STATES OF JERSEY

EMPLOYMENT LEGISLATION: PETITION

Lodged au Greffe on 4th October 2005
by Deputy G.P. Southern of St. Helier

STATES GREFFE

PROPOSITION

THE STATES are asked to decide whether they are of opinion –

to request the Employment and Social Security Committee to review the Employment Relations (Jersey) Law 2005, the Employment (Jersey) Law 2003, and the draft codes of practice that have been issued for consultation purposes, in order to identify if there are any provisions which deny employees the fundamental rights to recognition and representation, or that may breach International Labour Organisation Conventions 87 and 98, and, if any such provisions are identified, to take the necessary steps to remedy the situation.

DEPUTY G.P. SOUTHERN OF ST. HELIER

REPORT

The detailed arguments supporting the objections and reservations that continue to be expressed by Trade Union representatives on the Island over Employment Laws and their associated Codes of practice are laid out in the accompanying submission, (Appendix 1) by John Hendy Q.C., one of the U.K.'s foremost Employment Law specialists.

In its Consultation document "Fair Play in the Workplace: Trade Union Issues" issued in July 2001, the Employment and Social Security Committee set out a *Charter of Basic Trade Union Rights in Jersey* as follows –

Every worker should have the right:

1 to join a trade union and not be discriminated against on the grounds of union membership or participation in union activities;

2 to be a trade union representative and have reasonable time off for trade union duties and not be discriminated against on these grounds;

3 to be represented by a trade union, individually or collectively on any work issue;

4 to take industrial action to protect his or her occupational, social, economic or legal interests without the threat of dismissal or discrimination;

5 to picket at the workplace relevant to the dispute where the worker is employed.

Every trade union should have the right:

1 to organise and support industrial action in accordance with the union's rulebook to protect members' interests;

2 to uphold its own rule book and democratic procedures and to spend its funds and conduct its own activities in accordance with its rules, free from employer interference;

3 to represent its members in any workplace on any issue;

4 to be granted recognition, where necessary, voluntarily and/or formally, and to negotiate collective agreements with any employer where a majority of employees are members of the union or vote for recognition of it;

5 where the union has members, to have reasonable access to a suitable location in an employer's premises in order to communicate with members, to inspect for health, safety or welfare reasons or to ensure compliance with employment laws.

It is the belief of the employees' representatives in Jersey that the employment laws and codes of practice as currently drafted breach this Charter under workers' right 3, right to representation, and trade union right 4, right to recognition. In addition, it is contested that the laws and codes, as currently drafted may breach the International Labour Organisation (ILO) Conventions 87, Freedom of association and protection of the right to organise, and ILO Convention 98, Right to organise and bargain collectively.

There are no financial and manpower implications for the States arising from this petition.

APPENDIX 1

IN THE MATTER OF THE EMPLOYMENT RELATIONS (JERSEY) LAW 2005

AND IN THE MATTER OF THE DRAFT EMPLOYMENT RELATIONS CODES OF PRACTICE

O P I N I O N

---

1. We are asked to advise on the Employment Relations (Jersey) Law 2005 ("ERL"), and the four draft Employment Relations Codes of Practice. The ERL was approved on 17 May 2005 and is now before the Privy Council. While Privy Council approval is awaited, the Employment and Social Security Committee (the Committee) is consulting on its proposed codes of practice. During the course of debate over the passing of the ERL, the TUWU made several representations. Although some changes were made, the TGWU remains deeply concerned, and an emergency motion criticising the law was carried on 12 July 2005 by the TGWTJ delegate conference.

2. The ERL provides a system of legal identification and registration of trade unions and employer associations, clarifies the legal status of these bodies and creates a legal dispute resolution process. The Codes of practice cover four aspects: recognition of trade unions, resolving collective disputes, balloting for industrial action and limitations on industrial action.

3. This Opinion deals first with the compatibility of the ERL with Jersey's international obligations. We then consider further points to be raised during the consultation process on the Codes.

ERL and the ILO

4. There are several respects, in our opinion, in which the ERL is not compatible with the ILO, namely, registration, the settlement of collective disputes and the right to strike. These are dealt with in turn.

