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EMPLOYMENT (AMENDMENT) BILL, 2017

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EMPLOYMENT (AMENDMENT) BILL, 2017

A BILL FOR AN ACT TO AMEND THE EMPLOYMENT ACT

Enacted by the Parliament of The Bahamas

1. Short title and commencement.

- (1) This Act which amends the Employment Act (*Ch. 321A*), may be cited as the Employment (Amendment) Act, 2017.
- (2) This Act shall come into operation on such day as the Minister may appoint, by notice published in the Gazette.

2. Repeal and replacement of Part VI of the principal Act.

Part VI of the principal Act is repealed and replaced as follows—

PART VI

REDUNDANCY, LAY-OFFS AND SHORT-TIME

26. Redundancy of employees.

- (1) An employer may lawfully dismiss an employee because of redundancy provided that the provisions of this Part have been complied with.
- (2) For the purposes of this Part, an employee shall be deemed to be dismissed because of redundancy if his dismissal is wholly or mainly attributable to —
 - (a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or

- (b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish:

Provided that an employee shall not be deemed to be dismissed because of redundancy where such employee is required to carry out work for a fixed term of less than two years in respect of a specific construction project and such term has come to an end.

- (3) For the purposes of this section, it is presumed that “cease” and “ceased” means to come to an end permanently, from whatever cause and “diminish” and “diminished” have a corresponding meaning.

26A. Obligation of employer contemplating redundancy.

- (1) Where it is contemplated by an employer that one or more employees is to be dismissed because of redundancy, prior to dismissing that employee, the employer shall —
 - (a) inform the trade union recognized in accordance with Part III of the Industrial Relations Act (*Ch. 321*) or, if none exists, the employees’ representative of the situation giving rise to such contemplation and provide a written statement with the following particulars —
 - (i) the reasons for the dismissal contemplated and the facts relevant to those reasons;
 - (ii) the number and category of persons likely to be affected; and
 - (iii) the period over which such dismissals are likely to be carried out; and
 - (b) not later than six weeks prior to any employee being dismissed, consult with the recognized trade union, or if none exists, the employees’ representatives on —
 - (i) the possible measures that could be taken to avoid or mitigate the adverse effects of the redundancy including but not limited to an offer of re-employment in accordance with section 26D;
 - (ii) the appropriate method of selection of employees to be dismissed because of redundancy, taking into account seniority, the needs of the business and the principles of good industrial relations practice;
 - (iii) the procedures for dismissal, including the period of time over which the dismissals are to take place;

- (iv) any measures that the employer might be able to take to find alternative employment for those who are to be dismissed because of redundancy; and
 - (c) notify the Minister in writing within thirty days of the contemplation and give —
 - (i) the reasons for the dismissals;
 - (ii) the number and category of employees to be affected; and
 - (iii) the period of time over which the dismissals are likely to be carried out; and
 - (d) notify the affected employees in accordance with section 26B after all consultations referred to herein have been concluded.
- (2) Where an employer fails to give notice to the Minister in accordance with subsection (1)(c), the employer shall be liable to pay each affected employee thirty days basic pay in addition to any pay that the employee is entitled to under this Part.
- (3) For the purposes of this Part, an “affected employee” means an employee impacted by the circumstances resulting in the necessity for redundancy.
- (4) The Minister may, after consultation with representatives of employees and employers, make regulations with respect to the redundancy for certain sectors of industry and for specific categories of workers.

26B. Right to redundancy payment.

- (1) Where an employee who has been continuously employed for one year or more is dismissed by his employer because of redundancy, his employer is, subject to the provisions of this Part, liable to pay to him a sum (in this Act referred to as a “redundancy payment” or “redundancy pay”) calculated in accordance with subsection (2).
- (2) Subject to subsection (3), the amount of the redundancy payment shall be calculated by reference to the date of the employee’s redundancy by starting on that date and reckoning backwards the number of complete years of employment and allowing —
- (a) where the employee has been employed for twelve months or more —
 - (i) two weeks’ notice or two weeks’ basic pay in lieu of notice; and
 - (ii) two weeks’ basic pay (or a part thereof on a pro rata basis) for each year up to thirty-two weeks and from two years after the date of the commencement of this Act, up to forty weeks;
 - (b) where the employee holds a supervisory or managerial position —

- (i) one month's notice or one month's basic pay in lieu of notice; and
 - (ii) one month's basic pay (or a part thereof on a pro rata basis) for each year up to sixty-four weeks and from two years after the date of the commencement of this Act, up to eighty weeks.
- (3) Notwithstanding subsection (1), the employer shall have the right to appropriate any monies owing to him by the employee from any monies payable under subsection (1).
- (4) Where an employer provides a gratuity or non-contributory pension for an employee, the employee is not entitled to both redundancy pay and the gratuity or non-contributory pension but the employee shall select the one which he prefers.

