

STATES OF JERSEY



DRAFT AIR AND SEA PORTS (INCORPORATION) (JERSEY) LAW 201- (P.5/2015): SECOND AMENDMENT (P.5/2015 Amd.(2)) – COMMENTS

**Presented to the States on 1st June 2015
by the Council of Ministers**

STATES GREFFE

COMMENTS

General

This amendment appears to be based on representations made by the union Prospect to the Economic Affairs Scrutiny Panel earlier this year, and in his accompanying report, Deputy G.P. Southern of St. Helier draws heavily on statements made by the Negotiations Officer to the Panel.

Prospect is one of 2 unions (the other is Unite) which comprise the Jersey Civil Service Staff Association. Prospect is primarily concerned with the UK, and the evidence on which the amendment rests is clearly submitted from a UK standpoint, and shows limited understanding of the local position or the arrangements for incorporation. (It also misrepresents statements made by Ministers on this and related issues, this is dealt with below.)

The amendment itself reflects this confusion. It is clear from the accompanying report that the overarching intention is to maintain the position of Ports of Jersey Limited (PoJL) staff for 3 years after incorporation, but the specific effects of the amending words and phrases are rather confusing in some cases.

The position of the Council of Ministers is that the amendment should be rejected in full on 2 grounds.

Firstly, the transfer arrangements have been subject to detailed consultation over a long period between the relevant staff, the unions and the employer. A position has been reached that seems to be a satisfactory compromise between the interests of the parties, and this has been drafted into the Law and is reflected in the Memorandum of Understanding. This is the States' policy for this incorporation and for any further transfers out of the public service where it can realistically be applied. It is the same policy that was applied in respect of the successful transfer of staff to Andium Homes. Changing this policy on the basis of Deputy Southern's amendment would mean reshaping the policy on the hoof without further consultation, negotiation or careful thought.

Secondly, the amendment itself creates some very strange effects, not all of which appear to be intentional, and which would create administrative and operational difficulties which would outweigh any perceived benefit that they might offer to the transferring staff.

Part 1 – redeployment

If adopted, this part of the amendment would allow Ports staff to 'redeploy' back into the States should they be made redundant by PoJL. The amendment would not guarantee that they would find employment in the States, but they would be legally entitled to the same process as allowed for under the current redeployment policy.

If the incorporation proposition is adopted, the staff at the Ports will be transferring into a new company which will sit outside of the public service. This has been the intention since the incorporation concept was first discussed, and has been known to the staff for several years.

Should questions of redundancies arise in practice, the amendment would seem to force the States Employment Board (SEB) into a position of dealing with demands for redeployment from employees of an organisation which is no longer part of the States of Jersey, potentially at the same time as necessary efficiencies are being made in the public service. Apart from the practical problems of trying to push external staff into a shrinking organisation, it is not clear at this time whether redeployment as it currently exists can be fulfilled within the public service. The amendment therefore appears to provide for PoJL staff to be given a legal right which cannot be guaranteed for States of Jersey staff.

While the SEB may well become responsible for undertaking the process, without any prior involvement, for the redeployment process of exiting PoJL staff, PoJL would be the ‘employer’ at the relevant time. The redeployment process does not, of course, guarantee redeployment.

Remedies for employees under the Employment (Jersey) Law 2003 are addressed to the employer, in this case PoJL. Either the company would therefore seem to be liable for any failure on the part of SEB to conduct effective proper redeployment process, or the court will be asked to take a leap in interpretation so as to rewrite the Employment (Jersey) Law 2003 to hypothesise that the SEB is the employer. Rights and remedies go hand in hand, and the draft amendments are problematic in failing to consider remedies.

This section introduces a narrow connection between the SEB and PoJL which would be deeply confusing to attempt to manage, as PoJL would be a separate entity in all other respects. Any safeguards would also rely on the goodwill of SEB (whose accountability for any failure of process is uncertain) instead of the reasonableness of PoJL, who would be accountable as the employer.

Part 2 – 3 year conditions lock

This section seeks to ‘lock in’ for 3 years whatever collective agreements are in place between the SEB and staff at the time of incorporation – it states in unqualified terms that such agreements “*shall not be changed within the period of 3 years*”. This would block any renegotiation of those agreements between staff and PoJL for that period. It would also stop any attempts by individual staff members to vary or opt out of the agreements.

This ‘lock in’ will not cover pay increases, as these are explicitly time-sensitive agreements that do not persist.

It has been agreed that upon incorporation, PoJL would take over all existing contracts and collective agreements. From that starting point, PoJL will have no greater capacity to unilaterally change collective agreements than the SEB will have if the employees were to remain in the States.