Registration

5. Registration under the ERL functions as a gateway to key statutory rights. Under Article 7, a trade union or an officer or member of a trade union 'shall not do any act in furtherance of any purpose for which the union... is formed unless it is registered in accordance with this Law.' A trade union which is not registered is incapable of suing in its own name (Article 16(4)). Nor does it have any immunities from tor law in relation to trade disputes unless it is registered. (Article 20(1)), and the limitation of damages in tort proceedings is only available to registered trade unions (Article 2 1(1)).

6. The decision as to whether to register a trade union and whether to cancel the registration is made by a registrar appointed by the Employment and Social Committee (Article 8(1)), No provision is made to ensure the independence, impartiality or expertise of the registrar.

7. Under Article 10(1), the registrar is under a duty to refuse to grant an application for the registration of a trade union if 'any of the purposes of the union is unlawful'. No further criteria are laid down as to what would constitute an unlawful purpose of a union, except that restraint of trade is expressly stated not to render the purpose unlawful (Article 17(1)).

8. The registrar also has powers to cancel the registration, either of his or her own motion or on the

application of any person with sufficient locus standi. Registration must be cancelled if any of the purposes of the trade union are unlawful, and it may be cancelled if the registration has been obtained by fraud or mistake, if the union has failed to inform the registrar of any changes in the constitution, if it has ceased to exist, or if it has failed to comply with a prescribed requirement despite having had at least 21 days notice from the registrar (Article 14).

9. There is no indication of whether the registrar makes this decision only on the basis of the express purposes of the union as stated in its constitution, or by considering the constitution as a whole, or by considering whether any purposes may be implied from the conduct of the union. Thus a union with a history of unlawful conduct perhaps fortified by policy decisions of its annual or (in the case of the TGWU) its biennial delegate conference might find registration refused or cancelled. In the case of cancellation, given that the registration was originally granted, there is also a danger that activities subsequent to registration of the union will be taken into account.

10. The only procedural safeguard is in the form of an appeal to the Royal Court (Article 15), which may confirm or reverse the decision. The nature of such an appeal is undefined thus opening the possibility that the Royal Court may consider that it may only review rather than rehear the case. If the former view is taken then the registrar's decision may only be overturned if it is the product of an error of law or if it is so unreasonable that the court holds that no registrar properly directing himself on the law and the facts could have reached the decision appealed against.

11. The registration provisions are highly problematic because of the extent of discretion left in the hands of the registrar, aggravated by the absence of procedural safeguards or guarantees of independence of objectivity. This is particularly so in determining whether the purposes of a trade union are unlawful. Most importantly, it is well known from the experience of the law in the UK that a system which bases the lawfulness of strike action on immunities from tort gives rise to a large number of uncertainties. The ERL does not confer any positive right to strike. Instead it gives specific immunity to an act which would otherwise be tortious by reason of: an inducement of breach of contract, or a threat to induce a breach of contract if done by a registered union in contemplation or furtherance of an employment dispute (Article 19). A union may not appreciate that industrial action organised by it is unlawful until the matter has been determined by a court (e.g. – of dozens of examples – action against present employer to protect terms and conditions in the future in ***UCLH v UNISON*** [1999] ICR 204 CA; application of novel form of tor liability in the industrial context in ***Universe Tankships Inc of Monrovia v ITF*** [1982] ICR 262 HL). Th nature of the protection conferred by the proposed immunity is thus very weak indeed.

12. Furthermore the circumstances in which the protection is conferred is yet weaker. It only applies to acts done "in contemplation or furtherance of an employment dispute." An employment dispute is either an individual employment dispute as defined in Article 1(1) of the Employment (Jersey) Law 2003 or a collective employment dispute.

13. An individual employment dispute is defined by Article 1(1) of the Employment (Jersey) Law 2003 as:

> a dispute between an employer or employers and an employee or employees in the employment of that employer or employers which is connected with the terms of employment or with the conditions of labour of any of those employees or with the rights and duties of an employer or an employee under this Law but does not include a dispute as to the entering into, or the failure to enter into, a contract of employment with a person

That Law covers various matters including unfair dismissal but it remains unclear as to whether a dispute over the dismissal of an employee would constitute an individual employment dispute where issues of unfair dismissal have not arisen and where the real dispute might be better described as concerning the right of the employer to dismiss at all – a right which derives from contract and not statutory unfair dismissal. Accordingly it may be that a dispute such as that recently involving the union over the dismissal of members at Gate Gourmet would not constitute an individual employment dispute. Furthermore an individual employment dispute plainly excludes the hiring of new workers so that the original dispute at Gate Gourmet about the hiring of agency workers would certainly not qualify.

