Paper No. CB(2)767/00-01(01)

Bills Committee on Employment (Amendment) (No.2) Bill 2000 : Administration's response to questions raised by Members on 12 January 2001

At the Bills Committee meeting held on 12 January 2001, Members raised a number of questions as well as suggestions in relation to the Employment (Amendment) (No. 2) Bill 2000 sponsored by the Administration. We provide hereunder the Administration's response.

Clarify Provisions for Protecting Employees Against Dismissal During Pregnancy or Paid Sick Leave (Clauses 5 & 8 of the Bill)

2. Members asked why it would be necessary to make the amendments relating to the protection for employees against dismissal during pregnancy or paid sick leave and details of the court case which necessitated the amendments.

3. S.9 of the Employment Ordinance (EO) provides that an employer may terminate a contract of employment without notice or payment in lieu of notice if the employee has committed serious misconduct, such as fraud or dishonesty or habitual neglect of duties. S.6 and s.7 provide that an employer may terminate the employment of his employee by giving him proper notice or wages in lieu of notice. However, s.15(1) prohibits an employer from dismissing a pregnant employee under s.6 or s.7. The intention of this provision is to prohibit employers from dismissing pregnant employees, except in circumstances where summary dismissals are justified under s.9.

4. An employer who contravenes s.15(1) of the EO is liable under s. 15(2) to pay the dismissed employee compensation which includes wages in lieu of notice, a further sum equivalent to one month's wages and 10 weeks' maternity leave pay, if she would have been entitled to such payment had she not been dismissed. Furthermore, contravention of s.15(1) may subject the employer to prosecution and a fine of $100,000 on conviction. The employer may also be required under s.32P to pay compensation up to $150,000 in addition to other terminal payments if he fails to provide a valid reason within the meaning of s.32K for the dismissal and the Court or Labour Tribunal does not make an order for reinstatement or re-engagement.

5. Similarly, s.33 of the EO also prohibits an employer from dismissing an employee under s.6 or s.7 during paid sick leave. An employer who contravenes this section will also be liable to pay compensation to the employee and be subject to

prosecution.

6. In October 1997, a Judge of the Court of First Instance held that an offence only occurred under s.15(1) of the EO if the employer terminated the employee's contract of employment under s.6 or s.7 of the EO (a copy of the relevant judgement and a summary on the case is at Annex A for Members' information). In plain terms, the termination of the employee's contract pursuant to s.6 or s.7 is a necessary element of the offence created by s.15(1). There is no provision in the Ordinance that a wrongful dismissal can be deemed to be a dismissal pursuant to s.6 or s.7.

7. The implication of the judgement is that once an employer alleges that he has dismissed a pregnant employee summarily under s.9 of the EO, he cannot be prosecuted for contravention of s.15(1), even if the alleged summary dismissal is subsequently proved to be unsubstantiated. The problem lies with the way in which s.15 is written. The section, as it is now worded, only prohibits dismissal of employees during pregnancy under s.6 or s.7, without covering wrongful dismissals which are not justified under s.9. This ruling will also have implications on the protection of employees under s.33 of the EO against dismissal during their paid sick leave since the wording of that section is similar to that of s.15.

8. The Government's policy intention has always been to prohibit employers from dismissing pregnant employees or employees on paid sick leave, except in circumstances where summary dismissal is justified under s.9 of the EO. Subsequent to the court ruling mentioned above, no prosecution action can be taken out with regard to unlawful dismissal involving a pregnant employee or an employee on paid sick leave once an employer claims the dismissal is based on s.9. This situation is undesirable and inequitable. We should not allow employers to use s.9 as a pretext for dismissing pregnant employees or employees on paid sick leave. The purpose of introducing amendments is to plug an existing loophole in the law. They do not involve any change in the policy.

9. We are aware that there will be situations whereby the employer genuinely believes that the circumstances of the case justify a dismissal under s.9 but the court comes to a different view. We agree with Members that we should not subject innocent employers to criminal liability for a dismissal which he genuinely believes he has a right to carry out. We have therefore proposed to include a defence in the Bill. Under the proposed sections 15(5) and 33(4BC) of the EO (Clauses 5(d) and 8(c) of the Bill), as long as an employer can prove that at the time when he terminated the contract of a

pregnant employee or an employee on paid sick leave, he reasonably believed that he had a ground to terminate the contract under s.9, he shall have a defence and will not be caught by the offence provisions of the proposed sections 15(4) and 33(4BB) (Clauses 5(d) and 8(c) of the Bill).

