

立法會
Legislative Council

LC Paper No. CB(2)2043/99-00

(These minutes have been
seen by the Administration)

Ref : CB2/PL/MP/1

LegCo Panel on Manpower

**Minutes of meeting
held on Thursday, 27 April 2000 at 2:30 pm
in the Chamber of the Legislative Council Building**

Members present : Hon LEE Kai-ming, SBS, JP (Deputy Chairman)
Hon Kenneth TING Woo-shou, JP
Hon James TIEN Pei-chun, JP
Hon HO Sai-chu, SBS, JP
Hon Cyd HO Sau-lan
Hon LEE Cheuk-yan
Hon CHAN Wing-chan
Hon LEUNG Yiu-chung
Hon SIN Chung-kai
Hon Andrew CHENG Kar-foo
Hon SZETO Wah

Members absent : Hon LAU Chin-shek, JP (Chairman)
Hon David CHU Yu-lin
Hon Michael HO Mun-ka
Dr Hon LUI Ming-wah, JP
Hon Ronald ARCULLI, JP
Hon CHAN Kwok-keung
Hon CHAN Yuen-han
Dr Hon LEONG Che-hung, JP
Hon YEUNG Yiu-chung

Public Officers : Item III
attending

Mr Philip K F CHOK, JP
Deputy Secretary for Education and Manpower 1

Mr LAM Kam-kwong
Principal Assistant Secretary for Education
and Manpower 7

Mr William SIU, JP
Assistant Commissioner for Labour
(Right and Benefits)

Item IV

Mr Philip K F CHOK, JP
Deputy Secretary for Education and Manpower 1

Miss Erica NG
Principal Assistant Secretary for Education
and Manpower 4

Mr Alfred W K CHAN, JP
Deputy Commissioner for Labour (Labour Administration)

Mrs Clare SIU
Chief Labour Officer (Labour Relations)

Clerk in : Mrs Sharon TONG
attendance Chief Assistant Secretary (2)1

Staff in : Mr Raymond LAM
attendance Senior Assistant Secretary (2) 5

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As the Chairman was out of town, the Deputy Chairman took the chair.

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I. Confirmation of minutes of meeting held on 30 March 2000 and special meeting held on 5 April 2000 and matters arising
(LC Paper Nos. CB(2) 1767/99-00, CB(2) 1769/99-00 and CB(2)1765/99-00(01))

2. The minutes of the meeting held on 30 March 2000 and special meeting held on 5 April 2000 were confirmed.

List of follow-up actions required of the Administration

Adm 3. Members noted the list of follow-up actions required of the Administration. The Deputy Chairman requested the Administration to provide members with a progress report on the outstanding items in the list.

Adm 4. Mr Andrew CHENG expressed concern that the Administration had not yet provided detailed information on the manpower demand for each trade in the construction projects of the two railway corporations. He added that the Administration should provide detailed information on the demand and supply in respect of each trade for major infrastructural projects. Deputy Secretary for Education and Manpower 1 (DSEM1) undertook to provide the information.

Special arrangements for foreign domestic helpers performing driving duties

Adm 5. Referring to the statistics provided by the Administration in respect of the special arrangements for foreign domestic helpers (FDHs) performing driving duties (LC Paper No. CB(2) 1730/99-00 issued on 18 April 2000), Mr CHAN Wing-chan asked about the number of investigations carried out by the Administration into unauthorized driving by FDHs and the number of prosecutions made. DSEM1 undertook to seek the information from the Immigration Department and advise in writing.

II. Date of next meeting and items for discussion

(LC Paper No. CB(2) 1765/99-00(02))

6. Members agreed to discuss the following items at the next regular meeting on 25 May 2000 at 2:30 pm -

- (a) Draft report of the Panel on Manpower for submission to the Legislative Council;
- (b) Equal pay for work of equal value;
- (c) Minimum employment terms for persons engaged in projects or services contracted out by the Government; and

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(d) Occupational Safety and Health Management Information System.

(*Post-meeting note* : An item on "Memorandum of administrative arrangement between the Government and Vocational Training Council" was subsequently added to the agenda at the request of the Administration.)

III. Consultancy review on the Employees Compensation Assistance Scheme
(LC Paper No. CB(2) 1765/99-00(03))

7. At the invitation of the Deputy Chairman, Principal Assistant Secretary for Education and Manpower 7 (PAS(EM)7) briefed members on the result of the consultancy review of the Employees Compensation Assistance Scheme (ECAS).

