Employment (Amendment) (No.2) Bill 2000: Administration's response to questions raised by Members at the second Bills Committee meeting

At the second meeting of the Bills Committee on the Employment (Amendment) (No.2) Bill 2000 held on 12 February 2001, Members expressed their acceptance of the need to make such amendments as proposed under the Bill.

The Presumption Clause

- 2. Several Members were however concerned about the proposed wording of sections 15(1B) and 33(4BAA) and the presumption therein. Members were concerned that this presumption would create undue pressure for the Government to take out prosecutions against employers who have dismissed pregnant or sick employees summarily, as well as creating undue hardship on the part of employers. Members and the Legal Adviser also suggested that the Administration consider redrafting the sections by, for instance, setting conditions for the prosecution or making the presumption less difficult to rebut.
- 3. In our reply to Members after the first Bills Committee meeting as well as during the second Committee meeting held on 12 February 2001, we explained that as advised by the Department of Justice, in view of the existence of the defence given to employers (clauses 5(d) and 8(c)), if an 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. However, to address Members and the Legal Adviser's concern, we propose to combine s.15(1B) with s.15(5) and s.33(4BAA) with s.33(4BC). The revised sections 15(1B) and 33(4BAA) effectively mean that the presumption that an employer has dismissed his employee otherwise than in accordance with s.9 would not be invoked for the purposes of a prosection if he can prove -
 - (a) that the termination was made in accordance with s.9; or
 - (b) that he purported to terminate the contract in accordance with s.9 and, at the time of termination, he reasonably believed he had a ground to do so.

We believe the new wording could help address Members' concern about frivolous prosecution, although we must emphasize that the Administration's viewpoint is that the practical effect of the amended version is the same as our original proposal because, as explained, before initiating a prosecution, the defence that may be put forward by the employer would have already been taken into account. The new sections 15(1C) and 33(4BAB) make it clear that the new sections 15(1B)(b) and 33(4BAA)(b) as described in (b) above should not apply to civil proceedings.

4. A table showing the latest proposed amendments in the Employment (Amendment) (No. 2) Bill 2000 as compared with the previous proposed amendments is prepared at Annex. The amendments referred to in paragraph 3 above are set out in items (ii) and (iii) of the table.

Education and Manpower Bureau February 2001

Employment (Amendment) (No. 2) Bill 2000

| Items | | Existing Provision | Proposed amendments in the Bill | 1 st Proposed Committee Stage Amendments | 2 nd Proposed Committee Stage Amendments |
|-------|-------------|---------------------------|----------------------------------|--|--|
| | | | | 0 | O |
| (i) | Section 11F | (1) Subject to subsection | (1) Subject to subsection | (1) Subject to | No change from 1 st proposed |
| | | (1A), where, in the | (1A), where, in the | subsections (1A) | Committee Stage |
| | | case of an employee | case of an employee | and (1B), where, in | Amendments. |
| | | to whom this Part | to whom this Part | the case of an | |
| | | applies who has not | applies who has not | employee to whom | |
| | | been employed by | been employed by | this Part applies who | |
| | | the same employer | the same employer | has not been | |
| | | for the whole of a | for the whole of a | employed by the | |
| | | payment period but | payment period but | same employer for | |
| | | has been so | 7 7 | the whole of a | |
| | | employed for a | employed for a | payment period but | |
| | | period of not less | 2 0 | has been so | |
| | | than 3 months in the | than 3 months in the | employed for a | |
| | | payment period – | payment period – | period of not less | |
| | | (a) the contract of | | than 3 months in the | |
| | | employment is | | | |
| | | terminated – | terminated – | (a) the contract of | |
| | | (i) at any time | | | |
| | | during the | | 1 2 | |
| | | payment | payment | (i) at any time | |

| . 1 | • 1 | 1 | |
|--------------------------|---------------------|-----------------------|--|
| period; or | period; or | during the | |
| (ii) on the expiry | | | |
| of the | of the | period; or | |
| payment | payment | (ii) on the expiry | |
| period, | period, | of the | |
| otherwise than by the | otherwise than — | payment | |
| employee under section 6 | (A) by the employee | period; or | |
| or 7 or by the employer | | - | |
| under section 9; or | accordance with | (1B)Subsection (1)(a) | |
| | section 10; or | does not apply to a | |
| | (B) by the employer | 2 2 4 | |
| | under section 9; or | employment which | |
| | , | is terminated – | |
| | | (a) by the | |
| | | employee | |
| | | except such a | |
| | | contract which | |
| | | is terminated in | |
| | | accordance | |
| | | with section 10; | |
| | | ′ | |
| | | Or (b) by the | |
| | | (b) by the | |
| | | employer | |
| | | under section | |
| | | 9. | |
| | | | |