10. A Member has expressed the concern that the first sentence of the new sections 15(5) and 33(4BC) of clauses 5(d) and 8(c) of the Bill would imply that the defence for employer could only be deployed in proceedings. To address this concern, we propose to amend the wording to make it clear that any defence put forward by the employer would be considered when s.15(4) or s.33(4BB) is being invoked, not just in proceedings. Our proposed revisions are set out under items (ii) and (iii) in the table at Annex B.

11. The legal adviser of the LegCo has expressed the concern that our proposed wording for sections 15(IB) and 33(4BAA) (Clauses 5(b) and 8(b) of the Bill) would create undue pressure for the Government to take out prosecutions against employers using s.9 for dismissal. We have considered this view carefully. The proposed sections 15(1B) and 33(4BAA) require an employer to prove that the dismissal falls under s.9 of the EO. We consider that this is a reasonable requirement placed on the employer. As explained in our letter to Mr Arthur Cheung dated 14 December 2000, in the present cases, the employer is likely to have the necessary knowledge, information or evidence required to substantiate his position. The Department of Justice advises that the prosecution would have difficulty to establish an employer dismissed an employee otherwise than in accordance with s.9 without the presumption.

12. The Department of Justice further advises that in deciding whether to take out a prosecution, there should be sufficient evidence to establish the offence charged and there is a reasonable prospect to secure a conviction. If the employer can demonstrate that he dismisses a pregnant employee or an employee on paid sick leave under s.9 and that at the time of the dismissal he has sound reasons to believe he can do so, it is highly unlikely that prosecution would be initiated. Putting it in context and in particular in view of the defence, the new sections 15(1B) and 33(4BAA) will not result in frivolous prosecutions or cause employers undue hardship. In fact, past statistics show that each year, there were only a handful of prosecution cases which involved s.9 dismissal of pregnant employee or employee on paid sick leave (relevant statistics are set out in Annex C).

13. Given the above reasons, on balance, we prefer to maintain our proposals as

contained in clauses 5(b) and 8(b) of the Bill.

Clarification Provision on employee's entitlement of pro-rata end of year payment (Clause 4 of the Bill)

14. A Member suggested that the drafting of clause 4 of the Bill was too clumsy and did not make it immediately clear under what circumstances employees would be eligible for pro-rata end of year payment. We have considered this view carefully and would like to propose a new clause 4 (item (i) in the table at Annex B) which set out our proposed amendment in a more direct and easily understood manner, for Members' consideration.

Exclusion of acts covered by the Family Status Discrimination Ordinance from Part VIA of the EO (Clause 7 of the Bill)

15. A Member enquired why we proposed to exclude acts of discrimination covered by the Family Status Discrimination Ordinance from the application of Part VIA of the EO.

16. Existing s.32Q of the EO already excludes acts of sex discrimination within the meaning of the Sex Discrimination Ordinance (SDO) and disability discrimination within the Disability Discrimination Ordinance (DDO) from the application of Part VIA (employment protection provisions) of the EO. The rationale for such exclusion is two fold. Firstly, it has always been the Government's legal policy to avoid duplicity of remedies in respect of a single act. Since both Part VIA of the EO and SDO and DDO may deal with discriminatory acts in the employment field, it is necessary to have the exclusion as otherwise, a claimant may initiate claims under two separate pieces of legislation in two different courts and hence subject the employer to two separate trials and double payments in respect of a single act.

17. In fact, it is provided in the Labour Tribunal Ordinance that the LT may decline jurisdiction and transfer cases if it is of the opinion that the claim should not be heard and determined by it. After the enactment of the SDO and DDO, discriminatory acts including those in the employment field are heard in the District Court, which is considered the proper jurisdiction to hear allegations of acts of discrimination. The exclusion provided in the EO makes the delineation of authority to hear claims arising from discriminatory acts clear.

18. Clause 7 of the Bill aims to add Family Status Discrimination Ordinance (FSDO), which provides, among other things, protection for employees against unlawful discrimination on the ground of family status, to the exclusion list for the same reasons stated above. After the exclusion, in practice, an employee who has been dismissed in contravention of s.15(1) or s.33(4B) of the EO could still make his claim at the LT under Part VIA of the EO even if the dismissal involves discriminatory acts under the FSDO. The employee may simply claim that the dismissal was made in contravention of s.15(1) or s.33(4B) of the EO. It would be up to the employer to prove that the employee was dismissed for a valid reason as stipulated in s.32K of the EO. It will be when the employee's claim involves claims of discrimination as defined under the SDO, DDO and FSDO that the LT may need to refer the case to the District Court.

