

立法會
Legislative Council

LC Paper No. CB(2)1417/00-01
(These minutes have been
seen by the Administration)

Ref : CB2/BC/7/00

Bills Committee on Employment (Amendment) (No. 2) Bill 2000

Minutes of the 3rd meeting
held on Thursday, 1 March 2001 at 2:30 pm
in Conference Room B of the Legislative Council Building

Members Present : Hon Andrew CHENG Kar-foo (Chairman)
Hon Kenneth TING Woo-shou, JP
Hon James TIEN Pei-chun, JP
Hon Cyd HO Sau-lan
Hon LEE Cheuk-yan
Hon CHAN Yuen-han
Hon YEUNG Yiu-chung
Hon Ambrose LAU Hon-chuen, JP
Hon LI Fung-ying, JP
Hon Audrey EU Yuet-mee, SC, JP

Members Absent : Dr Hon LUI Ming-wah, JP
Hon Michael MAK Kwok-fung
Hon LEUNG Fu-wah, MH, JP

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

Mrs DO PANG Wai-yee
Assistant Secretary for Education and Manpower (4)

Mrs Jennie CHOR
Assistant Commissioner for Labour (Labour Relations)

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Mr Geoffrey FOX
Senior Assistant Law Draftsman

Mr Vidy CHEUNG
Senior Government Counsel

Clerk in Attendance : Ms Doris CHAN
Chief Assistant Secretary (2) 4

Staff in Attendance : Mr Arthur CHEUNG
Assistant Legal Adviser 5

Ms Dora WAI
Senior Assistant Secretary (2) 4

I. Confirmation of minutes of meeting held on 12 January 2001
(LC Paper No. CB(2)958/00-01)

The minutes of the meeting held on 12 January 2001 were confirmed.

Withdrawal of membership

2. The Chairman informed members that Miss Emily LAU had withdrawn from the Bills Committee with effect from 26 February 2001.

II. Meeting with the Administration
(LC Paper No. CB(2)907/00-01(01))

Briefing by the Administration

3. The Chairman welcomed representatives of the Administration to the meeting. At his invitation, Principal Assistant Secretary for Education and Manpower (4) (PAS(EM)4) briefed members on the Administration's proposed Committee Stage amendments (CSAs). She pointed out that by combining sections 15(1B) with 15(5) and 33(4BAA) with 33(4BC), the presumption that an employer had dismissed his employee otherwise than in accordance with section 9 would not be invoked for the purposes of a prosecution if the employer could prove -

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- (a) that the termination had been made in accordance with section 9; or
- (b) that he had purported to terminate the contract in accordance with section 9 and, at the time of termination, he had reasonably believed that he had a ground to do so.

The Administration believed that the revised provisions would help address Members' concern about frivolous prosecution although the practical effect of the amended version was the same as the original proposal in the Bill. She appealed to members to support the Bill and the CSAs.

Views of ALA5

4. At the enquiry of the Chairman, Assistant Legal Adviser 5 (ALA5) expressed his view that the latest CSAs should be acceptable to members as they had addressed the concern raised by members and himself at the last meeting. He invited members' attention to sections 15(1C) and 33(4BAB) which were new sections making the presumption under sections 15(1B)(b) and 33(4BAA)(b) not applicable in the case of civil proceedings. He requested the Administration to brief members on the background to these two new paragraphs as that aspect of the presumption had not been discussed by the Bills Committee before.

5. Senior Assistant Law Draftsman (SALD) explained that the presumption would be rebutted and there would be no criminal proceeding and no compensation if an employer claimed that he reasonably believed that he had a ground to dismiss the employee under section 9. The new sections were to disallow such a rebuttal of the presumption in civil proceedings such that an employee who had suffered damage from an unintentional wrongful dismissal should be entitled to compensation.

