

AS TABLED IN THE HOUSE OF ASSEMBLY

A BILL

entitled

EMPLOYMENT AMENDMENT (NO. 2) ACT 2020

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WHEREAS it is expedient to amend the Employment Act 2000 and make related amendments;

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

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Citation

1 This Act, which amends the Employment Act 2000 (“the principal Act”), may be cited as the Employment Amendment (No. 2) Act 2020.

Amends section 3

2 (1) In section 3 of the principal Act—

(a) insert the following definitions in their correct alphabetical positions—

“bullying” has the meaning given in section 10B;

“Manager” means the Manager of Labour Relations;

“sexual harassment” has the meaning given in section 10B;

“work permit” has the meaning given in section 57(2A) of the Bermuda Immigration and Protection Act 1956;”;

(b) in the definition of “inspector” delete “of Labour Relations”; and

(2) In consequence of the amendment under subsection (1), in section 29A(2)(r) of the principal Act delete “of Labour Relations”.

Amends section 4

3 In section 4 of the principal Act—

(a) after subsection (2) insert—

“(2A) For the purposes of determining under subsection (1)(b) whether a relationship more closely resembles that of an employee than an independent contractor, the Manager may—

(a) issue guidance and may, from time to time, revise such guidance;

(b) publish such guidance so issued or revised in such manner as he considers appropriate.”;

(b) after subsection (4) insert—

“(5) Section 6 of the Statutory Instruments Act 1977 shall not apply to any guidance issued or revised under this section.”.

Amends section 5

4 In section 5(3) of the principal Act, after paragraph (d) insert—

“(da) due to lay off;”.

Amends section 6

5 In section 6 of the principal Act—

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- (a) in subsection (2)—
 - (i) after paragraph (g) insert—
 - “(ga) the entitlement to rest days and meal breaks;
 - (gb) the entitlement to overtime pay or hours in lieu and the rate of overtime pay or the method of calculating it;”;
 - (ii) repeal paragraph (p) and substitute—
 - “(p) where the employment is pursuant to a work permit, the date of issue and expiry of that work permit, any employment-related conditions (including any requirement to work at more than one location) and any immigration restrictions set out in the work permit;
 - (q) the existence of the employer’s written policy against bullying and sexual harassment in the workplace and how the policy can be accessed;
 - (r) such other matters as may be prescribed,”;
- (b) in subsection (4) delete “paragraphs (g) to (k) and (n)” and substitute “(g) to (k), (n) and (q)”;
- (c) after subsection (4) insert—
 - “(4A) Where by virtue of section 9(2) there is no payment of overtime or hours in lieu, that fact shall be noted in the statement.”;
- (d) in subsection (5)(a) delete the words “paragraph (p)” and substitute “paragraph (r)”.

Amends section 9

- 6 In section 9(2)(b) of the principal Act after “agree” insert, “in writing”.

Inserts sections 10A and 10B

- 7 After section 10 of the principal Act insert—

“Meal breaks

- 10A An employer shall not require an employee—

- (a) to work for more than five hours continuously without a meal break of at least 30 minutes;
- (b) to perform any work during his meal break, without the consent of that employee.

Employer to provide policy statement against bullying and sexual harassment

10B (1) In this section—

“bullying” means the habitual display of offensive behaviour intended to harm, intimidate, humiliate, undermine or coerce a person or group of employees and includes, but is not limited to, ostracising, ridiculing, shouting at, threatening, and verbally abusing a person or group of employees; and

“sexual harassment” includes any one or more incidences of any of the following—

- (a) the use of sexually suggestive words, comments, jokes, gestures or actions that annoy, alarm or abuse a person;
- (b) the initiation of uninvited physical contact with a person;
- (c) the initiation of unwelcome sexual advances or the requests of sexual favours from a person;
- (d) asking a person intrusive questions that are of a sexual nature pertaining to that person’s private life;
- (e) transmitting sexually offensive writing or material of any kind;
- (f) making sexually offensive telephone or internet calls or messages to a person; or
- (g) any other sexually suggestive conduct in circumstances where a reasonable person would consider the conduct to be offensive.

(2) An employer shall ensure—

- (a) that there is a clear written policy statement against bullying and sexual harassment within the place of work for which that employer has responsibility;
- (b) that the policy statement is presented to each employee on the commencement of his employment with that employer; and
- (c) that procedures are put in place to assist every employee in understanding the policy statement.

(3) The policy statement referred to in subsection (2) must contain the terms set out in Schedule 1 and an employer may consult with employees, trade unions or other representatives (if any) in the establishment of the policy statement.

(4) The Minister may by order amend Schedule 1.

(5) Section 6 of the Statutory Instruments Act 1977 shall not apply to an order under subsection (4).”.

