

立法會
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**Paper for the House Committee meeting
on 16 June 2000**

**Report of the Bills Committee on
Employment (Amendment) Bill 2000**

Purpose

This paper reports on the deliberations of the Bills Committee on Employment (Amendment) Bill 2000 (the Bill) and seeks members' support for the Bill to resume its Second Reading debate at the Council meeting on 26 June 2000.

The Bill

2. The purpose of the Bill is limited to the making of a clarifying amendment to the Employment Ordinance (Cap. 57) (EO) to the effect that the taking part by an employee in a strike is not a lawful ground under section 9 of the EO for the termination of the employee's contract of employment without notice or payment in lieu.

The Bills Committee

3. At the House Committee meeting on 3 March 2000, Members decided to form a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix**.

4. Under the chairmanship of Hon LEE Kai-ming, the Bills Committee held one meeting with the Administration.

Deliberations of the Bills Committee

5. The Administration has advised that the existing provisions of section 9 of the EO do not make it clear that the taking part by an employee in a strike is not a lawful ground for an employer to terminate the employee's contract of

employment without notice or payment in lieu. The Administration has therefore proposed to introduce amendments to clarify the relevant sections of the EO so as to avoid unnecessary misunderstanding between employers and employees. The Administration has advised that the Labour Advisory Board has endorsed the proposed amendments.

6. Members generally welcome the proposed amendments to section 9 of the EO to make it clear that an employer cannot dismiss an employee summarily under this section on the ground of his taking part in a strike. The Bills Committee's deliberations on certain issues raised by some members are set out in the following paragraphs.

Article 27 of the Basic Law (BL 27)

7. A few members point out that although the circumstances set out in section 9 of the EO under which an employer may terminate a contract of employment without notice or payment in lieu do not expressly include the taking part in a strike, the provisions in sections 31H, 31X, and 32H of the EO imply that there are circumstances in which an employee taking part in a strike could entitle his employer to terminate his employment without notice or payment in lieu. These members are of the view that the amendments proposed in the Bill are made in order to comply with BL 27, rather than clarifying the existing provisions of the EO.

8. The Administration has advised that Hong Kong residents have the right and freedom to form and join trade unions and to strike. Such right and freedom are protected constitutionally by BL 27, and there is no legislation in Hong Kong prohibiting people to strike. In the Administration's view, section 9 of the EO is not inconsistent with BL 27 as there is no provision in section 9 stipulating that an employer can dismiss an employee without notice or payment in lieu on the ground that the employee has participated in a strike. If an employer dismisses an employee without notice or payment in lieu by reason of the employee taking part in a strike, the dismissal may be considered unlawful.

9. The Administration has further pointed out that sections 31H, 31X and 32H of the EO afford certain protection to employees in that when an employee, who has been given notice by his employer to terminate his contract of employment, takes part in a strike before the expiry of that notice, his rights to severance payment, long service payment or remedies for employment protection will not be affected.

10. The Administration is therefore of the view that the existing provisions of the EO have not breached the provisions of BL 27. The purpose of the Bill is to clarify section 9 of the EO by adding a provision stating expressly that taking part in a strike does not entitle an employer to terminate the employee's

contract of employment without notice or payment in lieu.

Definition of "strike"

11. A member enquires whether an individual employee's refusal to work would be regarded as a form of "strike" under the EO.

12. The Administration has explained that section 2 of the EO provides that "strike" has 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" means "the cessation of work by a body of persons employed acting in combination, or 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 person or body of persons employed, to accept or not to accept terms or conditions of or affecting employment". An employee who simply refuses to carry out work assigned to him cannot therefore be regarded as taking part in a strike.

13. The Administration has also pointed out that under sections 6 and 7 of the EO, an employer or an employee may terminate a contract of employment by giving notice or payment in lieu of notice to the other party. However, an employer can terminate a contract of employment without notice or payment in lieu under section 9 of the EO if the employee -

- (a) wilfully disobeys a lawful and reasonable order;
- (b) misconducts himself;
- (c) is guilty of fraud or dishonesty; or
- (d) is habitually neglectful in his duties.

The Administration has emphasized that summary dismissal is a serious disciplinary action and should only be applied to cases where an employee has committed very serious misconduct or fails to show improvement after the employer's repeated warnings.

14. A member points out that an employee taking part in a strike is not afforded protection under section 21B of the EO which deals with protection against anti-union discrimination. The Administration has explained that as taking part in a strike will not of its nature be an activity undertaken outside working hours or with the consent of the employer, "strike" is not intended to be covered under section 21B of the EO as a form of trade union activities. The Administration has further advised that if an employee is found to be unreasonably and unlawfully dismissed, the Labour Tribunal may make an award of compensation of up to \$150,000.

Right to reinstatement

15. A few members are of the view that since the Administration has proposed to amend section 9 of the EO to clarify that an employer cannot 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. A member has proposed that amendments be made to sections 9 and 32N of the EO to specify that where an employee takes part in a strike and the employer terminates his contract by reason of his taking part in the strike, the court or the Labour Tribunal may make an order for reinstatement or make an award of terminal payments.

16. The Administration has explained that reinstatement of employees dismissed for taking part in strikes has wide implications and will need to be examined in detail. The Administration has pointed out that under the EO, the Labour Tribunal may order an employer to pay an employee an indemnity of up to \$150,000 for unlawful dismissal. In the Administration's view, the amendments to sections 9 and 32N of the EO proposed by the member are outside the scope of the Bill.

17. Some members have accepted the Administration's view and do not consider that the inclusion of the right to reinstatement in the Bill is appropriate. They are of the view that the issue should be dealt with separately outside the context of the Bill.

18. The member concerned has indicated that she will submit her proposed amendments to the President for a ruling as to whether they are in order.

Recommendation

19. The Bills Committee generally supports the Bill and recommends that the Second Reading debate on the Bill be resumed on 26 June 2000.

Advice sought

20. Members are invited to note the deliberations of the Bills Committee and support the recommendation in paragraph 19 above.

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

Membership list

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 Ronald ARCULLI, JP

Hon HUI Cheung-ching

Hon CHAN Yuen-han

Hon CHAN Wing-chan

Hon LEUNG Yiu-chung

Hon Howard YOUNG, JP

Hon Andrew CHENG Kar-foo

Total : 12 members