

STATES OF JERSEY

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DRAFT EMPLOYMENT (AMENDMENT No. 4) (JERSEY) LAW 200

**Lodged au Greffe on 21st November 2007
by the Minister for Social Security**

STATES GREFFE



Jersey

DRAFT EMPLOYMENT (AMENDMENT No. 4)(JERSEY) LAW 200

European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000 the Minister for Social Security has made the following statement –

In the view of the Minister for Social Security the provisions of the Draft Employment (Amendment No. 4, (Jersey) Law 200- are compatible with the Convention Rights.

(Signed) **Senator P.F. Routier**

REPORT

Introduction

The purpose of this Proposition is to amend the Employment (Jersey) Law 2003 to extend the Jersey Employment Tribunal's ("the Tribunal") jurisdiction in relation to unfair dismissal claims in two ways. It provides the Tribunal with –

1. The power to reduce an unfair dismissal award where an employee is found to have contributed to their own dismissal (in specified circumstances); and
2. The discretion to consider whether it would be appropriate for an unfairly dismissed employee to be re-employed by their employer (whether reinstatement or re-engagement), and the power to award additional compensation if the employer does not comply with a direction for re-employment.

Background

The Minister for Social Security has received representations from a number of interested parties on the above 2 issues relating to the powers of the Employment Tribunal in unfair dismissal awards and asked the independent Employment Forum to consider the issues in more detail and make a recommendation. The Forum recommended that the legislation should include the 2 additional powers; the Minister approved the recommendation in April 2007 and instructed that an amendment should be drafted accordingly.

Reduction in unfair dismissal compensation

An equivalent provision in a similar small jurisdiction is Article 23 of the Employment Protection (Guernsey) (Amendment) Law, 2005, which provides that the Employment and Discrimination Tribunal may reduce an unfair dismissal award in certain circumstances.

The Guernsey Tribunal may take into account whether an offer of reinstatement has been unreasonably refused, and any other circumstances in which the Tribunal considers that it would be just and equitable to reduce the award of compensation, to whatever extent it sees fit.

In the interests of natural justice, statutory provision has been made for the circumstances in which an award may be reduced in Jersey, which are similar to those in Great Britain, including for example; the employee's conduct, any other amounts paid to the employee by way of settlement, and the refusal of an offer of reinstatement.

Right to re-employment

Having carefully considered the issue of re-employment in its 2001 recommendation on unfair dismissal, the Forum was then of the opinion that there is nothing to be gained by having such a provision present in Jersey legislation. This was considered to be a sensible approach at that time; it was not intended to restrict the powers of the Tribunal and was recommended in the interests of avoiding unnecessary complexity.

However, following further consideration, the Forum's recommendation noted that Jersey is a more restricted employment market than the U.K., making the option of an award for re-employment more relevant and necessary.

The amendment makes provision for the Tribunal to consider 2 different options for re-employment as an alternative to financial compensation for dismissal; reinstatement, and the more flexible option of re-engagement.

Where **reinstatement** is awarded, the employee is to be treated in all respects as though the dismissal had not occurred, with no loss financially, or of seniority.

Where **re-engagement** is awarded, the employee is to be re-employed but not necessarily in the same job or on the same terms and conditions of employment; however, as far as possible, the terms must be as favourable as if the employee had been reinstated.

In deciding whether or not to make an order for reinstatement or re-engagement, the Tribunal will take into account the employee's wishes; the practicability of the employee returning to work for the employer (or a successor company); and in cases where the employee was partly to blame for the dismissal, whether or not it would be just to make such an order, and if so, on what terms.

Orders for reinstatement or re-engagement may include an award of compensation for any loss of earnings suffered during the period in which the employee was dismissed, and also compensation for any losses if the

employer refuses to comply fully with the terms of an order for re-employment.

If there has been a total failure to comply with an order for re-employment, the Tribunal will be able to make an additional award of compensation up to a maximum of 26 week's pay, unless the employer can satisfy the Tribunal that it was not reasonably practicable to comply with the order.

Financial/manpower implications

There are no financial or manpower implications for the States arising from the adoption of this Draft Law.