14. A dispute is only collective under the ERL if, inter alia, a collective agreement exists between the employer or employers and the trade union (Article 5). Curiously a collective agreement is defined (Article 1) as one between an employer or employers representative of a substantial proportion of employers in the trade or industry and "employees who are representative of a substantial proportion of the employees engaged in the trade or industry concerned." Thus an agreement between an employer and a trade union would appear not to be a "collective agreement" under the proposed law! More significantly if the employees did not represent a substantial proportion of those in the trade or industry an agreement would not count as a collective agreement. Again therefore, it will be seen that the dispute with Gate Gourmet with whom there was a collective agreement but the employees represented only a tiny proportion of those involved in aircraft catering might well not qualify. Furthermore, the proposed law requires that the collective agreement "exists." An employer could easily deny a union the immunity for industrial action by terminating (in accordance with its terms or otherwise) all collective agreements with the union. It appears that if there is no collective agreement as defined, any industrial action would be unlawful unless it comes within the definition of an individual employment dispute.

15. A trade union might therefore run the risk of refusal or cancellation of registration if the registrar considers that its purposes include the taking of industrial action which is unlawful under these provisions. A union which, for example, avowed a policy that it would take industrial action even where it had not achieved a collective agreement or one had been terminated might find its registration refused or cancelled on the basis that it had an unlawful purpose. This is only one example of the extent of the registrar's discretion.

16. According to the ILO Committee on Freedom of Association, Convention No. 87 on freedom of association is contravened if workers are required to obtain previous authorisation to establish their own organisations. Registration which depends on meeting statutory conditions constitutes a requirement for previous authorisation, infringing the Convention (Case 1575). The ILO has held that this could occur even in the case of a much stronger provision, whereby registration of a trade union may be refused if the union TT about to engage" in activities likely to cause a serious threat to public safety or public order. In such a case, the refusal to register should only take place under the supervision of the competent judicial authorities where serious acts have been committed, and have been duly proven (see the Digest of decisions and principles of the Committee on Freedom of Association, 3rd ed. 1985, para. 280). The power of the registrar, who is by no means a competent judicial authority, to determine whether the purposes of a trade union are lawful, clearly infringes these principles.

17. Nor is the contravention cured by the right of appeal. The ILO Committee has held that where a registrar has to form his own judgement as to whether the conditions for the registration of a trade union have been fulfilled, the existence of a procedure of appeal to the courts is not a sufficient guarantee. In effect, this does not alter the nature of the powers conferred on the authorities responsible for effecting registration, and the judges hearing such an appeal would only be able to ensure that the legislation has been correctly applied. The Committee has drawn attention to the desirability of defining clearly in the legislation the precise conditions which trade unions must fulfil in order to be entitled to registration and on the basis of which the registrar may refuse or cancel registration, and of prescribing specific statutory criteria for the purpose of deciding whether such conditions are fulfilled or not (See the Digest of 1985, para. 277.)

18. In addition, the Committee has emphasised that the cancellation of registration of an organisation by the registrar of trade unions is tantamount to the suspension or dissolution of that organisation by administrative authority. (Digest of 1985, para. 489).

19. Optional registration, which carries with it some benefits, is permissible, and the union may be required to fulfil certain formalities to register, provided these do not amount to previous authorisation (Digest of 1985, para. 283). However, it is plain that the form of registration required by Jersey laws is far from optional, since registration is a prerequisite for basic rights, including the right to make contracts and engage in industrial action.

Resolution of Collective Employment Disputes

20. ERL provides for collective employment disputes to be brought before the Jersey Employment Tribunal (JET) either with the consent of both parties, or by one party if all other available procedures have been applied unsuccessfully and a party to the dispute is acting unreasonably in the way in which that party is or is not complying with an available procedure.. Available procedures include procedures in a collective agreement, a relevant contract of employment or a relevant handbook for employees, or an approved code of practice or a procedure which is established with the relevant trade or industry (Article 22). The TGWU has already made submissions that the inclusion in this list of an employer's handbook permits unilateral imposition of a procedure.