8. Mr CHAN Wing-chan asked whether there was resistance against increasing the insurance levy by the level as proposed under Option A. Referring to paragraph 15 of the Administration's paper, he asked whether the three "cut-off" points for implementing the "capped" scheme would all result in an increase in insurance levy. He said that adopting the judgment date as the "cut-off" point for implementing the "capped" scheme might be unfair to the claimants.

9. DSEM1 responded that the employers' representatives consulted so far were generally of the view that the increase in insurance levy from 5.3% to 8.7% under Option A was too substantial. Referring to paragraph 15 of the Administration's paper, he said that the levy rate for the ECAS would be increased from 1% to 3.6%, 3.5% or 3.0% respectively, depending on whether the "accident date", "lodgment date" or "judgment date" was used as the "cut-off" date.

10. The Deputy Chairman said that a major issue not mentioned in the Administration's paper was that since the establishment of the ECAS in 1991, a number of employers had not taken out or had taken out insufficient insurance cover for employees' compensation. This also reflected that enforcement was inadequate.

11. Mr LEE Cheuk-yan considered that the options stated in the Administration's paper were unacceptable. Option A involved a substantial increase in the payment of insurance levy by employers, while Options B and C would bring about a reduction in the protection of employees. He asked about the number of cases where an employer was fined for failure to comply with the requirement of taking out employees' compensation insurance, and the average fine involved. He also questioned why it was necessary for the Employees Compensation Assistance Fund Board (ECAFB) to hold a stable level of assets equivalent to about four times of its annual expenditure, while such a need was not found with the Employees Retraining Board (ERB). He expressed concern that the requirement for a stable level of assets had been set at an exceedingly high level to exaggerate the necessary increase in the insurance levy, thus causing employers to reject Option A. He added that the Administration should bear any financial shortfall in ECAS. He suggested that the Administration should consider

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a new option where payments under ECAS were financed by fines collected for non-compliance with the requirement of taking out a policy of insurance pursuant to the Employees' Compensation Ordinance and where ECAFB was given the right to contest so as to facilitate achieving a reasonable level of compensation.

12. The Deputy Chairman said that the parties involved in employees' compensation claims should be given the choice of out-of-court settlement. Legal costs, which were substantial owing to the lengthy process of litigation, should not be deductible from the total compensation amount.

13. DSEM1 clarified that legal costs paid by ECAFB to claimants were in addition to compensation awards. He added that since the establishment of ECAS in 1991, the Administration had adopted the policy that ECAS should be financed by a levy on the premium of employees' compensation insurance. The Administration was therefore not in a position to finance any shortfall in ECAS. He said that setting the stable level of assets at about four times of ECAFB's annual expenditure was only the view of the consultant. He added that the case of ERB was different in that periodic injection of funds were made by the Administration to ERB.

14. Assistant Commissioner for Labour (Rights and Benefits) 1 (AC for L(RB)) said that the Labour Department (LD) had always stressed to employers the importance of taking out adequate employees' compensation insurance cover. About 36 000 establishments had been checked by LD to ensure compliance with the requirement in 1999. There were 861 successful prosecutions against failure to take out employees' compensation insurance. The total fines involved were more than \$2.33 million, representing an average fine of \$2,714 per case. In response to the Deputy Chairman, AC for L(RB) said that the current maximum fine was \$25,000. Mr LEE Cheuk-yan considered that the Administration should increase the minimum and maximum fines for failure to comply with the requirement of taking out employees' compensation insurance to \$10,000 and \$500,000 respectively.

15. DSEM1 said that consideration was being given to providing ECAFB with the discretion to play a more active role in claim negotiations and court proceedings. He agreed to consider the suggestion of increasing the fines on employers who did not take out employees compensation insurance. However, he expressed doubt about whether the total amount of fines received would be adequate for meeting all claims under ECAS.

16. Mr LEUNG Yiu-chung said that Options B and C were unacceptable as they would result in a reduction in the protection of employees. He asked whether there was an increasing or decreasing trend of employers not taking out employees' compensation insurance. He said that if there was an increasing trend, there might also be an increase in the insurance premium, thus reducing the need for an increase in the insurance levy. Referring to paragraph 27 of the Administration's paper, he expressed doubt about whether the cost of hiring loss adjusters to handle claims management would really result in an additional cost as much as \$1 million per year.

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He said that the gross legal costs paid by ECAFB, which represented 15% of the total amount of assistance paid by it, was also too high. He considered that the Administration should carry out a comprehensive review on the issue. With more employers taking out employees compensation insurance, the amount of claims under ECAS would probably decrease.

17. AC for L (RB) said that there had been a general trend of increasing claim over the past ten years. He stressed that employers who did not take out employees' compensation insurance would still be held liable for the compensation payment. Thus, ECAS was a safety net.