European Convention on Human Rights

Article 16 of the Human Rights (Jersey) Law 2000 requires the Minister in charge of a Projet de Loi to make a statement about the compatibility of the provisions of the Projet with the Convention rights (as defined by Article 1 of the Law). On 19th November 2007 the Minister for Social Security made the following statement before Second Reading of this Projet in the States Assembly –

In the view of the Minister for Social Security the provisions of the Draft Employment (Amendment No. 4, Jersey) Law 200- are compatible with the Convention Rights.

Explanatory Note

Part 1 – Interpretation

Article 1 defines the Employment (Jersey) Law 2003 as the principal Law.

Part 2 – Remedies for unfair dismissal

Article 2 amends Part 7 of the Employment (Jersey) Law 2003 in relation to remedies for unfair dismissal. It amends Article 77 of the principal Law so as to give the Jersey Employment Tribunal an additional power to direct the re-employment of a dismissed employee as an alternative to compensation. If the Tribunal finds an unfair dismissal complaint is well-founded, it must, if the complainant wishes, consider whether to make a direction for continued employment. If no such direction is made it must award compensation. Article 2 also inserts Articles 77A to 77G into the principal Law.

Article 77A– Direction for continued employment

This Article provides that a direction for continued employment is either a direction for reinstatement of the dismissed employee or a direction for his or her re-engagement in another job.

Article 77B– Direction for reinstatement

This Article sets out what a direction for reinstatement means. Under such a direction the dismissed employee is re-employed in all respects as if the dismissal had not taken place.

Article 77C– Direction for re-engagement

This Article sets out what a direction for re-engagement means. Under such a direction the dismissed employee is employed by his or her former employer, a successor employer or an associated employer on terms which are comparable to those of his or her former employment.

Article 77D– Choice of direction

This Article sets out the considerations that the Tribunal must take into account when deciding whether to make a direction for continued employment, and, if so, which type. In considering which direction to make, the Tribunal must consider whether it is practicable for the employer to comply with such a direction.

Article 77E– Enforcement of direction

This Article provides that if the employer does not comply with a direction for continued employment, the Tribunal shall make an award of compensation to the dismissed employee.

Article 77F– Compensation awards

This Article provides that if the Tribunal awards compensation instead of making a direction for continued employment, or awards compensation under Article 77E, it must do so in accordance with an Order made under this Article. The Tribunal may reduce the amount of compensation if it thinks it just and equitable to do so taking into account specified factors including the dismissed employee's conduct and any payments made to him or her.

Article 77G– Transitional provision

Under this Article, complaints for unfair dismissal presented to the Tribunal immediately before the date this Law comes into force will continue to be dealt with under the principal Law as if this Law had not come into force.

Part 3 – Miscellaneous and closing

Article 3 repeals Article 36 of the principal Law. This is because Article 36 cross refers to the definition of "employ" in the principal Law. That definition is repealed by the Employment Relations (Jersey) Law 2007.

Article 4 cites the short title of the Law and provides that it will come into force on such day as the States may by Act appoint.



Jersey

DRAFT EMPLOYMENT (AMENDMENT No. 4)(JERSEY) LAW 200

Arrangement

Article

PART 1

INTERPRETATION

1 Interpretation

PART 2

REMEDIES FOR UNFAIR DISMISSAL

2 Amendment of Part 7 of the Employment (Jersey) Law 2003

PART 3

MISCELLANEOUS AND CLOSING

3 Repeal of Article 36

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Jersey

DRAFT EMPLOYMENT (AMENDMENT No. 4)(JERSEY) LAW 200

A LAW to amend further the Employment (Jersey) Law 2003.

Adopted by the States [date to be inserted]

Sanctioned by Order of Her Majesty in Council [date to be inserted]

Registered by the Royal Court [date to be inserted]

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

PART 1

INTERPRETATION

1 Interpretation

In this Law, “principal Law” means the Employment (Jersey) Law 2003^[1].