This section seems to greatly reduce the flexibility of the relationship between the employer and employee, which is perhaps its intention. It does mean that if the PoJL sought to better incentivise staff, for instance by offering performance-related pay, then that could not be applied generally, as this would amount to a new collective agreement cutting across those which the draft amendment would require to be in force for 3 years. The point goes further, limiting the ability to agree individual arrangements by opting out of existing collective agreements. This is because there

may come a point, if many such individual arrangements are entered into, that the existence of the agreements will materially alter the extent to which the collective agreement governs.

Part 3 – 3 year pension lock

The intention of this section is not clear.

PoJL will be an admitted body under the PECRS scheme, so the pension provision for its employees will remain the same as for States employees. As an admitted body, it is not within the gift of PoJL to unilaterally modify its pension arrangements.

The amendment does not require PoJL to enrol new staff into the PECRS scheme. It is PoJL's intention that new staff will join PECRS, and is not affected by the amendment.

Subject to States approval, the transfer from PECRS to PEPS CARE scheme is scheduled for 1st January 2019, so this amendment would not affect that change.

The freezing of terms, rights and liabilities for 3 years will not affect those issues where the existing PECRS Regulations themselves include a process for adjustments, e.g. pension increases and contribution rates. So in the highly unlikely event that changes to contribution or payment levels take place before the transition to PEPS CARE, they will affect the PoJL staff as well as States employees.¹ There does not seem to be any practical difference between this and the normal status of an admitted body.

As drafted, the amendment will cause PoJL members to miss out on certain changes. For example, following tax changes last year, the intention is to amend the PECRS Regulations to allow those retiring to commute a greater amount of their pensions. Those changes are intended to take place on 1st January 2016, and POJL members would be frozen in the October 2015 position.

The assumption is that Deputy Southern believes that there is some possibility that the PoJL will withdraw from PECRS. This would require the permission of the shareholder. The Council of Ministers (CoM) offers a categorical assurance that PoJL will not be permitted to do so for a period of 3 years. In practical terms, PoJL is unlikely to ever withdraw from PECRS or its successors, but a 3 year moratorium is sought by the amendment.

Statements made to the Scrutiny Panel

The CoM is very appreciative of the hard work carried out by the Scrutiny Panel in developing its response to the proposition. No criticism of the Panel is implied, but the accompanying report to the amendment contains statements made to it that should be corrected.

¹ There is a minor exception. Currently, if there is a reduction in the ordinary pension increase, but PECRS shows a surplus within 6 years, that surplus may be applied to reverse that reduction. There is a proposal to remove this as of 1st January 2016. Deputy Southern's amendment would mean that PoJL employees would continue to have the benefit of the existing position, even if the States were to approve removing the provision generally.

It is asserted that “*actually the Chief Minister made a statement in the Assembly that he intended to follow the Cabinet Office protocol [assumed to mean the ‘Cabinet Office and National Trade Union Committee Protocol for handling surplus staff situations’] ... I understand the Chief Minister was asked the question ... I think that was in a debate around the ports and airport.*”²

It is assumed that this refers to the Hansard record of 9th October 2012, during the States debate on the principle of incorporation. Deputy Southern refers to the Cabinet Office protocol (at 7.1.5) in connection with a question he asked earlier about Connex staff (at 6.1.1) of the then Minister for Transport and Technical Services. The Chief Minister did not make such a statement during that debate or the question period.

The creation of Visit Jersey is referred to as a ‘*sell-off*’³ in the style of British Telecom – this is not correct.

The Prospect representative goes on to say that: “*I would say if you are looking for something to base a success story on, maybe look at Andium Homes. Do not look at tourism. But this model legislatively needs considerably more detail in terms of the transfer terms, in terms of what the protections are going to be post transfer, about how they are going to be disposed of in terms of who is making those decisions.*”⁴

The transfer of Ports staff has been based solidly on the ‘Andium model’, which contained comparable arrangements, provisions and safeguards. The ‘Transfer of Public Sector Employees’ (TOPSE) Policy was developed jointly between Ports, Housing and the TUs. The policy was applied in its current form to manage the successful transfer of staff from Housing to Andium Homes.

Statement under Standing Order 37A [Presentation of comment relating to a proposition]

This comment was submitted to the States Greffe after noon on Friday 29th May 2015 as it was not possible to gain approval from all Ministers before that time.

² Consolidated for brevity – see page 4, paragraphs 5 and 6 of the amendment for the full text

³ See page 5, paragraph 1 of the amendment

⁴ See page 5, paragraph 1 of the amendment