Education and Manpower Bureau
February 2001

Annex A

Summary of the Prosecution Case Involving
S. Space Design (H.K.) Co. Ltd

Background to the Case

X had worked under a continuous contract as Accountant Supervisor for S. Space Design (H.K.) Ltd (hereafter referred to as "SSD") since 16.6.1995.

2. On 9.4.1996, X was informed of her wage increment. SDD also took the opportunity to thank her for her good performance.

3. On 18.4.1996, X served notice of maternity leave to SSD. Approval was granted two days later.

4. On 8.5.1996, X was dismissed with immediate effect. On the next day she was issued a letter of summary dismissal stating that she was dismissed because of her poor attitude and unsatisfactory performance at work during the previous few months. X strongly opposed to the allegation.

5. X filed a civil claim at the Labour Tribunal for her entitlements under the Employment Ordinance (EO). The case was heard on 11.9.1996 and an award was made in her favour. While SSD paid in accordance with the award, it applied for and was granted leave to appeal against the award. The appeal was eventually dismissed.

6. In view of the prima facie evidence for a contravention of section 15(1) of the EO, prosecution action was taken by the Labour Department. A summons under sections 15(1) and 15(4) was laid against SSD.

7. SSD pleaded not guilty to the office at the first hearing on 16.12.1996 but was eventually convicted at the Eastern Magistracy on 19.5.1997 under sections 15(1) and 15(4) of the EO.

8. The Magistrate considered termination according to section 9 of the EO was not justified. The case before him was a wrongful termination. There was no basis for the company to have the employment of the employee terminated because of her unsatisfactory work performance.

9. In arriving at his decision, the Magistrate was not unaware of the fact that the wording of section 15(1) referred to termination under section 6 and section 7, and yet the termination in this case before the Magistrate was made according to section 9 of EO. The Magistrate applied the Mischief Rule of statutory interpretation and convicted the employer.

Summary of the High Court Judgment

10. The employer appealed the decision to the High Court. Among the four grounds of appeal, the judge at the High Court accepted the first two grounds of appeal, and quashed the conviction handed down by the Magistrate. The full text of the judgment notes delivered on 24.10.1997 is at Appendix.

11. The first ground of appeal is that the prosecution failed to prove an essential element of offence of section 15(1), i.e. that the contract of employment was terminated under section 6 or section 7 of EO.

12. The second ground of appeal is that the Magistrate erred in law, firstly, by applying the "mischief rule" as a method of statutory interpretation; and secondly by importing the findings of an award of compensation made by the Labour Tribunal into a criminal proceeding.

13. The third ground of appeal is that the Magistrate went too far into intervening into the examination of witnesses; and the fourth one is that the conviction was unsafe and unsatisfactory.

14. The High Court held that there was no scope for the

application of Mischief Rule on section 15(1). The Mischief Rule of statutory interpretation has or should have effect only when the legislation under consideration is ambiguous.

15. It held that section 15(1) specifically prohibits the termination of the contract of employment under section 6 and section 7 of the EO. The terms are plain and there is simply no ambiguity there.

16. The judgment elaborated that, in dealing with the meaning of a statutory provision, a court should look at the terms of the relevant provision. If those terms were clear and unambiguous then the court needs go no further. If in applying the clear and unambiguous terms of the legislation, some absurdity may result, then it is a matter for the legislature to have the law amended.

Appendix

IN THE HIGH COURT OF HONG KONG

COURT OF FIRST INSTANCE

(Appellate Jurisdiction)

MAGISTRACY CRIMINAL APPEAL NO. 615 OF 1997

BETWEEN

HKSAR — Respondent

and

S. SPACE DESIGN (HK) CO. LTD. — Appellant

Coram: Deputy Judge McMahon in Court

Date of Hearing: 8th October 1997

Date of Delivery of Judgment: 24th October 1997

JUDGMENT

The Appellant, an incorporated company, appeals against its conviction at Eastern Magistracy on the 19th May 1997 for an offence of terminating the employment of an employee after she had given notice of her

intention to take maternity leave, contrary to sections 15(1) and 15(4) of the Employment Ordinance, Cap. 57.