21. The tribunal may make a binding award with the consent of both parties, or a declaration that a party is not observing relevant terms and conditions, or as to the interpretation of any disputed terms and conditions of a collective agreement (Article 23). Generally, a declaration generally simply declares the law. In this case, however, it is expressly stated that the declaration will have the effect of incorporating into individual contracts of employment the terms and conditions specified in the declaration, and these remain until varied by agreement between the parties, by subsequent declaration, or until different terms and conditions of employment are settled through the machinery for the settlement of terms and conditions in the relevant trade, industry or undertaking (Article 24).

22. The inclusion of the declaration as a remedy is an express response to earlier objections to the effect that that the collective dispute provisions amounted to unilateral binding arbitration. It was stated then that the use of the declaration removed this risk. We cannot agree. The JET can make a declaration which incorporates the JET's interpretation of the disputed terms and conditions into the individual contracts of employment. This is still tantamount to binding arbitration. This is particularly problematic where a union has taken industrial action after agreement could not be reached under one of the named procedures. In this circumstance, the employer has the power to refer the dispute to the JET on the grounds that the union is acting unreasonably as defined; and JET has the power to incorporate its interpretation of the terms and conditions into individual employees' contracts. This is clearly a case of unilateral binding arbitration.

23. The ILO committee on Freedom of Association has held that provisions which establish that, failing agreement between the parties, the points at issue in collective bargaining must be settled by the arbitration of the authority are not in conformity with the principle of voluntary negotiation contained in Article 4 of Convention No. 98 on the Right to Organise and Collective Bargaining (See 259th Report Case No. 1450, para. 217.) In particular, a provision which permits either party unilaterally to request the intervention of the labour authority for the settlement of the dispute may effectively undermine the right of workers to call a strike and does not promote voluntary collective bargaining (See 265th Report, Cases Nos. 1478 and 1484, para. 547.)

The Right to Strike

24. As stated above, the ERL has not given workers a positive right to strike, but instead followed the British model of providing immunities from tortious action for acts in contemplation and furtherance of a trade dispute. (Article 19). Moreover, a collective employment dispute is defined more narrowly than in the UK in that it requires, among other things that a collective agreement must exist between the employer or employers and the trade union (Article 5), leaving a gap in cases where no collective agreement yet exists or where one has been terminated, In addition, unlike the British legislation, there is no express provision for the lawfulness of picketing and no protection for workers dismissed while on strike.

25. Although there is no express recognition of the right to strike in ILO Convention 87, the ILO Committee of Experts has held that the 'right to strike is one of the essential means through which workers and their organisations may promote and defend their economic and social interests'. The International Covenant on Economic Social and Cultural Rights (ICESCR) is more express, with an explicit right to strike in Article 8. Referring to the UK provision of immunities rather than direct protection of the right, the Committee on Economic, Social and Cultural Rights stated, in its report on the United Kingdom in 1997

(reiterated in its Report of 2002), that

> the failure to incorporate the right to strike into domestic law constitutes a breach of Article 8 of the Covenant. The committee considers that the common law approach recognizing only the freedom to strike, and the concept that strike action constitutes a fundamental breach of contract justifying dismissal, is not consistent with protection of the right to strike. ... Employees participating in a lawful strike should not ipso facto be regarded as having committed a breach of an employment contract.

26. The ERL does provide, in Article 18, that an employee is not liable in damages to his or her employer for a breach of contract consisting of a cessation of work, a refusal to work, or a refusal to work in a manner lawfully required by his or her employer where this is in contemplation or furtherance of an employment dispute. However, Article 18(2) specifies that this does not affect any other right or remedy of the employer or any other liability of the employee arising out of a breach of a contract of employment. One such implication is that the employee could be held to have committed a fundamental breach of contract, justifying dismissal at common law. Moreover, the Employment (Jersey) Law 2003 contains no specific protection against unfair dismissal during the course of lawful industrial action, apart from the general protection for unfair dismissal. In the absence of such protection whilst the bringing of an unfair dismissal claim by a striker is not debarred, it is also overwhelmingly likely to fail because the employer will assert that the dismissal was justified by the striker's conduct in wilfully refusing to carry out his obligations under the contract and/or in seeking to disrupt the employer's business (***Ticehurst v British Telecommunications plc*** [1992] ICR 383 CA), thus amounting to a fundamental and repudiatory breach of contract or, at the least, gross misconduct.