18. Mr Andrew CHENG said that a solution to address the problem of failure to comply with the requirement relating to compulsory insurance was to increase the level of fine and use the fines to meet claims under ECAS. He suggested that the level of fine might be set at a certain percentage of the total amount of compensation to the claimant. He said that the options proposed in the Administration's paper were undesirable, as Option A was unfavourable to good employers, while Options B and C were unfavourable to employees. He expressed reservations about the proposal of giving ECAFB the right to contest. He said that under common law principles, the judge should be fair even if the defendant was not given the right to contest. He expressed concern that once this precedent was opened up, the Government and all public bodies would also have the right to contest in similar claims under the common law. AC for L(RB) said that the Pneumoconiosis (Compensation) Ordinance (Cap. 360) also provided the Pneumoconiosis Compensation Fund Board with such a power. The purpose of the power was to provide the court with more information rather than suppressing the level of compensation. Mr CHENG said that it might be more appropriate to describe it as "the right to provide information to the court for consideration" instead of "the right to contest".

19. Mr HO Sai-chu expressed support for the views expressed by members. He considered that the options as set out in the Administration's paper were undesirable. The proposed increases in insurance levy under the options were too high. The options neither encouraged employers to abide by the law nor encouraged them to take out insurance. A more comprehensive review of ECAS should be made and more options should be provided for consideration. He said that the Labour Advisory Board (LAB) had also requested the Administration to explore other options when the proposal was first presented to LAB for consideration. He said that the existing ECAS was unfair in that employers who took out insurance were subsidizing those who had failed to do so. He supported the view that the level of fine should be increased to a level sufficient for meeting the claims under ECAS. He added that the Administration should provide funding for meeting claims relating to previous years under ECAS.

Adm

20. DSEM1 agreed to consider members' suggestions about other possible options and increasing the level of fine. He reiterated that since the establishment of ECAS in 1991, the Administration had always maintained the policy that ECAS should be financed by a levy on the premium of employees' compensation insurance. He added

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that the Administration had been strictly enforcing the law. Nevertheless, it would look into ways of further strengthening enforcement.

21. Mr SZETO Wah supported the view that the level of fine should be increased. He said that the Administration should bear the shortfall in ECAS, if the fines were not sufficient for meeting all claims under ECAS. He opined that the Administration had probably given instructions to the consultant on the proposing of options.

22. PAS(EM)7 informed members that it had been proposed in the Employees' Compensation (Amendment) (No.2) Bill 2000 introduced into the Legislative Council on 1 March 2000 that the maximum level of fine for employers who did not take out employees' compensation insurance would be increased to \$100,000. A Bills Committee formed to examine the Bill was pending activation.

23. Mr CHAN Wing-chan supported the view that the level of fine on employers who did not take out the compulsory insurance should be increased. He asked about the Administration's time-table on dealing with the issue. DSEM1 said that the Administration hoped to draw up its proposal on the issue for consultation with relevant committees, such as LAB, before presenting its proposal to the Executive Council for consideration. He expected that the relevant legislative proposal would be introduced into the Legislative Council after October 2000.

IV. Review of Provisions under the Employment Ordinance relating to reinstatement

(LC Paper No. CB(2) 1765/99-00(04))

24. At the invitation of the Deputy Chairman, Deputy Commissioner for Labour (Labour Administration) (DC for L(LA)) briefed members on the results of LD's review of the reinstatement provisions under the Employment Ordinance (Cap. 57) (EO).

25. Mr CHAN Wing-chan welcomed the proposal that the Labour Tribunal (LT) would be given the power to order for the reinstatement of an employee without having to seek the employer's consent. He however expressed concern that an employer might dismiss an employee after reinstatement. He asked whether the proposal on reinstatement covered employees dismissed on the ground of taking part in a strike. He informed members that Miss CHAN Yuen-han would move a Committee stage amendment to the Employment (Amendment) Bill 2000 to provide for the reinstatement of an employee dismissed on the ground of taking part in a strike. He also asked whether there would be a minimum time period for the reinstatement order.

26. DC for L(LA) responded that an employee who was dismissed shortly after reinstatement could lodge a complaint with LD, which would carry out investigations and examine the reasons for the dismissal. If the matter could not be settled through the conciliation of LD, the employee could bring the case to LT for adjudication. He

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said that it would be a serious matter if the dismissal was related to reinstatement, as this would possibly be a violation of court order.