Section 15(1) of the Ordinance is as follows:

> "Subject to sub-Section (1A), no employer shall terminate a contract of employment of a female employee under Section 6 or 7 during the period from the date on which she gives notice under Section 12(4) or (8), or of her confinement where she subsequently gives notice under Section 12(5), to the date on which she is due to return to work on the expiry of her maternity leave or the date of cessation of her pregnancy otherwise than by reasons of her confinement."

Sub-Section (4) provides that a breach of sub-Section (1) is an offence and imposes a certain level of penalty.

It can be seen from the terms of Section 15(1) that the provision on its face prohibits the termination of a pregnant employee's contract under Section 6 or 7 of the Ordinance. Section 6 provides for the termination of an employee's contract by either party by notice and further provides for the period of notice to be given. Section 7 provides for the termination of the employee's contract by either party without notice, but with payment made by the terminating party in lieu of notice and further provides as to the calculation of that payment.

The grounds of appeal advanced by the Appellant are:–

Firstly, that the prosecution failed to prove an essential ingredient of the offence, namely that the Defendant terminated the contract of employment of the female employee under Section 6 or Section 7 of the Ordinance.

Secondly, that the magistrate erred in law, firstly by applying the "mischief rule" as a method of statutory interpretation, and secondly, by finding that an award of compensation made by the Labour Tribunal in favour of the employee brought Sections 6 and 7 into play "indirectly".

Thirdly, that the magistrate interrupted and cross-examined the defence witnesses and in so doing, ... (i) indicated his disbelief of their evidence before the close of the defence case, and in so far as is relevant to this judgement, ... (v), made comments of a hostile and sarcastic nature in relation to their evidence.

Fourthly, that in all the circumstances, the conviction is unsafe and unsatisfactory.

Grounds 1 and 2 are interrelated and I will deal with them together. It was common ground at trial that the Appellant company had not attempted to terminate the employment of the dismissed employee pursuant to the provisions of Section 6 or Section 7 of the Ordinance but had instead dismissed her summarily on the grounds that she was not satisfactorily performing her duties as an employee. That summary dismissal, it seems to have been accepted, was either pursuant to Section 9(a) of the Ordinance which sets out specific provisions relating to the employee's misconducting himself in his employment which, if satisfied, allows the employer to dismiss him, or

pursuant to the employer's rights of summary dismissal at common law which are preserved by Section 9(b) of the Ordinance.

The magistrate, in his statement of findings, came to the conclusion that there was no basis in fact for the appellant to have terminated the employment of the employee because of her work performance being unsatisfactory. He accepted the employee's evidence to the effect that she had performed her duty satisfactorily. He rejected the evidence called on behalf of the appellant to the contrary. His findings of fact in this regard are not challenged by the Appellant.

The magistrate, in his findings, goes on to deal with the law. At paragraph 13, he said, inter alia, of Section 15(1):

> "The Section was designed to protect employees from being dismissed under Section 6 and 7, namely by notice or payment of wages in lieu of notice. In this case, the method of dismissal was by summary dismissal based on PW1 that is the employee's misconduct. So at first sight, the instant offence appeared not to be appropriate."

With that statement of the law the Appellant takes no issue. The magistrate immediately goes on as follows:

> "However, looking at Section 15 it is necessary to apply the so called Mischief Rule of statutory interpretation and look at what mischief the law was trying to prevent."

With this statement the Appellant takes issue. Mr. Plowman S.C. submitted on behalf of the Appellant that there was no scope for the application of what the magistrate calls the Mischief Rule. He says that rule or principle of

statutory interpretation has or should have effect only when the legislation under consideration is ambiguous, and that the legislation in this case is in no way ambiguous.

In *Johnson v. Moreton* [1980] AC 37, the court adopted earlier statements contained in, firstly, *Vacher and Sons Limited v. The London Society of Compositors* [1913] AC at p. 107 to the effect that

> "If the language of a statute is plain, admitting of only one meaning, the legislature must be taken to have meant and intended what it has plainly expressed and whatever it has in clear terms enacted must be enforced even though it should lead to absurd or mischief results."

And secondly, in *Gladstone v. Bowen* [1962] QB at p. 384 to the effect that

> "the courts have no power to fill in a gap in a statute even if satisfied that it had been overlooked by the legislature and that if the legislature had been aware of the gap would have filled it in."