Questions from members

6. Ms Audrey EU pointed out that the new section 15(1C) only prescribed that section 15(1B)(b) should not apply in the case of civil proceedings whereas section 15(1B)(a) was not mentioned. She enquired whether section 15(1B)(a) would apply to civil proceedings and, if this was the case, whether it would mean that there would also be a presumption in civil proceedings.

7. SALD stated that the presumption in the original Bill applied to both criminal and civil proceedings. The presumption and the defence provisions were combined pursuant to the request of members and ALA5. The reason for making reference to civil proceedings in the CSAs was that the Administration wished to maintain the position of the original Bill after the combination as far as civil proceedings were concerned. The objective of disallowing rebuttal of the presumption under section 15(1B)(b) in civil proceedings was to ensure that employees' entitlement to

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compensation for unintentional wrongful dismissals would not be adversely affected.

8. PAS(EM)4 pointed out that as civil cases relied on factual evidence, an allegation made by an employer that he believed he had a reasonable ground to dismiss an employee under section 9 would not be accepted in civil proceedings. As regards the presumption under section 15(1B)(a) that the dismissal was made otherwise than in accordance with section 9, recent court cases showed that the burden of proof in civil proceedings still lay with employers.

9. Ms Audrey EU clarified that she was most concerned about the change brought about by the CSAs to the existing civil proceedings for dismissals made under section 9. She pointed out that currently there seemed to be no presumption for civil cases. An employee had to introduce evidence to prove that the dismissal was wrong in order to claim for compensation. This practice would be changed by the introduction of the new section 15(1C). PAS(EM)4 replied that currently the burden of proof in relation to dismissals under section 9 was not expressly stated in the Employment Ordinance. Therefore the Administration intended to take this opportunity to state clearly in the Employment Ordinance the burden of proof for both civil and criminal cases for dismissals relating to sections 15 and 33.

10. In reply to the Chairman, PAS(EM)4 further explained that the need for introducing the new section 15(1C) had arisen from the re-drafting of section 15(1B). She pointed out that the presumption under the original version of section 15(1B) was applicable to both civil and criminal proceedings while the defence provision under section 15(5) of the original Bill was only applicable to criminal proceedings. Consequent upon the combination of the presumption and defence provisions, reference to civil proceedings had to be made in the Bill in order to avoid a situation where an employer could avoid making compensation to an employee by claiming that at the time of the dismissal he believed that he had a reasonable ground to do so. She added that the practical effect of the amended version of the Bill was the same as the original proposal.

11. ALA5 confirmed that the effect of the original Bill had not been changed after incorporating the proposed CSAs.

12. Mr LEE Cheuk-yan asked whether the burden of proof would lie with employers for dismissals under section 9. He also asked whether there would be any change to the current practice after the introduction of the Bill. Assistant Commissioner for Labour (Labour Relations) said that the Labour Department and/or the Labour Tribunal would investigate whether each alleged case of dismissal under section 9 was really justified. In civil proceedings, an employer had the responsibility to provide evidence to support the dismissal. The originally proposed statutory defence applicable to criminal proceedings should not apply to civil cases.

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13. Mr LEE Cheuk-yan further asked whether the burden of proof would still lie with employers even without the presumption clause in the Bill. PAS(EM)4 said that it would be for the court to decide if there was no statutory requirement. In 1989, a judge of the Labour Tribunal held that it was reasonable to require an employer to explain the reason for a dismissal made under section 9. SALD said that there were in fact some grey areas in past cases and there had all along been no statutory provision requiring employers to provide evidence to support dismissals under section 9. He said that the Bill aimed at making clear that in civil proceedings, the burden of proof should fall on an employer as he was the person who exercised the power to dismiss an employee. He should be fully aware of the reason for the dismissal and it was perfectly reasonable to require him to give the explanation.

14. Miss CHAN Yuen-han said that the point she was most concerned about was the same as the follow-up question raised by Mr LEE Cheuk-yan. She had nothing further to raise as she fully endorsed the Administration's explanation.