| (ii) | Section 15 | (1B)An employer who | (1B) An employer who |
|------|------------|-----------------------|---------------------------|
| | | terminates the | terminates the |
| | | contract of | continuous contract of |
| | | employment of a | employment of a |
| | | pregnant employee | pregnant employee |
| | | shall, unless the | shall be taken for the |
| | | contrary is proved, | purposes of subsection |
| | | be taken for the | (1)(a) or (b) to |
| | | purpose of | terminate the contract |
| | | subsection (1) (a) or | otherwise than in |
| | | (b) to terminate | accordance with |
| | | such contract | section 9 - |
| | | otherwise than in | (a) unless the contrary |
| | | accordance with | is proved; or |
| | | section 9. | (b) subject to subsection |
| | | | (1C), unless the |
| | | | employer proves |
| | | | that – |
| | | | (i) he purported to |
| | | | terminate the |
| | | | contract in |
| | | | accordance with |
| | | | that section; and |
| | | | (ii) at the time of |
| | | | such |
| | | | termination, he |

| | | | | | | | reasonably believed that he had a ground to do so. |
|--|-----|---|-----|--|--|-----|--|
| | | | | | | (1C | Subsection (1B)(b) |
| | | | | | | | shall not apply in the case of civil |
| | | | | | | | proceedings. |
| | (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. | | 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. | 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 | Without prejudice to the operation of subsection (1B), it shall be a defence for an employer charged with an offence under | | 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 |

| | 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 accordance with section 9; and (b) at the time of such termination, he reasonably believed that he had a ground to do so. | subsection (4) to prove that — (a) he purported to terminate the continuous contract of employment of the pregnant 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. | to prove that (a) he purported to terminate the continuous contract of employment of the pregnant 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. |
|------------------|---|--|---|
| (iii) Section 33 | (4BAA)An employer who terminates the contract of employment of | | (4BAA) An employer who terminates the continuous contract of employment of an |

| 1. | 1 |
|-------------------|------------------------|
| an employee on | employee on any |
| any sickness | sickness day taken |
| day taken by the | by the employee in |
| employee in | respect of which |
| respect of which | sickness allowance is |
| sickness | payable under this |
| allowance is | section shall be |
| payable under | taken for the |
| this section | purposes of |
| shall, unless the | subsection (4B) to |
| contrary is | terminate the |
| | |
| proved, be taken | contract otherwise |
| for the purpose | than in accordance |
| of subsection | with section 9 – |
| | (a)unless the contrary |
| terminate such | is proved; or |
| contract | (b) subject to |
| otherwise than | subsection |
| in accordance | (4BAB), unless |
| with section 9. | the employer |
| | proves that - |
| | (i) he |
| | purported to |
| | terminate |
| | the contract |
| | |
| | in |

| | | | | | | | (4BAB) | section; ar (ii) at the tip of sure termination he reasonably believed the had ground to so. | hat nd me uch on, y hat a do |
|--|--|------|--|------------|-------|--|--------|---|------------------------------|
| | | | | | | | (4BB) | (b) shall not applied in the case of ciproceedings.Any employer w | ivil |
| | (4BB)An employer who (4BB)An employer who (4BB) subsection (4B) shall be guilty of an offence and shall be liable on | 4BB) | Subject subsection (4BC), employer contravenes subsection | any who | (4BB) | Subject subsection (4BC), employer contravenes subsection | | contravenes subsection (4B) sh | nall an be ion |

| conv | viction to a | shall be guilty | shall be guilty | |
|------|--------------|---------------------|------------------|--------------------------------|
| fine | at level 6. | of an offence | | |
| | | and shall be | and shall be | |
| | | liable on | liable on | |
| | | conviction to a | conviction to a | |
| | | fine at level 6. | fine at level 6. | (4BC) In proceedings for an |
| | | | | offence under |
| | (4 | ABC) In proceedings | (4BC) Without | subsection (4BB) (and |
| | | for an offence | prejudice to the | without prejudice to |
| | | under subsection | operation of | 1 |
| | | (4BB) (and | subsection | subsection (4BAA)), it |
| | | without prejudice | (4BAA), it shall | shall be a defence for |
| | | to the operation | be a defence for | 1 0 |
| | | of subsection | an employer | |
| | | (4BAA)), it shall | _ | - |
| | | be a defence for | offence under | 1 1 |
| | | the employer | | |
| | | charged with the | _ | continuous contract |
| | | offence to prove | | <u> </u> |
| | | that – | terminate the | 1 3 |
| | | (a) he purported | continuous | in accordance with |
| | | to terminate | contract of | , · |
| | | the | employment | (b) at the time of such |
| | | continuous | of the | , |
| | | contract of | employee | reasonably believed |
| | | employment | concerned in | that he had a ground |

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