26C. Option for redundancy pay from new employer.

Where there is a new employer of the enterprise, an employee of the former employer shall have the option —

- (a) to have his contract of employment terminated and receive redundancy pay calculated in accordance with section 26B; or
- (b) to continue with the successor employer within four weeks of the transfer of the enterprise to the successor or employer.

26D. Suitable alternative offer not to be unreasonably refused.

Where, as a mitigating measure for the situation of redundancy, an employer has made an alternative offer in writing to an employee —

- (a) to renew his contract of employment; or
- (b) to re-engage him under a new contract,

so that in accordance with the particulars specified in the offer, as to the capacity and place in which he would be employed and the other terms and conditions of his employment would either —

- (i) be the same as the corresponding provisions of the contract in force immediately before his dismissal; or
- (ii) differ wholly or in part from the corresponding provisions of the contract as in force immediately before his dismissal, but the offer constitutes an offer of suitable employment in relation to the employee; and
- (iii) the renewal or re-engagement would take effect on or before the expected date of redundancy or not more than four weeks after that date,

the employee shall not be entitled to redundancy payment in accordance with section 26B where he has unreasonably refused the offer.

27. Priority to redundant employees on re-hiring.

Where an employee is made redundant in accordance with section 26 and within twelve months from the date the employee was made redundant —

- (a) there is an increase in demand for such goods and services; and
- (b) the employer has to recruit employees for the purposes of the business, the employer shall give priority to the employees who were made redundant.

27A. Presumption against genuine redundancy and sham arrangements.

(1) An employer shall not dismiss, or threaten to dismiss, an individual who—

- (a) is an employee of the employer; and
- (b) performs particular work for the employer;

in order to engage the individual as an independent contractor to perform the same, or substantially the same work under a contract for services.

(2) Where, within twelve months of being made redundant by an employer, an individual is engaged by the same employer, or his agent, to perform the same, or substantially the same work that the individual did in the previous employment of that employer, the contract shall be deemed to be a contract of services, unless the terms and conditions of the contract are more favourable to the individual in the new contract.

27B. Recovery of redundancy.

- (1) Payment of redundancy pay shall be made on or before the date of the employee's redundancy.
- (2) A redundancy payment may be recovered as a debt due to the employee in proceedings before the Tribunal.
- (3) A redundancy payment shall be a preferred debt in all cases involving bankruptcy or liquidation.

28. Lay-offs and short-time.

(1) Except where there is an agreement to the contrary in a contract of employment, an employer shall not lay off an employee, or place an employee on short-time —

- (a) except for one or other of the reasons specified in subsection (3); and
- (b) unless the requirements of section 28A are complied with in relation to the laying off or the placement of the employee on short-time, as the case may be.

(2) An employee shall be presumed —

- (a) to have been laid off for a week where —

- (i) he is employed under a contract on terms and conditions such that his remuneration under the contract depends on his being provided by the employer with work of the kind which he is employed to do; and
 - (ii) he is not entitled to any remuneration under the contract in respect of the week because the employer does not provide work of that kind for him.
- (b) to have been placed on short-time for a week, if by reason of a diminution in the work provided for the employee by the employer, being work of a kind which under his contract the employee is employed to do, the remuneration of the employee for the week is less than half a week's wages.
- (3) The reasons referred to in subsection (1)(a) are that—
 - (a) the employer has temporarily ceased, or intends temporarily to cease, to carry on the business for the purposes of which the employee was employed by him, or has temporarily ceased, or intends temporarily to cease, to carry on that business in the place where the employee was so employed;
 - (b) the requirements of the business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was so employed, have temporarily ceased or diminished, or are expected temporarily to cease or diminish.
- (4) The Minister may, after consultation with representatives of employees and employers, make regulations with respect to the lay-off or placement on short-time for certain sectors of industry and for specific categories of workers.

28A. Obligation of employers contemplating laying-off and short-time.

