staff to observe the same rules and regulations on conduct and related matters as applied to civil servants. These rules demand high standard of integrity and the Government may adopt conduct and discipline measures that are more stringent than, but not necessarily consistent with, the provisions in the Employment Ordinance.

If the Employment Ordinance is extended to cover NCSC staff, it may be unlawful for the Government to dismiss an NCSC employee even when his criminal conviction, or information about him that has come to light from criminal investigation or proceedings unrelated to his duties, gives the Government grounds to doubt his integrity and probity. It may also be unlawful for the Government to suspend the employment of an employee without pay beyond 14 days pending criminal investigation, even when the findings that come to light during the investigation give the Government grounds to doubt his suitability to continue his employment.

Therefore, the effective operation of the Government and its ability to maintain a clean, trusted and respectable workforce to deliver quality public service could be undermined if the Government has a sizeable group of employees whom the Government has doubt on their integrity or probity and yet could not dismiss them or suspend them from their duties without pay.

(c) Government policies

It has been Government's policy that the Employment Ordinance does not bind the Government and it should not be extended to cover NCSC employees. This policy has been promulgated in the Council and at meetings of the Panel on Manpower since 1999.

Response from Hon CHAN Kwok-keung, Hon LI Fung-ying and Hon LEUNG Fu-wah

6. Mr CHAN, Ms LI and Mr LEUNG do not agree with SEM, based on the following views:

(a) Public Expenditure

SEM has over-estimated the additional expenditure to cope with the additional work arising from the Bill. Given that the

employment terms of NCSC staff are no less favourable than the Employment Ordinance and the Government has all along claimed to be a good employer providing plenty of complaints and redress channels to NCSC staff, there should be no complaints or labour disputes from these staff.

In their estimation, the additional consultation cases for each Labour Officer will only be 2.4 cases and the additional number of inspection for each Labour Inspector will be less than 3.9 times per year. These additional work can be absorbed by the existing staff under the Government's Enhanced Productivity Programme.

At present, complaints lodged by NCSC staff are already handled by the relevant departments or the Civil Service Bureau. The actions taken by the department concerned and the Civil Service Bureau include consultation services, conciliation, discussion and resolution of conflicts. If the Employment Ordinance is extended to cover Government's NCSC employees, it will not have resource implications because it would mean that the work of the departments concerned and of the Civil Service Bureau would be shifted to the Labour Department and the Labour Tribunal.

(b) Operation of the government

If the Employment Ordinance is extended to cover NCSC staff, specific clauses can be added into NCSC staff's employment contracts to require them to observe the same rules and regulations on conduct and related matters as applied to civil servants. These specific clauses are not unlawful under the Employment Ordinance and, therefore, will not undermine the effective operation of the Government.

(c) Government policies

Whilst not disputing SEM's claim that the Bill relates to the Government's policy that the Employment Ordinance does not bind the Government, the Members state that the employment terms and conditions of service for civil servants are formulated with reference to the Public Service (Administration) Order, the Public Service (Disciplinary) Regulation and the Civil Service Regulations, but those for NCSC staff are neither guided by these regulations nor covered by the Employment Ordinance. Consequently, when NCSC staff wish to complain about employment-related issues or

seek redress over breach of employment terms or contractual provisions, there is no independent impartial third party to offer fair mediation. The impact of the Bill is to promote good employer-employee relationship in line with the Government's policy of being a good employer.

The Administration's further comments

7. SEM emphasizes that the estimated additional manpower and resources required for implementing the Bill are reasonable. These resources are required by the Labour Department for handling additional complaints, conducting consultations with NCSC staff and the government departments concerned, answering enquiries from them, and inspecting government departments; and by the Labour Tribunal for handling, additionally, non-monetary claims made by NCSC staff about breaches of the Employment Ordinance. As the relevant investigations under the Employment Ordinance require the collection and verification of substantial quantities of evidence, the estimated additional manpower resources are reasonable for a systematic division of labour to enhance the effectiveness of these inspections and to enforce legislation of various degrees of complexity.

Advice of Counsel to the Legislature

8. In regard to SEM's claim that the Bill relates to public expenditure, Counsel to the Legislature advises that the Bill does not seek to require the Administration to incur any public expenditure. However, bearing in mind that the Commissioner for Labour is conferred with the various powers to enforce the Ordinance and the Labour Department's present mode of operation for enforcement, it is obvious that additional resources would be required to carry out enforcement work. This would include the handling of complaints and inspections. Consultation service and telephone enquiries service as such are not services required by the Ordinance. However, it would be very difficult to disassociate these services from the duties required of the Labour Department under the Ordinance from the practical point of view.

9. A bill will relate to public expenditure if its implementation would have a substantive effect on public expenditure. In other words, if the amount of public expenditure is substantial and is such that the President must not ignore, she would rule that the Bill relates to public expenditure within the meaning of Rule 51(3). The amount of the public expenditure involved is necessarily an estimation or assessment. Unless there is some indication that the Administration has arrived at the submitted figures by sheer speculation or there is substantial doubt as to the appropriateness of the basis used for estimation, it would be very difficult for the President to reject those figures.