27. The Freedom of Association Committee of the ILO has stated unequivocally that no one should be penalised for carrying out or attempting to carry out a legitimate strike. (See 295th Report, Case No. 1755, para. 343.) Respect for the principles of freedom of association requires that workers should not be dismissed or refused re-employment on account of their having participated in a strike or other industrial action. (See 277th Report, Case No. 1540, para. 90.) This is true too of Convention No. 98: ILO law clearly provides that the dismissal of workers because of a strike, which is a legitimate trade union activity, constitutes serious discrimination in employment and is contrary to Convention No. 98. (See 239th Report, Case No. 1271, para. 274.)

28. ILO Convention also requires that workers dismissed for taking part in a lawful strike should be entitled to reinstatement if the dismissal is unfair. Although the 2003 law does not expressly preclude an application for dismissal by employees dismissed due to industrial action, Article 76 only provides a remedy of compensation and not reinstatement.

29. **Employer inducement:** Despite the finding by the European Court of Human Rights in *Wilson and Palmer v UK* [2002] 1RLR 128, that UK law permitting an employer to make financial inducements to encourage employees to give up trade union representation was a breach of Article 11 of the European Convention on Human Rights and Fundamental Freedoms, there is no provision prohibiting such inducements in Jersey legislation.

The codes

30. Professor Ewing has prepared a comprehensive and very useful response to the consultation paper on the Codes. We do not propose to repeat the points he has made, since they speak for themselves, but instead to assess the current proposals on the codes in the light of international law, and in particular, that of the ILO.

31.(i) **The status of the Codes:** As a result of representations made by the TGV drawing on Professor Ewing's submissions, the ERL was amended to give codes of practice the status of an Order in Council, or subordinate legislation, which means that they cannot come into force sooner than 28 days after the Order is before the States, which may annul it. Moreover, a code cannot be approved that contravenes an international obligation that is binding on Jersey. Before approving a code, the Committee must publish a notice inviting interested persons to inspect the proposals and to make representations, which must be

considered by the Committee when deciding whether or not to approve the code.

32. These are welcome amendments. However, as well as giving the codes a more robust legal basis, the amendments have reinforced their function as integral to the operation of the legislation. Although failure to observe an approved code of practice does not in itself make a person liable to proceedings, immunities from liability are withdrawn if a code of practice provides for a holding of a ballot of members and the action is not taken in accordance with such a ballot. A trade union is also not protected from liability in tort for action that is defined in an approved code of practice as conduct that is not reasonable when taken in respect of an employment dispute. However, this reinforced function does not apply to recognition, which still cannot be enforced in a court of law. Although disputes can be referred to JACS, it only has power to make recommendations. And because a collective employment dispute requires a collective agreement to be in place, a dispute over recognition would not in itself be a collective dispute giving unions immunity against tortious action in respect of any industrial action taken to achieve recognition. This asymmetry within the legislation is of concern.

33.(ii) **Code 1: Recognition of trade unions:** ILO Conventions require that where there is a process of recognition, recognition be afforded to the most representative union (Digest of 1985, para. 617). At the same time such a system should not have the effect of preventing minority unions from functioning and at least having the right to make representations on behalf of their members and to represent them in cases of individual grievances. (See the Digest of 1985, para. 616.)

34. So far as representativeness is concerned, Professor Ewing's opinion was that a union should be entitled to be recognised if it can demonstrate that 50% plus one of the employees in the bargaining unit are members of the union, or if it can show in a ballot that 50% plus one of the employees are in favour of recognition. The Forum in its Report of 1st February 2005 partially accepts these figures, proposing, however that if the employer does not accept the union's estimate of its membership, or if membership is below 50% plus one, then a ballot is necessary, and a ballot can only be held if at least 35% of the bargaining unit are in membership of the applicant union or would be willing to take up membership if recognition were granted. This is significantly higher than the figure in Britain, where a union is entitled to call for a ballot where 10% o the bargaining unit are in membership and there is other evidence indicating a majority would be likely to support recognition in a ballot.