PART 2

REMEDIES FOR UNFAIR DISMISSAL

2 Amendment of Part 7 of the Employment (Jersey) Law 2003

For Article 77 of the principal Law there shall be substituted the following Articles–

“77 Remedies

- (1) Where, on a complaint under Article 76, the Tribunal finds that the grounds of complaint are well-founded it shall, if the complainant wishes, consider whether to make a direction for continued employment under Article 77A.
- (2) If no direction is made under Article 77A, the Tribunal shall make an award of compensation calculated in accordance with Article 77F.

77A Direction for continued employment

The Tribunal may make a direction for continued employment as follows –

- (a) a direction that the employer reinstate the complainant in accordance with Article 77B;

or

- (b) a direction that the employer re-engage the complainant in other employment in accordance with Article 77C.

77B Direction for reinstatement

- (1) A direction for reinstatement is a direction that the employer shall treat the complainant in all respects as if the dismissal had not taken place.
- (2) On making a direction for reinstatement, the Tribunal shall specify –
 - (a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the effective date of termination and the date of reinstatement;
 - (b) any rights and privileges (including seniority and pension rights) which must be restored to the complainant; and
 - (c) the date by which the direction must be complied with.
- (3) If the complainant would have benefited from an improvement in the terms and conditions of employment had the dismissal not taken place, a direction for reinstatement shall require the complainant to be treated as if the complainant had benefited from that improvement from the date on which the complainant would have done so but for the dismissal.
- (4) In calculating for the purposes of paragraph (2)(a) any amount payable by the employer the Tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the effective date of termination and the date of reinstatement by way of –
 - (a) wages in lieu of notice or ex gratia payments paid by the employer; and
 - (b) remuneration paid in respect of employment with another employer, and such other benefits as the Tribunal thinks appropriate in the circumstances.

77C Direction for re-engagement

- (1) A direction for re-engagement is a direction, on such terms as the Tribunal thinks fit, that the complainant be engaged by the employer, or by a successor of the employer, or by an associated employer as defined in Article 79(7), in employment comparable to that from which the dismissal took place or other suitable employment.
- (2) On making a direction for re-engagement, the Tribunal shall specify the terms on which the re-engagement is to take place, including –
 - (a) the identity of the employer;
 - (b) the nature of the employment;
 - (c) the remuneration for the employment;
 - (d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the effective date of termination and the date of re-engagement;
 - (e) any rights and privileges (including seniority and pension rights) which must be restored to the complainant; and
 - (f) the date by which the direction must be complied with.
- (3) In calculating for the purposes of paragraph (2)(d) any amount payable by the employer,

the Tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the effective date of termination and the date of re-engagement by way of –

- (a) wages in lieu of notice or ex gratia payments paid by the employer; and
 - (b) remuneration paid in respect of employment with another employer,
- and such other benefits as the Tribunal thinks appropriate in the circumstances.

77D Choice of direction

- (1) If the complainant wishes the Tribunal to consider whether to make a direction for continued employment under Article 77A, the Tribunal shall consider first whether to make a direction for reinstatement.
- (2) In exercising its discretion under Article 77A(a), the Tribunal shall take into account–
 - (a) whether the complainant wishes to be reinstated;
 - (b) whether it is practicable for the employer to comply with a direction for reinstatement; and
 - (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to direct the reinstatement.
- (3) If the Tribunal decides not to make a direction for reinstatement it shall then consider whether to make a direction for re-engagement.
- (4) In exercising its discretion under Article 77A(b) the Tribunal shall take into account–
 - (a) any wish expressed by the complainant as to the nature of the direction to be made;
 - (b) whether it is practicable for the employer or a successor of the employer or an associated employer within the meaning of Article 79(7) (as the case requires) to comply with a direction for re-engagement; and
 - (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to direct that person's re-engagement and (if so) on what terms.
- (5) Except in a case where the Tribunal takes into account contributory fault under paragraph (4)(c) it shall, if it directs re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as a direction for reinstatement.
- (6) Where in any case an employer has engaged a permanent replacement for the complainant, the Tribunal shall not take that fact into account in determining, for the purposes of paragraph (2)(b) or (4)(b), whether it is practicable for the employer to comply with a direction for reinstatement or re-engagement.
- (7) Paragraph (6) does not apply where the employer shows –
 - (a) that it was not practicable for the employer to arrange for the complainant's work to be done without engaging a permanent replacement; or
 - (b) that –
 - (i) the employer engaged the permanent replacement after the lapse of a reasonable period without having heard from the complainant whether the complainant wished to be reinstated or re-engaged, and
 - (ii) when the employer engaged the permanent replacement it was no longer reasonable for the employer to arrange for the complainant's work to be done except by a permanent replacement.