Amends section 11

8 In section 11 of the principal Act—

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(a) repeal subsection (1) and substitute—

“(1) In this section—

“public holiday” has the meaning given in the Public Holidays Act 1947, but does not include any Sunday which would not otherwise be a public holiday by virtue of that Act; and

“with pay” means pay at the employee’s regular rate of wages.”; and

(b) in subsection (6), after “agree” insert the words “in writing”.

Amends section 15

9 In section 15(3) of the principal Act, delete the words “who has completed at least one year of continuous employment”.

Amends section 17

10 In section 17(1)(a) of the principal Act, delete the words “or sibling” and substitute “, sibling, grandparent, great-grandparent, grandchild or great-grandchild”.

Amends section 18

11 In section 18 of the principal Act—

(a) repeal and replace subsection (1A) as follows—

“(1A) An employee’s contract of employment shall not be terminated by an employer—

(a) pursuant to subsection (1)(a), unless the notice requirements under section 20 and the provisions under section 26 or 27 have been complied with;

(b) pursuant to subsection (1)(b), unless the notice requirement under section 20 has been complied with.”; and

(b) after subsection (4) insert—

“(5) Where an employee’s contract of employment is terminated, his employer shall pay any wages and other remuneration and benefits which accrued at the date of termination and such payment shall be made within seven days of termination or at the next interval at which the employee would have been paid had the contract of employment not been terminated, which ever period is the longer.”.

Repeals and replaces section 19

12 Repeal section 19 of the principal Act and replace it with—

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“Probationary period

19 (1) Subject to this section, a new or promoted employee may be required to serve a probationary period of not more than six months commencing from the date of his employment or promotion.

(2) An employee who is serving a probationary period shall be entitled to receive from his employer a review of the employee’s performance on or before the completion of one half of the probationary period.

(3) An employer may, before the expiration of the probationary period referred to in subsection (1) and after conducting a review under subsection (2), extend an employee’s probationary period for a period not exceeding three months.

(4) During the probationary period (including any period of extension under subsection (3)), a contract of employment may be terminated without notice—

- (a) by the employer for any reason relating to the employee’s performance review, performance, conduct, or operational requirements of the employer’s business; or
- (b) by the employee for any reason.

(5) In the application of this section to an employee who during a period of continuous employment is promoted (and without prejudice to section 27), subsection (4) shall not apply.

(6) The six-month and three-month periods referred to in subsections (1) and (3), respectively, shall not apply to—

- (a) customs officers;
- (b) fire officers;
- (c) police officers;
- (d) prison officers; and
- (e) such other classes of employee as may be prescribed for the purposes of this section.”.

Amends section 20

13 In section 20(3)(b) of the principal Act, delete “four weeks” and substitute “six weeks”.

Amends section 21

14 In section 21 of the principal Act, after subsection (2) insert—

“(3) For the avoidance of doubt any payment made to an employee pursuant to this section shall be made in accordance with section 18(5).”.

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Amends section 23

15 In section 23 of the principal Act—

- (a) in subsection (4)(b)(i) after “dissolution” insert, “; under no less favourable terms than he was employed immediately prior to the dissolution”;
- (b) in subsection (5), after “terminated” insert, “, pursuant to subsection (3)(d),”.

Repeals and replaces section 26

16 Section 26 of the principal Act is repealed and replaced as follows—

“Termination for repeated misconduct

26 (1) Where an employee is guilty of misconduct which is directly related to the employment relationship but which does not fall within section 25, the employer may give him a written warning setting out the misconduct complained of and appropriate instructions as to how to improve his conduct.

(2) If, within a six-month period, an employee is guilty on two separate occasions of misconduct falling within subsection (1) and receives (in respect of the first occasion of misconduct) a written warning in accordance with subsection (1), the employer may, after the second further occasion of misconduct, terminate the employee’s contract of employment without notice or the payment of any severance allowance.

(3) If, within a 12-month period, an employee is guilty on four separate occasions of misconduct falling within subsection (1) and receives (in respect of the first three occasions of misconduct) written warnings in accordance with subsection (1), the employer may, after the fourth further occasion of misconduct, terminate the employee’s contract of employment without notice or the payment of any severance allowance.

(4) An employer shall be deemed to have waived his right to terminate under subsection (2) or (3) if he does not do so within 14 days after having knowledge of—

- (a) the second further occasion of misconduct referred to in subsection (2); or
- (b) the fourth further occasion of misconduct referred to in subsection (3).”.

Amends section 27

17 In section 27 of the principal Act—

- (a) in subsection (1) after “written warning” insert, “setting out the unsatisfactory performance complained of”; and
- (b) after subsection (2) insert—

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“(3) An employer shall be deemed to have waived his right to terminate under subsection (2) if he does not do so within 14 days after the expiry of the six-month period referred to in that subsection.”.