Thirdly, that if the words of a statute are capable, without being distorted, of more than one meaning the court should prefer the meaning which leads to a sensible and just result complying with the statutory objective and reject the meaning which leads to absurdity or injustice and is repugnant to the statutory objective: *Stock v. Frank Jones* [1978] 1 WLR at p. 231.

Those principles as stated are in my view correct. The true and proper approach of a court in dealing with the meaning of a statutory provision before it is to, firstly, look at the terms of the relevant provision.

If those terms are clear and unequivocal then the court need go no further. If in applying the clear and unambiguous terms of the legislation, some absurdity may result, then that is a matter for the legislature to cure. Though no doubt a court would adopt whatever procedural means it could to avoid unfairness. If on looking at the legislation, its terms, on a fair and plain reading, are found to be ambiguous or equivocal then the court then and only then should apply the principle referred to by the learned magistrate as the Mischief Rule in determining what the true intention of the legislature was in passing the statutory provision in question.

On the face of Section 15(1), its terms are plain and unambiguous. It specifically prohibits the termination of the employees contract of employment under Section 6 or Section 7 of the Ordinance. There is simply no ambiguity there.

That being so the principle expounded in <u>*Vachers*</u> case (supra) and adopted in <u>*Johnson v. Morton*</u> (supra) applies and the court need have gone no further.

In any event, I am happy the legislature may well have meant Section 15(1) to apply only to contractual terminations pursuant to Section 6 and Section 7 and that it is not an absurdity that it does not apply to Section 9 and summary dismissals.

The purpose of Section 15(1) is to prevent an employer dismissing a pregnant employee simply because she is pregnant by using the provisions of Section 6 and Section 7 which gives him a right to dismiss employees generally and without cause. By omitting Section 9 from the provision of Section 15(1), I am sure that the legislature may have intended to preserve the employer's right to dismiss, for cause, employees who were in breach of their duties as employees and who conceivably could be damaging the employer's business or who otherwise had offended against the employer or his business. The scope of an employee's misbehaviour is potentially so wide in Section 9 that the legislature may well, in balancing both the employer and the employee's interests, have deemed it inappropriate for inclusion in Section 15(1).

Accordingly, through the operation of sub-Section 4, in my view, an offence only comes into being pursuant to Section 15(1), given proof of the other required elements of Section 15(1), if the employer terminates the employee's contract of employment only under either Section 6 or Section 7 of the Ordinance. And I have no doubt that, on its plain terms, the termination of the employee's contract pursuant to Section 6 or Section 7 is a necessary element of the offence created by Section 15(1) through Section 15(4).

There was no evidence whatsoever before the magistrate that the Appellant had terminated the employee's contract pursuant to Section 6 or Section 7 of the Ordinance and in his oral reasons for verdict the magistrate said that he accepted the contract was not terminated by way of Section 6 or Section 7 of the Ordinance. Accordingly, even though, oddly, the charge did not particularise the termination of contract pursuant of Section 6 or Section 7

of the Ordinance an omission which, however, could have been cured by amendment even in this court, there was at the end of the day no proof of an essential element of the offence.

In his statement of findings, however, the magistrate proceeds by purported use of the Mischief Rule to import into his findings of fact a finding of fact that the dismissal of the employee was, constructively, pursuant to Section 6 or Section 7 of the Ordinance. In those findings, the magistrate says concerning Section 15

> "that the mischief that Section 15 is trying to prevent is to protect employees from being dismissed after notice of maternity leave has been submitted whilst allowing them to be dismissed by other ways, provided these other ways, presumably Section 9 and common law will reasonably and fairly be established and not just used as a vehicle to avoid legal liabilities. That is why the mechanism of law is such that should the employer fail to establish his case for summary dismissal, the employee will be entitled to compensation."

As a general statement of the purpose of the legislation I do not think this portion of the magistrate's findings can be faulted, and the magistrate obviously appreciate contracts can be terminated pursuant to provisions other than Section 6 or Section 7 of the Ordinance.

He then goes on to find that the purported termination of the employee's contract in the case before him was a mere vehicle to evade the law and that it was a wrongful termination.

He says that this finding was supported by the fact that

"the Appellant company had to compensate PW1, that is the employee, (presumably before the Labour Tribunal as set out in the admitted facts of the case) and such compensation included wages in lieu of notice, so bringing Section 6 and 7 into play indirectly."