77E Enforcement of direction

- (1) The Tribunal shall make an award of compensation, to be paid by the employer to the complainant, if –
 - (a) a direction under Article 77A is made and the complainant is reinstated or re-engaged, but
 - (b) the terms of the direction are not fully complied with.
- (2) Subject to the maximum amount prescribed for the purposes of Article 86(6), the amount of the compensation shall be such as the Tribunal thinks fit having regard to the loss sustained by the complainant in consequence of the failure to comply fully with the terms of the direction.
- (3) If a direction under Article 77A is made but the complainant is not reinstated or re-engaged, the Tribunal shall make –
 - (a) an award of compensation for unfair dismissal calculated in accordance with Article 77F; and
 - (b) an additional award of compensation of an amount up to 26 weeks' pay, to be paid by the employer to the complainant.
- (4) Paragraph (3)(b) does not apply where the employer satisfies the Tribunal that it was not practicable to comply with the direction.
- (5) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the Tribunal shall not take that fact into account in determining for the purposes of paragraph (4) whether it was practicable to comply with the direction for reinstatement or re-engagement unless the employer shows that it was not practicable to arrange for the dismissed employee's work to be done without engaging a permanent replacement.
- (6) Where in any case the Tribunal finds that the complainant has unreasonably prevented a direction under Article 77A from being complied with, in making an award of compensation for unfair dismissal the Tribunal shall take that conduct into account as a failure on the part of the complainant to mitigate loss.

77F Compensation awards

- (1) Subject to paragraph (3), an award under Article 77(2) or Article 77E(3)(a) shall be calculated in accordance with an Order made under paragraph (2).
- (2) The Minister shall by Order specify a scale of compensation which may be awarded by the Tribunal under Article 77(2) or Article 77E(3)(a).
- (3) An award under Article 77(2) or Article 77E(3)(a) may be reduced by such amount as the Tribunal considers just and equitable having regard to any of the circumstances described in paragraphs (4), (5), (7) and (8).
- (4) The Tribunal finds the complainant has either –
 - (a) unreasonably refused an offer by the employer which, if accepted, would have had the effect of reinstating the complainant in the complainant's former employment in all respects as if the dismissal had not taken place; or
 - (b) accepted such offer as is described in sub-paragraph (a) in circumstances where the Tribunal may reasonably conclude that at the time the offer was accepted the complainant intended to terminate the employment as soon as reasonably practicable.

- (5) The Tribunal considers that any conduct of the complainant before dismissal (or, where the dismissal was with notice, before the notice was given) was such that reduction of the award is just and equitable.
- (6) For the purposes of paragraph (5), the Tribunal may take into account conduct committed whilst in employment which came to light after notice was given or the act of dismissal occurred where such conduct is related to the circumstances giving rise to the notice being given or the act of dismissal taking place.
- (7) The complainant has agreed to receive a payment by way of settlement of the complaint (whether or not the dismissal is related to redundancy).
- (8) The complainant has been awarded a redundancy payment under any enactment or is entitled to a redundancy payment under his or her contract of employment.

77G Transitional provision

- (1) In this Article, “the specified date” means the date the Employment (Amendment No. 4) (Jersey) Law 200 comes into force.
- (2) If, before the specified date, a complaint has been presented to the Tribunal under Article 76 and has not been finally determined, the Tribunal shall deal with the complaint on or after the specified date as if the Employment (Amendment No. 4) (Jersey) Law 200-had not come into force.”.

PART 3

MISCELLANEOUS AND CLOSING

3 Repeal of Article 36

Article 36 of the principal Law shall be repealed.

4 Citation and commencement

- (1) This Law may be cited as the Employment (Amendment No. 4) (Jersey) Law 200.
- (2) This Law shall come into force on such day as the States may by Act appoint.