Amends section 30

18 In section 30(4) of the principal Act—

- (a) in the opening words, delete “the employer shall, as soon as practicable” and substitute, “the employer shall, not less than 14 days before giving notice in accordance with section 20”;
- (b) in paragraph (a) after “inform”, insert “the employee and”; and
- (c) in paragraph (b) after “consult”, insert “the employee and”.

Amends section 32

19 In section 32 of the principal Act after subsection (1), insert—

“(1A) Before laying off an employee, the employer shall as soon as practicable inform the employee and the employee’s trade union or other representative (if any) of the following information—

- (a) the existence of the relevant condition of redundancy;
- (b) the reasons for the lay off contemplated; and
- (c) the period over which such lay off is likely to be carried out.”.

Amends section 36

20 In section 36(1) of the principal Act, delete “three months” and substitute “six months”.

Amends section 37

21 In section 37(1) of the principal Act, in the continuing words, delete the words “as soon as practicable” and substitute “within 14 days of receiving the complaint or having such belief”.

Amends section 40

22 In section 40(5)(a) of the principal Act, delete “two weeks” and substitute “three weeks”.

Inserts Schedule 1

23 (1) After section 48 of the principal Act insert—

“SCHEDULE 1

(Section 10B)

CONTENT OF POLICY STATEMENT AGAINST BULLYING AND SEXUAL HARASSMENT

The policy statement against bullying and sexual harassment referred to in section 10B shall contain the following provisions—

- (a) definitions of “bullying” and “sexual harassment” that are substantially the same as the definitions in section 10B;
 - (b) a statement to the effect that every employee is entitled to employment free of bullying and sexual harassment;
 - (c) a statement to the effect that the employer will make every reasonable effort to ensure that no employee is subjected to bullying or sexual harassment;
 - (d) a statement informing employees of the measures, including disciplinary measures, that may be taken against any person within the workplace or under the employer’s direction who subjects any employee to bullying or sexual harassment;
 - (e) a statement explaining how complaints of bullying and sexual harassment may be brought to the attention of the employer;
 - (f) a statement to the effect that no person shall disclose the name of a complainant or the name of the respondent or the circumstances related to the complaint to any person except where disclosure is necessary for the purposes of investigating the complaint or taking disciplinary measures in relation thereto; and
 - (g) a statement informing employees of the provision in the Human Rights Act 1981 which gives them a right to make a complaint where sexual harassment is committed against them and the relevant authority to whom the complaint must be made.”.
- (2) In consequence of the amendment under subsection (1)—
- (a) in section 35(3) of the principal Act, delete “The Schedule” and substitute “Schedule 2”;
 - (b) in the existing Schedule to the principal Act, delete the heading “SCHEDULE” and substitute “SCHEDULE 2”.

Consequential amendments

24 The Human Rights Act 1981 is amended by repealing section 9(3) and substituting—

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“(3) A person who is an employee has a right to freedom in his workplace from sexual harassment by his employer, or by an agent of his employer, or by a fellow employee, and notwithstanding any requirements in relation to the responsibilities of employers under any other enactment, an employer shall take such action as is reasonably necessary to ensure that sexual harassment does not occur in the workplace.”.

Commencement and savings

25 (1) This Act shall come into operation on 1 June 2021.

(2) Nothing in this Act shall affect any actions or proceedings which commenced prior to its coming into operation.

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EXPLANATORY MEMORANDUM

This Bill seeks to amend the Employment Act 2000 (the principal Act) and make related amendments.

Clause 1 is self-explanatory.

Clause 2 amends section 3 of the principal Act by inserting new definitions.

Clause 3 amends section 4 of the principal Act to enable the Manager of Labour Relations to issue guidance, for the purposes of determining whether a relationship more closely resembles that of an employee than an independent contractor.

Clause 4 amends section 5 of the principal Act to provide expressly that an employee's period of continuous employment shall be deemed to include any period of lay off.

Clause 5 amends section 6 of the principal Act to include in the statement of employment particulars; (i) the entitlement to rest days and meal breaks; (ii) the entitlement to overtime pay or hours in lieu; (iii) any work permit related conditions and restrictions; and (iv) the existence of the employer's written policy against bullying and sexual harassment in the workplace.

Clause 6 amends section 9 of the principal Act to provide that where an employer and employee agree that the provision of overtime pay or time in lieu for hours worked in excess of 40 hours per week is not to apply, that agreement must be in writing.

Clause 7 inserts new sections 10A and 10B into the principal Act. New section 10A provides for an entitlement to meal breaks and new section 10B requires an employer to provide to his employees a clear written policy statement against bullying and sexual harassment in his place of employment.

Clause 8 amends section 11 of the principal Act to define the term "with pay" and to provide that where an employer and employee agree that entitlement to public holiday pay is not to apply, that agreement must be in writing.