35. Professor Ewing has detailed a number of concerns about the process of achieving recognition, and in particular the supervision of the process, the ballot and the resolution of disputes. All of these remain to be addressed, as does the proposed exemption for small businesses, employing 10 or fewer employees, which would have the effect of excluding 80% of the Island's employers. In order to comply with ILO obligations, Jersey is required to 'encourage and promote the full development' of collective bargaining. To exclude such a large proportion from the procedures would cast doubt on that policy. The ILO, as stated above, has also held that all unions should have the right to make representations on behalf of their members and represent them in individual grievances. This entails that, at the very least, there should be a right to be represented even in workplaces with 10 or fewer employees.

36.(iii) **Code 2 Procedure for resolving disputes:** The issue of binding arbitration has been dealt with above. The further major difficulty is the definition of reasonableness for the purposes of the Code, particularly since a union may lose its registration and hence its immunities for actions in tort if it is acting unreasonably in its use of procedure and the Registrar considers that acting in that way was one of the union's purposes. The Code would need to provide very clear guidance as to what is reasonable and unreasonable in this respect.

37.(iii) **Code 3: Balloting on industrial action:** The Forum suggest that the code should not be overly prescriptive so as to avoid conflicting with provisions in unions' own rule books. This is a welcome recognition of the importance of union autonomy. However, the major point of contention remains that of notice before industrial action. The Code provides that employers should be given such notice as necessary to warn customers, ensure the health and safety of employees or the public or to safeguard equipment which might otherwise suffer damage from being shut down or left without supervision, It

gives, as an example, the number, category or workplace of the employees concerned. While the Forum suggests that it would be reasonable to expect an employer to be provided with enough information to work out how the business will be affected, it is doubtful whether precise information as to the numbers, categories and workplaces of employees concerned is necessary to achieve that objective. Experience in England and Wales has shown in the last few years that allegations of inaccuracy in ballot notices is the principle ground on which injunctions are sought to restrain unions from industrial action. Thus earlier this year in an unreported decision (***University of North London v NATFHE***) an injunction was granted because though the union had specified the grade of every lecturer to be called out on a one day strike and identified the exact number and specified in relation to each which department or sub-department he or she worked in so that by consulting the timetable the University could ascertain every lecture which would not be given and the room in which it should have been delivered, the failure to identify at which site each lecturer had his or her desk was a breach of the requirement to specify workplaces.

38. Particularly serious is the link between the requirements for balloting and the retention of trade union immunity. Article 20(2) of ERL provides that an immunity is lost if an approved code of practice provides for the holding of a ballot and the ballot has not been held in accordance with the approved code, or a majority of those balloted do not support the industrial action. This means that even if a majority of those balloted support the action, a union could lose its immunity and a strike could become unlawful if even a small detail of the approved code has not been complied with. In particular, if a union does not give sufficient information to the employer to enable it to make plans to mitigate the effect of the strike, then even an overwhelming majority in favour of the action will not save it from unlawfulness. The experience in the UK bears ample testimony to the ability of employers to find breaches in the balloting provisions in British legislation and on the basis of this to gain an injunction or other remedy to prevent the strike.

39.(v) **Code 4 Limits on industrial action:** This code deals with three proposed limits: essential services, secondary action and picketing. Each is dealt with in turn.

40.(a) **Essential services:** The Forum has accepted that a code of practice is not an adequate basis to prohibit strikes in essential services. It does not propose that essential services should be regulated by legislation either. Instead, it suggests that appropriate limitations on strikes in essential services should be reached through agreement with the relevant union. Professor Ewing suggested that the ILO definition of essential service should be used and this has been accepted.