27. As regards the right of workers to go on strike, DC for L(LA) said that the Administration had introduced the Employment (Amendment) Bill 2000, which proposed the clarification of section 9 of EO by adding a provision stating expressly that the taking part of an employee in a strike did not entitle an employer to terminate the employee's contract of employment without notice or payment in lieu. He said that the current proposals on reinstatement were related to unreasonable and unlawful dismissal. The dismissal of an employee who took part in a strike did not fall into these categories. He said that as the reinstatement of employees dismissed for taking part in a strike had wide implications, the issue would need to be studied in detail by LAB. He said that the introduction of a minimum time period for the reinstatement order might only be of little use, as an employer could still dismiss the employee after the minimum time period. He added that under existing EO, an employer could be prosecuted for unlawful dismissal of an employee. LT could order an employer to pay an employee an indemnity of up to \$150,000 for unlawful dismissal. The existing legislation had provided sufficient protection to employees.

28. Mr LEE Cheuk-yan expressed support for the reinstatement of employees dismissed for taking part in a strike. The right to strike was a right guaranteed under the Basic Law (BL). He said that existing legislation in this respect was in breach of BL. The amendment of section 9 of EO was inadequate for protecting the right to strike. He considered that the dismissal of an employee who took part in a strike should be classified as unlawful dismissal so that it would also be subject to reinstatement. He added that the Administration should also deal with the issue that strikes within working hours and with the consent of employers were not protected by the Trade Unions Ordinance (Cap. 332).

29. DC for L(LA) reiterated that the issue had wide implications and had to be examined in detail. Issues such as whether "strike" included "wild cat strike" had to be carefully examined. He added that in the two-year period up to June 1999, LD had handled 6 016 claims under Part IVA of EO, among which 277 were against dismissal during pregnancy. He considered that the introduction of the proposed legislative amendments to protect employees against unreasonable and unlawful dismissal should not be delayed by the issue of dismissal for participation in strikes.

30. Mr HO Sai-chu considered that the reinstatement of employees dismissed for taking part in a strike should not be included in the Administration's proposal on reinstatement.

31. Mr LEE Cheuk-yan agreed to the view that legislative amendments should be introduced as soon as possible to implement the Administration's proposals on reinstatement. He asked whether the Administration could introduce the legislative amendments in the current legislative session while separately look into the reinstatement of employees dismissed for taking part in a strike. DC for L(LA) said

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that whether the legislative amendments could be introduced within the current legislative session would depend on the progress of law-drafting work.

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32. Mr LEUNG Yiu-chung said that the Administration was inconsistent in objecting to similar legislative proposals on reinstatement introduced by him in 1997, while saying that there was currently an urgency to introduce the legislative proposals as set out in the Administration's paper. He said that many employees who participated in strikes were later dismissed by employers for disobedience. He asked about the Administration's plan in respect of the issue. DSEM1 said that in view of members' concern about the issue, the Administration could look into the reinstatement of employees dismissed for taking part in a strike and consult LAB on the issue.

33. Mr James TIEN said that employers had already made concessions in arriving at the proposals on reinstatement as set out in the Administration's paper. The issue of reinstatement of employees dismissed for taking part in a strike had already been discussed by LAB. If discussions were to be re-opened on matters already discussed and decided, employers might possibly object to the proposals originally agreed and as set out in the Administration's paper. He objected to the reinstatement of employees dismissed for taking part in a strike, as an employee facing a lawful dismissal could easily choose to go on strike so that his employment could be reinstated after he was dismissed by the employer. He added that even if the examination of the legislative proposal was to be expedited, a Bills Committee should still be formed to examine the relevant bill clause-by-clause.

34. DSEM clarified that the LAB supported the view that the current proposal on reinstatement should apply only to employees who had been unlawfully and unreasonably dismissed, and employees taking part in strikes did not fall into this category. If members were concerned, the Administration could look into the specific issue of reinstatement of employees dismissed for taking part in a strike and consult the LAB on the issue in due course.

35. Mr Andrew CHENG said that the Administration lacked a firm position on the right to strike. He said that if a right was guaranteed under BL, it should be implemented unless BL was amended. He considered that merely amending section 9 of EO was inadequate to protect the right to strike. Although it prohibited an employer from dismissing an employee for taking part in a strike, there was no provision for the reinstatement of the employee so dismissed.

36. The Deputy Chairman asked whether an employee dismissed for exercising trade union rights could only be reinstated only after an order for reinstatement was made by the court. DC for L(LA) responded that an employee dismissed for exercising trade union rights could lodge a complaint with LD. If LD considered that there was sufficient grounds for prosecuting the employer, it would do so after seeking legal advice from D of J. If the matter could not be settled by the conciliation of LD, it could be brought to LT for adjudication.

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37. There being no other business, the meeting ended at 4:15 pm.

Legislative Council Secretariat
19 May 2000