- (1) Before laying off an employee or placing him on short-time, an employer shall—
 - (a) carry out the consultations in accordance with subsection (3)(b); and
 - (b) supply the employee, the trade union recognised for purposes of bargaining on behalf of the employee (if there is one) and the Minister with a written statement of the facts that require the employer to lay off the employee or place him on short-time.
- (2) The statement referred to in subsection (1)(b) shall contain particulars of—
 - (a) the facts referred to in section 28(3) relevant to the lay-off or short-time action; and

- (b) the number and categories of affected employees and the period during which the lay-off or short-time action is to be carried out, where any employees, in addition to the employee in question, are affected by those facts.
- (3) The consultations to be carried out pursuant to subsection (1)(a) are consultations with the affected employees or their representative, being consultations conducted that —
 - (a) shall commence not later than six weeks before any of the affected employees is laid off or placed on short-time and shall be completed within a reasonable time;
 - (b) shall be in respect of —
 - (i) the proposed method of selecting the employees who are to be laid off or placed on short-time;
 - (ii) the proposed method of carrying out the lay-off or short-time action, with due regard to any agreed procedure, including the period over which the lay-off or short-time action is to take place; and
 - (iii) any measures that the employer might be able to take to find alternative employment for those who are to be laid off or placed on short-time and to mitigate for them the adverse effects of being laid off or placed on short-time.

28B. Continuity of employment during lay-off.

Where an employee is temporarily laid off by an employer, such period shall not be treated as interrupting the continuous employment of that employee.

28C. Presumption of redundancy after continuous lay-off.

- (1) Subject to subsection (2), where an employee has been laid-off for a continuous period of at least twelve weeks, such lay-off shall be deemed a dismissal because of redundancy in accordance with section 26(2).
- (2) The provisions of subsection (1) do not apply to an employee who is employed in the hospitality industry, or any other industry designated by the Minister by order as a seasonal industry and who actually performs work on a seasonal basis, except where work which the employee is habitually employed to do is not offered to that employee for the following season.
- (3) If after two consecutive seasons an employee habitually engaged in seasonal work is not offered work, the employer shall be deemed to have dismissed that employee because of redundancy.”.

3. Amendment of section 29 of the principal Act.

Subsection (1) of section 29 of the principal Act is amended —

- (a) in paragraph (b)(ii), by the deletion of the words “up to twenty-four

- (b) weeks” and the substitution of the words “of service”; and
in paragraph (c)(ii), by the deletion of the words “up to forty-eight weeks”
and the substitution of the words “of service”.

4. Repeal and replacement of Part XII of the principal Act.

Part XII of the principal Act is repealed and replaced as follows —

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PART XII

FINGERPRINTING AND LIE DETECTOR TEST

67. Prohibition against fingerprinting for employment.

- (1) No employer shall, as a requirement for employment or continued employment, require any person to furnish a set of his fingerprints or take a lie detector test.
- (2) Subsection (1) shall not apply to an employer who is seeking to employ or who has employed a person on any premises in respect of which licences are issued under the Gaming Act.
- (3) Any person who contravenes this section commits an offence.

68. Biometric technology in fingerprinting for identity verification.

- (1) Notwithstanding section 67(1), an employer may utilize within the workplace biometric technology in fingerprinting of his employees for the sole purpose of identity verification.
- (2) Any employer who utilizes any employee's biometric fingerprints for any purpose other than as stated in subsection (1), commits an offence.

69. Destruction or return of records.

- (1) Where the fingerprints of any person have been furnished to an employer for any of the purposes specified in section 67 or 68, the employer shall within five business days of the termination or resignation of that employee —
 - (a) return all physical copies and records thereof to the employee;
 - (b) destroy or permanently delete all digitally stored copies thereof.
- (2) The employer shall within five business days of such termination or resignation, give written confirmation to the employee that such records have been destroyed or deleted.

70. Penalties.

Any person who commits an offence under this Part shall be liable to a fine of five thousand dollars.”

OBJECTS AND REASONS

Clause 2 of the Bill seeks to repeal and replace Part VI of the Act to introduce new provisions that seek to—

- (a) place an obligation on employers contemplating redundancy to undertake certain considerations and make notification of such contemplation to the Minister and respective trade union;
- (b) provide for the option of a new contract from the new employer in lieu of redundancy pay;
- (c) provide that employees must not unreasonably refuse a suitable alternative offer from the existing employer;
- (d) provide for the prioritising of redundant employees for re-hiring;
- (e) provide that lay-offs do not affect the continuity of employment in certain circumstances;
- (f) speak to presumption of redundancy after continuous lay-offs.

Clause 3 of the Bill seeks to amend section 29 of the Act to remove the cap with respect to the number of years of service in relation to severance pay.

Clause 4 of the Bill seeks to repeal and replace Part XII of the Act to provide for the utilization of biometric technology in fingerprinting by the employer in the workplace for the sole purpose of identity verification.