15. Mr James TIEN expressed concern as to whether the burden of proof required of an employer in this Bill concerning dismissals under section 9 would, in future, apply to provisions relating to other categories of dismissals of employees under the Employment Ordinance. He requested the Administration to clarify its policy intention in this aspect. PAS(EM)4 said that the Administration had no plan to propose the same requirement in other provisions under the ordinance.

16. Miss CHAN Yuen-han cited as an example that employees involved in trade union activities who received discriminatory treatment from employers had found it difficult to introduce evidence to prove the malpractice of their employers. In view of this, the ordinance concerned had been amended to move the burden of proof from employees to employers in order to provide greater protection to employees in this respect.

17. Ms Audrey EU pointed out that the word "continuous" was added before "contract of employment" in section 15(1B) in the proposed CSAs. She asked whether this was an omission in the past and, if not, the difference it made. SALD replied that the "continuous contract of employment" in section 15(1B) was referring to the same continuous contract of employment in sections 15(1)(a) and (b). Adding "continuous" in section 15(1B) would make the meaning clearer but it in fact made no practical difference.

18. Referring to the proposed CSA to clause 4, Ms Audrey EU opined that the emphasis of the new section 11F(1B) should be put on the action of termination rather than the contract of employment. She suggested the following wording for the Administration's consideration -

"Subsection (1)(a) does not apply where a contract of employment is

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terminated -

- (a) by the employee except when the termination is in accordance with section 10; or
- (b) by the employer under section 9."

19. SALD agreed to revise the CSA as suggested by Ms EU.

Clause by clause examination of the Bill

Section 11F - Proportion of the end of year payment

20. In response to a question asked by the Chairman, PAS(EM)4 clarified that the proposed CSA to section 11F(1)(a) clearly stated the two conditions under which an employee would be entitled to pro-rata end of year payment upon termination of employment. Members noted that the Administration had agreed to re-draft this section and provide a revised CSA for members' consideration.

21. SALD proposed the following wording for section 11F(1B) for members' consideration -

"Subsection (1)(a) does not apply where a contract of employment is terminated -

- (a) by the employee (except such a contract is terminated in accordance with section 10); or
- (b) in accordance with section 9."

Ms EU suggested that "(except such a contract is terminated in accordance with section 10)" in (a) above be written as "(except where the termination is in accordance with section 10)" so that the emphasis was put on the action of termination and not on the contract of employment. She added that particular attention should be paid to the Chinese version to ensure that the same emphasis was reflected.

Consequential amendments

22. PAS(EM)4 reported that the consequential amendments to Schedule 3 of the Sex Discrimination Ordinance to retitle the Women and Young Persons (Industry) Regulations as proposed under clause 16 of the Bill was no longer required as Schedule 3 had already expired. The Administration would propose a CSA to delete this clause.

Other issues

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23. Ms Audrey EU asked whether this Bills Committee would consider the suggestion put forward by SALD that a notice with reason for the dismissal be given to the employee upon dismissal. PAS(EM)4 explained that as this was not the objective of this Bill, the Administration would address this issue on another occasion. The Chairman undertook to raise this issue at a meeting of the Panel on Manpower.

Legislative timetable

Adm

24. Members expressed support for the Bill in general. PAS(EM)4 undertook to provide members with the revised CSAs within several days after the meeting. The Chairman would report the deliberations of the Bills Committee to the House Committee on 9 March 2001 recommending resumption of the Second Reading debate on the Bill on a date to be advised by the Administration.

(Post-meeting note : The revised CSAs were circulated to members on 8 March 2001 vide LC Paper No. CB(2)1028/00-01. As subsequently agreed, the Bills Committee would report its deliberations to the House Committee on 16 March 2001 recommending resumption of the Second Reading debate on the Bill on 4 April 2001.)

III. Any other business

25. There being no other business. The meeting ended at 3:40 pm.

Legislative Council Secretariat

27 April 2001