41. **Secondary Action:** The code of practice states that it would unreasonable to take industrial action in furtherance of a collective dispute in the following circumstances: (i) where action is taken in support of a 3rd party; (ii) where employees are not directly involved; (iii) where the dispute is not with the same employer; (iv) where the employees are not at the same place of work of those directly affected. The Forum suggested that all four could be summed up in a single definition of secondary action, namely 'where the employees are not a party to the dispute.' Article 20(3) provides that an immunity is lost if the conduct of a trade union is does not conform to the definition of in a code of practice of reasonable conduct when done in contemplation or furtherance of an employment dispute. Thus secondary action as here defined would render a strike unlawful and expose the union to liability in tort.

42. The ILO has reiterated on numerous occasions that 'workers should be able to take industrial action in relation to matters which affect them even though, in certain cases, the direct employer may not be party to the dispute, and that they should be able to participate in sympathy strikes provided the initial strike they are supporting is itself lawful.' (ILO Committee of Experts, 2003). A ban on secondary action is also in breach of the European Social Charter. It is clear that the effective ban on secondary action, through the fact that it is classed as unreasonable behaviour and therefore has the effect of removing union immunities, is in breach of Jersey's international obligations. Thus a union which had as a policy of upholding Jersey's international obligations by supporting secondary action where the protection of the interests of its members required it might well find that its registration would be denied or removed. This would appear to be, to say the least, inappropriate.

43. **Picketing:** The Code of Practice provides that picketing is considered reasonable only when it is one of

the following: to peacefully obtain and communicate information; or to peacefully persuade a person to work or not to work. The Code goes on to state that picketing in these two circumstances would be protected by immunities if all of those union members who are likely to be called to take part in the action have been balloted (in accordance with the code) and the majority of those are in favour of taking (or continuing) industrial action.

44. However, since, as mentioned above, there is no express provision in the ERL for picketing, the immunities mentioned are only for the torts specified in Article 19, namely inducement or threat of inducement of breach of contract. This means that even if all the conditions are satisfied, namely the picket is supported by a ballot and its aim is to peacefully persuade or communicate information, it could still entail the commission of a civil wrong. Indeed the Code states expressly that picketing is not protected from civil suits such as 'obstruction of a path, road, entrance or exit to premises; interference (e.g. because of noise or crowds) in the rights of neighbouring properties (i.e. private nuisance) and trespassing on private property.' It might be very difficult to hold a picket without some obstruction of a path, road, entrance or exit to premises and if these are unlawful under Jersey law, the union could not picket lawfully. It is our view that to give no immunity from such liability runs the risk of breaching the right to freedom of expression in Article 10 and/or freedom of assembly in Article 11 of the European Convention on Human Rights. It should be observed that in Canada the Supreme Court overturned Provincial legislation and legitimated secondary picketing in labour disputes on the grounds that the legislation offended the Canadian Charter of Rights and Freedoms in interfering with the freedom of expression guaranteed by the Charter (in similar language to the European Convention): ***Pepsi-Cola Canada Beverages (West) Ltd R.W.D.S.U., v Local 558.*** [2002] SCC 8 (held: there was nothing illegal or unlawful about secondary picketing and to find otherwise would have been contrary to freedom of expression guaranteed by the Canadian Charter; there was no legal basis consistent with freedom of expression to distinguish primary and secondary picketing: both were exercises in freedom of expression and both lawful, unless accompanied by unlawful conduct).

45. Suggestions that the right be further restricted to the employees' own place of work and to a maximum of six pickets received some support, but the TGWU's submission that it would be preferable to use a criterion of peacefulness is noted by the Forum. It is not clear, however, which approach is to be used.

John Hendy QC
Sandra Fredman
Old Square Chambers,
Gray's Inn,
London
22 September 2005

APPENDIX 2

Form of Petition

To: His Excellency Air Chief Marshal Sir John Cheshire KBE, CB, Lieutenant-Governor

To: Sir Philip Bailhache, Bailiff, President

To: the members of the States of Jersey

The humble petition of the residents of the Island of Jersey

shews that the Employment Relations (Jersey) Law 2005 and the Employment (Jersey) Law 2003 currently deny the employees of the Island the fundamental rights to recognition and representation and that the codes of practice, now out to consultation, may breach ILO Conventions 87 and 98.

Accordingly your petitioners pray that the Employment and Social Security Committee acts to remedy these faults and your petitioners as in duty bound will ever pray.

FULL NAME	ADDRESS	SIGNATURE

604 signatures