He thereby seemingly imports into the facts of the case before him a constructive termination of the employee's contract under Section 6 and Section 7 when those facts plainly, and as previously accepted by him, established that the termination was not pursuant to Section 6 or Section 7 of the Ordinance.

Leaving aside the question as to whether the learned magistrate could ever be right to base a finding of fact in the criminal proceedings before him on facts found before and by another tribunal, it is most certainly not the case that that tribunal's calculation of the compensation payable to the employee for wrongful dismissal under Section 9, by partial reference to the same matters included in Section 6 and Section 7 of the Ordinance, can be taken as importing into the facts of the criminal case before the magistrate a constructive termination of contract pursuant to Section 6 or Section 7 of the Ordinance.

There is simply no basis on the facts before the magistrate, or the law applicable to those facts, for such a finding. There is no provision anywhere in Chapter 57 or any where else as far as I am aware that a wrongful dismissal pursuant to Section 9 of the Ordinance, that is a wrongful summary dismissal, is deemed to be a dismissal pursuant to Section 6 or Section 7 of the Ordinance.

To import such an implied provision into the terms of Section 15 is to usurp the function of the legislature.

In short, the magistrate's finding that the dismissal, although apparently pursuant to Section 9(a) and Section 9(b) of the Ordinance, is to be constructively regarded as a termination of contract pursuant to either Section 6 or Section 7 is wrong in law.

Accordingly, I am satisfied that the Appellant has made out both Grounds 1 and Grounds 2(i) and (ii) of its Grounds of appeal and thereby Ground 4 and its conviction is quashed and sentence set aside.

I further add that had I not allowed this appeal for the reasons I have given on Grounds 1 and 2, I would have done so on the Appellant's Ground 3.

It is fair to say that particularly regarding DW1, the first defence witness, who was the assistant general manager of the Appellant, the magistrate interrupted his evidence to the extent that he conducted a significant part of both examination in chief and cross-examination of the witness. Many of these interruptions were to clarify matters given in evidence, but a significant number were either to contradict the witness or to belittle him.

Typical examples are, firstly, as to the contents of a form the witness was being questioned about,

> "So you, so now in addition to playing doctor you are playing lawyer as well. Just now by looking at

> somebody's face you know somebody has not done something. And now you know what is not going to be accepted by the court, amazing."

Earlier the magistrate in response to the same witness's evidence that he had not thought the dismissed employee had been as sick on a particular occasion as she said she had been commented:

> "Since when you become a doctor. Answer, since when you had become a doctor."

And when the witness said he could now recall a person whom the employee had quarrelled with commented:

> "now you have the fantastic memory recall system, only a minute ago you could not remember and now you can remember. How nice."

One more example. When commenting on the bad English contained in the document made by the witness, the magistrate said to the witness,

> "no matter what the outcome of this case is, I think you ought to go to Sogo and buy yourself an English dictionary. Do you get a staff discount."

The witness's company, the Appellant, was apparently related to Sogo.

All in all, the magistrates comments contained considerable sarcasm and could give no other impression than that he disbelieved the witness. Other

defence witnesses were treated on occasion in a similar manner but not as frequently so. There is no doubt on the transcript of evidence provided the learned magistrate went too far into the arena.

I have no doubt given the magistrate's experience and thorough approach to the evidence he wished only to arrive at a proper decision. Indeed, his findings that the defence witnesses before him were not worthy of belief are not challenged.

Unfortunately in dealing with those witnesses, in the defence case, he went further than intervening merely to clarify the evidence and from the contents and tone of his questions and comments, showed at an early stage of the defence case that he simply did not believe the defence witnesses or accept its case.

The Appellant has in my judgment made out the third ground of appeal also.

(M.A. McMahon)
Deputy Judge of the Court of First Instance

Mr. Eddie Sean, S.G.C. for HKSAR/Respondent

Mr. Gary Plowman, S.C., Keith Yeung & Maurice Chan instructed by Elizabeth Ho of Kwok & Yin for Appellant.

