

立法會
Legislative Council

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(These minutes have been seen by
the Administration and cleared
with the Chairman)

Ref : CB2/BC/14/99

**Bills Committee on
Employment (Amendment) Bill 2000**

**Minutes of meeting held on Thursday, 1 June 2000 at 2:30 pm
in Conference Room B of the Legislative Council Building**

Members Present : Hon LEE Kai-ming, SBS, JP (Chairman)
Hon Kenneth TING Woo-shou, JP
Hon James TIEN Pei-chun, JP
Hon LEE Cheuk-yan
Dr Hon LUI Ming-wah, JP
Hon HUI Cheung-ching
Hon CHAN Yuen-han
Hon CHAN Wing-chan
Hon Howard YOUNG, JP

Absent with Apology : Hon Ronald ARCULLI, JP
Hon LEUNG Yiu-chung
Hon Andrew CHENG Kar-foo

Public Officers Attending : Miss Erica NG
Principal Assistant Secretary (Education and Manpower) 4

Mrs Jennie CHOR
Assistant Commissioner for Labour (Labour Relations)

Miss Bertha CHENG
Acting Chief Labour Officer (Labour Relations)

Miss Shandy LIU
Senior Government Counsel

Department of Justice

Clerk in Attendance : Mr LAW Wing-lok
Chief Assistant Secretary (2) 5

Staff in Attendance : Mr Arthur CHEUNG
Assistant Legal Adviser 5

Mr Stanley MA
Senior Assistant Secretary (2)6

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I. Election of Chairman

Nominated by Mr Kenneth TING and seconded by Mr CHAN Wing-chan, Mr LEE Kai-ming was elected Chairman of the Bills Committee.

II. Meeting with the Administration

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Purpose of the Bill and compliance with Article 27 of Basic Law

2. At the invitation of the Chairman, Principal Assistant Secretary (Education and Manpower) (PAS/EM) briefed members that the primary purpose of the Bill was to amend section 9 of the Employment Ordinance (EO) (Chapter 57) to clarify that the taking part by an employee in a strike was not a lawful ground for an employer to terminate the employee's contract of employment without notice or payment in lieu. She pointed out that as undertaken by the Administration at the meeting of the LegCo Panel on Manpower in July 1999, the Bill had incorporated amendments to other relevant sections of the EO to clarify the wording so as to avoid unnecessary misunderstanding between employers and employees. She added that the Labour Advisory Board had expressed support for the amendments proposed in the Bill.

3. Mr LEE Cheuk-yan said that the purpose of the Bill should be to amend the EO in order to comply with Article 27 of the Basic Law (BL 27), rather than to clarify the implications of the relevant provisions of the EO. He pointed out that the spirit of BL27 should be interpreted in the context of the International Covenant on Civil and Political Rights and International Labour Convention (ILC) which was applicable to Hong Kong by virtue of BL 39. He stressed that the ILC contained provisions

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stipulating that employees should have the right to strike, and the right to reinstatement if they were dismissed by reason of their taking part in strikes. He considered that similar provisions should be incorporated in the Bill.

4. In response, PAS/EM said that section 9 of the EO was not inconsistent with BL 27. She pointed out that there was no provision in section 9 which stipulated that an employer could dismiss an employee without notice or payment in lieu on the ground that the employee had participated in a strike. She added that Hong Kong residents had the right and freedom to form and join trade unions and to strike. Such right and freedom were protected constitutionally by BL 27, and there was no legislation in Hong Kong prohibiting people to strike.

5. Assistant Commissioner for Labour (Labour Relations) (ACL(LR)) said that the Bill primarily sought to clarify section 9 of the EO by adding a provision which stated expressly that participation in a strike did not constitute a lawful ground for an employer to terminate an employee's contract of employment without notice or payment in lieu. She pointed out that sections 31H, 31X and 32H of the EO afforded certain protection to employees in that when an employee, who had been given notice by his employer to terminate his contract of employment, took part in a strike before the expiry of that notice, his right to severance payment, long service payment or remedies for employment protection would not be affected.

6. Mr CHAN Wing-chan expressed support for the Bill. He said that employees in Hong Kong generally resolved labour disputes through negotiation and consultation with employers and would not easily resort to strikes. In fact, labour disputes involving employees' strikes or industrial actions in the past had been resolved through conciliation of the Labour Department and trade unions.

Definition and interpretation of "strike"

7. Mr James TIEN enquired whether an individual employee's refusal to work would be regarded as a form of strike under the EO. He also asked whether an employee should give advance notice to his employer prior to going on strike.

8. ACL(LR) responded that the meaning of "strike" was defined under the EO and an employee who refused to work without a justifiable reason could not be regarded as taking part in a strike. She also pointed out that the definition of strike under the EO did not entail a requirement of the employees to serve a notice to the employer.