Clause 9 amends section 15 of the principal Act to remove the requirement for an employee to have at least one year of continuous employment before becoming entitled to paid time off to receive ante-natal care.

Clause 10 amends section 17 of the principal Act to include as a member of a person's immediate family, for the purposes of bereavement leave, a person's grandparent, great-grandparent, grandchild or great-grandchild.

Clause 11 amends section 18 of the principal Act to clarify that where an employer seeks to terminate an employee's contract of employment for a reason connected with the operational requirements of the employer's business, he must comply with the notice requirement under section 20 and not the provisions under section 26 or 27. This clause also provides the time period within which an employer, who terminates an employee's

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contract of employment, must pay any wages or other remuneration and benefits accruing at the date of termination.

Clause 12 repeals and replaces section 19 of the principal Act to provide; (i) for a probationary period for new or promoted employees of not more than six months (subject to that section); (ii) for the conduct of a performance review during the probationary period; (iii) for the probationary period to be extended after that performance review for a period of not more than three months; and (iv) for an employee's contract of employment to be terminated without notice during the probationary period. This clause also provides that, in respect of an employee who is promoted during a period of continuous employment, the provision enabling termination without notice during the probationary period shall not apply. For such an employee, section 27 shall have effect to enable termination without notice for unsatisfactory performance provided the employee is given a prior written warning, appropriate instructions for improvement, and six months to demonstrate improvement. Finally, this clause provides that the six-month and three-month periods of probation and extended probation shall not apply to the uniform services and such other classes of employees as may be prescribed.

Clause 13 amends section 20 of the principal Act to provide that a notice of termination shall not be given during an employee's absence on sick leave unless the period of sick leave extends beyond six weeks instead of four weeks.

Clause 14 amends section 21 of the principal Act to require, for the avoidance of doubt, that payment in lieu of notice of termination is to be made in accordance with section 18(5), which is within seven days of termination or at the next interval at which the employee would have been paid had the contract not been terminated or, whichever is the longer of the two.

Clause 15 amends section 23(4) of the principal Act to clarify that where an employee's employment under a partnership ceases on dissolution of that partnership, no severance shall be payable where the employee enters into employment with any of the partners immediately after the dissolution under no less favourable terms than immediately prior to the dissolution. This clause also clarifies that subsection (5) applies where an employee's contract of employment is terminated by reason of death of that employee from an occupational disease or accident resulting from that employment.

Clause 16 repeals and replaces section 26 of the principal Act to enable an employer to give to an employee, who is guilty of misconduct, a written warning setting out both the misconduct and appropriate instructions for improvement. This clause also enables the employer to terminate, without notice or severance, an employee who, within a six-month period, is guilty on two separate occasions of misconduct, or who, within a 12-month period, is guilty on four separate occasions of misconduct (provided the employee received the requisite written warnings). Finally, this clause provides that an employer shall be deemed to have waived his right to terminate if he does not do so within the respective periods specified.

Clause 17 amends section 27 of the principal Act to require that where a written warning is given by an employer to an employee who is not performing his duties in a satisfactory manner, the written warning, so given, must also set out the unsatisfactory performance complained of. This clause also provides that where an employer does not

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terminate an employee (who within six months from the date of a written warning does not demonstrate that he is able to perform his duties in a satisfactory manner) within the period specified, the employer shall be deemed to have waived his right to terminate under this section.

Clause 18 amends section 30 of the principal Act to require an employer, before terminating an employee's employment for redundancy, to inform and consult the necessary persons as set out in that section at least 14 days before giving notice, in accordance with the statutory notice period under section 20. This clause also includes, in the list of necessary persons to be so informed and consulted, the employee himself.

Clause 19 amends section 32 of the principal Act by inserting new subsection (1A), which requires an employer before laying off an employee to inform the employee and the employee's trade union or other representative (if any), as soon as practicable, of the information set out in that subsection.

Clause 20 amends section 36 of the principal Act to extend the period for which an employee's complaint (that his employer has failed to comply with a provision under the principal Act) may be made from three months to six months.

Clause 21 amends section 37 of the principal Act to require an inspector, within 14 days of either receiving a complaint under section 36 or having reasonable grounds to believe that an employer has failed to comply with any provision of the principal Act, to inquire into the matter.

Clause 22 amends section 40 of the principal Act to increase the amount of compensation to be paid pursuant to this subsection, in respect of an unfair dismissal, from not less than two weeks wages to not less than three weeks wages.

Clause 23 inserts new Schedule 1 into the principal Act, which sets out the required content of an employer's policy statement against bullying and sexual harassment, and renumbers the existing Schedule as Schedule 2.

Clause 24 makes consequential amendments to the Human Rights Act 1981.

Clause 25 provides for a commencement date of 1 June 2021 and a savings provision.