The Members may be right in their view that, in practice, the Administration may be able to absorb the additional work through re-deployment of existing resources. However, Counsel is of the view that, for the purpose of considering the Bill under Rule 51(3), it should be the Bill's immediate effect on the Administration which is relevant and, on that basis, he advises that there is not sufficient ground for the President to reject the Administration's estimated amount of public expenditure. Whether that amount is so substantial that the President must not ignore is a matter for the President.

10. In relation to the "operation of the Government", Counsel to the Legislature refers to the view I expressed in previous rulings^(Note) that, if I was satisfied that the implementation of a proposed bill would have obvious effect on the structure or procedure of the executive authorities, and that the effect would not be of a temporary nature, I would form the opinion that the bill relates to the operation of the Government.

11. In Counsel to the Legislature's view, the executive authorities' ability to dismiss summarily NCSC staff would not be undermined in practice under the Bill. This is because section 9 of the Employment Ordinance does not affect the common law rules under which an employee may be summarily dismissed for reasons including those referred to by the Administration in its submission.

12. As regards the executive authorities' ability to suspend a NCSC staff from duty, Counsel agrees with the Administration's statement that "it may be unlawful for the Government to suspend the employment of an employee without pay beyond 14 days pending criminal investigation, even when the findings that come to light during the investigation give the Government grounds to doubt his suitability to continue to serve the community" because a contractual provision which allows the Government to do so may not be covered by section 11 of the Ordinance. However, if such situation should arise, it would be likely that the executive authorities may terminate that contract of employment. In an extreme situation where for some reasons the executive authorities prefers to continue employing the staff but does not wish him to perform any duty, it could be done if the executive authorities do not stop paying him.

13. Counsel's view on the legal effect of the Bill on the Administration is that the effect is fundamentally related to the Administration's management of NCSC staff. There is no suggestion that the Bill would require any change in the structure or practice of the Administration. He concludes that the effect of this Bill on the Administration does not fall within the meaning of "operation of the Government" as interpreted by me in my previous rulings.

^(Note) Rulings dated 19.7.1999 on Hon LEE Cheuk-yan's Employment (Amendment) (No. 2) Bill 1998 and Labour Relations (Right to Representation, Consultation and Collective Bargaining) Bill

14. Lastly, on the Administration's claim that it has been Government's policy that the Employment Ordinance, which does not bind the Government, should not be extended to cover NCSC staff, Counsel advises that there is ample evidence of the existence of such a policy.

My opinion

Does the Bill relate to Government policy?

15. There can be no dispute about SEM's claim that the Bill relates to Government's policy that the Employment Ordinance should not apply to NCSC staff. The policy has been clearly stated in the Council and at meetings of the Council's relevant Panel. The Members' view on this issue are concerned with the merits of the policy. As I have pointed out previously, my rulings under Rule 51 should not be concerned with the merit or otherwise of any legislative proposal, be it from the Administration or Members.

Does the Bill relate to public expenditure?

16. I agree with Counsel to the Legislature's assessment that, in considering whether a bill relates to public expenditure, the amount of additional public expenditure that may be incurred for implementing the bill is a critical consideration. The Administration has provided a detailed account of how it has estimated that about \$9.5 million per year would be required additionally. While the Members might be right in their view that, in practice, the Administration may be able to absorb the additional work through redeployment of existing resources, I am of the view that there is not sufficient ground for me to reject the Administration's estimated amount of public expenditure.

17. For the purpose of ruling under Rule 51(3), I have considered whether, for performing the functions with the implementation of the Bill, the increase in public expenditure is substantial and is such that I must not ignore, or whether it represents a minimal continuing demand on public expenditure which can be ignored. Having regard to my ruling dated 19 July 1999 on Hon LEE Cheuk-yan's proposed Employment (Amendment) (No. 2) Bill 1998 (in particular paragraphs 38 and 39 in that ruling), I conclude that the amount is substantial and I cannot ignore it. The Bill, in my opinion, relates to public expenditure.

Does the Bill relate to the operation of the Government?

18. I take the view of Counsel to the Legislature that the legal effect of the Bill on the executive authorities relates to the management of NCSC staff

and that the Bill would not require any change in the structure or procedure of the executive authorities in order to continue with the Government's efforts to maintain a clean, trusted and respectable workforce and to set high standard of integrity for NCSC staff. I also note Counsel's advice on the effect of sections 9 and 11 of the Employment Ordinance on the executive authorities' management of NCSC staff.

19. As the Bill, if enacted, will not have the effect of affecting the structure or procedure of the executive authorities, I am of the opinion that it does not relate to the operation of the Government.

Ruling

20. Having taken into account the views of the SEM, Mr CHAN Kwok-keung, Ms LI Fung-ying and Mr LEUNG Fu-wah, together with the advice of Counsel to the Legislature, I rule that the proposed Employment (Amendment) (No. 2) Bill 2001 does not relate to the operation of the Government within the meaning of Rule 51 of the Rules of Procedure. However, the Bill relates to public expenditure and Government policy and may not be introduced by Members.

(Mrs Rita FAN)
President
Legislative Council

14 March 2002