Annex B

Employment (Amendment) (No. 2) Bill 2000

Items		Existing Provision	Proposed amendments in the Bill	Proposed Committee Stage Amendments
(i)	Section 11F	(1) Subject to subsection (1A), where, in the case of an employee to whom this Part applies who has not been employed by the same employer for the whole of a payment period but has been so employed for a period of not less than 3 months in the payment period – (a) the contract of employment is terminated – (i) at any time during the payment period; or (ii) on the expiry of the payment period, otherwise than by the employee under section 6 or 7 or by the employer under section 9; or	(1) Subject to **subsection (1A)**, where, in the case of an employee to whom this Part applies who has not been employed by the same employer for the whole of a payment period but has been so employed for a period of not less than 3 months in the payment period – (a) the contract of employment is terminated – (i) at any time during the payment period; or (ii) on the expiry of the payment period, **otherwise than –** **(A) by the employee other than in accordance with section 10; or** **(B) by the employer under**	(1) Subject to **subsections (1A) and (1B)**, where, in the case of an employee to whom this Part applies who has not been employed by the same employer for the whole of a payment period but has been so employed for a period of not less than 3 months in the payment period – (a) the contract of employment is terminated – (i) at any time during the payment period; or (ii) on the expiry of the payment period; **or** **(1B) Subsection (1)(a) does not apply to a contract of employment which is terminated –** **(a) by the employee**

Note : Differences between the original proposed amendment and the Committee Stage Amendments are expressed in bold types.

			section 9; or	**except such a contract which is terminated in accordance with section 10; or** **(b) by the employer under section 9.**
(ii)	Section 15	(4) Any employer who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine at level 6.	(4) Subject to subsection (5), any employer who contravenes subsection (1)(a) or (b) shall be guilty of an offence and shall be liable on conviction to a fine at level 6. **(5) In proceedings for an offence under subsection (4) (and without prejudice to the operation of subsection (1B)), it shall be a defence for the employer charged with the offence to prove that –** (a) he purported to terminate the continuous contract of employment of the pregnant employee concerned in	(4) Subject to subsection (5), any employer who contravenes subsection (1)(a) or (b) shall be guilty of an offence and shall be liable on conviction to a fine at level 6. **(5) Without prejudice to the operation of subsection (1B), it shall be a defence for an employer charged with an offence under subsection (4) to prove that –** (a) he purported to terminate the continuous contract of employment of the pregnant employee concerned in accordance with section

Note : Differences between the original proposed amendment and the Committee Stage Amendments are expressed in bold types.

			accordance with section 9; and (b) at the time of such termination, he reasonably believed that he had a ground to do so.	9; and (b) at the time of such termination, he reasonably believed that he had a ground to do so.
(iii)	Section 33	(4BB) An employer who contravenes subsection (4B) shall be guilty of an offence and shall be liable on conviction to a fine at level 6.	(4BB) Subject to subsection (4BC), any employer who contravenes subsection (4B) shall be guilty of an offence and shall be liable on conviction to a fine at level 6. **(4BC) In proceedings for an offence under subsection (4BB) (and without prejudice to the operation of subsection (4BAA)), it shall be a defence for the employer charged with the offence to prove that –** (a) he purported to terminate the	(4BB) Subject to subsection (4BC), any employer who contravenes subsection (4B) shall be guilty of an offence and shall be liable on conviction to a fine at level 6. **(4BC) Without prejudice to the operation of subsection (4BAA), it shall be a defence for an employer charged with an offence under subsection (4BB) to prove that –** (a) he purported to terminate the continuous contract of employment of the employee

Note : Differences between the original proposed amendment and the Committee Stage Amendments are expressed in bold types.

			continuous contract of employment of the employee concerned in accordance with section 9; and (b) at the time of such termination, he reasonably believed that he had a ground to do so.	concerned in accordance with section 9; and (b) at the time of such termination, he reasonably believed that he had a ground to do so.

Note : Differences between the original proposed amendment and the Committee Stage Amendments are expressed in bold types.

Annex C

Year	No. of successful convictions		No. of cases affected by the judgement in S. Space Design (HK) Co. Ltd.[1]	
	s.15(1)	s.33	s.15(1)	s.33
1995	5	0	N/A	N/A
1996	13	0	N/A	N/A
1997	6	0	1	0
1998	2	0	3	1
1999	4	0	3	2
2000	2	0	6	2

Remarks: Before the High Court ruling in October 1997, the Labour Department had taken out prosecution twice under s.15(1) of the Employment Ordinance against employers for probable wrongful s.9 dismissal of pregnant employee. On both occasions, the employers pleaded guilty to the charge.

[1] In these cases, prosecution cannot be taken out or has to be discontinued. The High Court Judgment involving S. Space Design (HK) Co. Ltd was delivered on 24th October 1997. Cases thus affected by the judgement are cases where termination has not been taken in accordance with s.6 or s.7.