9. Senior Government Counsel (SGC) of the Department of Justice supplemented that section 2 of the EO provided that strike had the same meaning assigned to it by section 2 of the Trade Unions Ordinance (Cap.332). Under section 2 of the Trade Unions Ordinance, "strike" was defined as -

"the cessation of work by a body of persons employed acting in combination, or

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a concerted refusal, or a refusal under a common understanding, of any number of persons employed, to continue to work for an employer in consequence of a dispute, done as a means of compelling their employer or the employer of any other person or body of persons, or any persons or body of persons employed, to accept or not to accept terms or conditions of or affecting employment"

10. Mr James TIEN enquired about the right of employers and employees to terminate a contract of employment.

11. ACL(LR) responded that under sections 6 and 7 of the EO, an employer or employee could terminate a contract of employment by giving notice or payment in lieu of notice to the other party in accordance with the terms and conditions as specified in the employment contract. However, an employer could summarily terminate a contract of employment without notice or payment in lieu under section 9 of the EO if the employee -

- (a) willfully disobeyed a lawful and reasonable order;
- (b) misconducted himself;
- (c) was guilty of fraud or dishonesty; or
- (d) was habitually neglectful in his duties.

ACL(LR) emphasized that summary dismissal was a serious disciplinary action and should only be applied where an employee had committed very serious misconduct or failed to show improvement after the employer's repeated warnings. She also pointed out that under Part VIA of the EO on Employment Protection, an employee who was dismissed otherwise than for a valid reason could claim for remedies for unreasonable dismissal.

12. Dr LUI Ming-wah and Mr Kenneth TING expressed support for the proposal in the Bill which would serve to avoid misunderstanding between employers and employees regarding the termination of contract without notice by employer under section 9 of the EO.

Protection against anti-union discrimination

13. Mr LEE Cheuk-yan pointed out that an employee taking part in a strike was not afforded protection under section 21B of the EO which dealt with protection against anti-union discrimination. He was of the view that such exclusion was not in line with the spirit of BL 27 and the relevant provisions of the ILC.

14. ACL(IR) explained that as taking part in a strike would not of its nature be an activity undertaken outside normal working hours or with the consent of the employer, strike was not intended to be covered under section 21B of the EO as a form of trade

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union activities. However, she stressed that participation in a strike should not affect the employee's entitlement to benefits under the EO and his continuity of employment with the employer. As regards inclusion of the right to strike in legislation on anti-union discrimination, ACL(IR) pointed out that the ILC had not provided a detailed interpretation of workers' right to strike, and individual member countries might impose lawful restriction on the exercise of the right and freedom of individuals to form and join trade unions and to strike.

15. The Chairman and Miss CHAN Yuen-han expressed concern about workers and officers of trade unions who were dismissed after taking part in strikes. The Chairman pointed out that so far there had not been a successful conviction of anti-union discrimination as provided under Part IVA - Protection Against Anti-Union Discrimination of the EO. In view of the fact that prior to 1997 there were incidents of workers and members of trade unions being dismissed for taking part in the organization and conduct of strikes, the Chairman and Miss CHAN urged the Administration to review the existing provisions on anti-union discrimination as soon as practicable. The Administration noted their views.

Right to reinstatement

16. Miss CHAN Yuen-han was of the view since the Administration had proposed to amend section 9 of the EO to clarify that an employer could not dismiss an employee summarily on the ground of his taking part in a strike, amendments should also be made to the EO to specify the right to reinstatement so as to accord further protection to employees taking part in strikes. Messrs LEE Cheuk-yan and CHAN Wing-chan echoed Miss CHAN's view.

17. Miss CHAN referred to her proposed amendments which were circulated to members of the Bills Committee and the Administration prior to the meeting. She explained that her amendments sought to amend sections 9 and 32N of the EO to specify that where an employee took part in a strike and the employer terminated his contract by reason of his taking part in the strike, the court or the Labour Tribunal could make an order for reinstatement without employers' consent or make an award of terminal payments.

18. PAS/EM pointed out that according to legal advice, the Committee Stage amendments proposed by Miss CHAN Yuen-han fell outside the scope of the Bill. Besides, the proposed amendments involved issues with wide implications and should be examined in detail in separate context.

19. Messrs James TIEN, Kenneth TING and Dr LUI Ming-wah agreed with the Administration's view and considered that the right to reinstatement issue should be dealt with separately outside the context of the Bill.

Other issues

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20. Responding to the Chairman, Assistant Legal Adviser 5 said that the legal and drafting aspects of the Bill were in order.

21. Members agreed to report the deliberations of the Bills Committee to the House Committee on 9 June 2000. PAS/EM advised that the Administration intended to resume Second Reading debate on the Bill at the Council meeting on 26 June 2000.

III Any other business

22. There being no other business, the meeting ended at 3:30 pm.

Legislative Council Secretariat

24 July 2000