STATES OF JERSEY

DRAFT EMPLOYMENT RELATIONS (JERSEY) LAW 200- (P.19/2005): THIRD AMENDMENTS

Lodged au Greffe on 26th April 2005
by Deputy G.P. Southern of St. Helier

STATES GREFFE

DRAFT EMPLOYMENT RELATIONS (JERSEY) LAW 200- (P.19/2005): THIRD AMENDMENTS

(1) PAGE 58, NEW ARTICLE 21A

Insert after Article 21, but before Part 4, the following new Article –

"21A Restrictions on Interim Relief

(1) Where –

(a) an application for an injunction is made to a court in the absence of the party against whom it is sought or any representative of that party, and

(b) the party claims, or in the opinion of the court would be likely to claim, that the party acted in contemplation or furtherance of a trade dispute,

the court shall not grant the relief sought unless satisfied that all steps which in the circumstances were reasonable have been taken with a view to securing that notice of the application and an opportunity of being heard with respect to the application have been given to the party.

(2) Where –

(a) an application for interim relief is made to a court pending the trial of an action, and

(b) the party against whom it is sought claims that the party acted in contemplation or furtherance of a trade dispute,

the court shall, in exercising its discretion whether or not to grant the relief, have regard to the likelihood of that party's succeeding at the trial of the action in establishing any matter which would afford a defence to the action under Article 19 (protection from certain tort liabilities)."

Renumber subsequent provisions and cross-references accordingly.

(2) PAGE 59, ARTICLE 22(3)(a) –

For the words ", a relevant contract of employment or a relevant handbook for employees" *substitute the following words –*

"or a relevant contract of employment".

(3) PAGE 60, ARTICLE 23 –

After paragraph (3) add the following paragraphs –

"(4) In a case where the Tribunal has made a declaration under paragraph (1) that a trade union is entitled to be recognized by an employer in accordance with an approved code of practice, the Tribunal may make an additional declaration.

(5) An additional declaration may be made under paragraph (4) if –

(a) it is claimed that the employer has failed to recognize the trade union; and

(b) the Tribunal is satisfied that the claim is well-founded.

(6) An additional declaration may provide for the incorporation into the individual contracts of employment of the employees to whom the additional declaration applies of the terms of the additional declaration.

(7) The employees to whom an additional declaration may apply are those in respect of whom a declaration has been made under paragraph (1) that a trade union must be recognized.".

(4) PAGE 60, ARTICLE 25 –

Insert in paragraph (1), after the words "this Law" *the following words –*

"(being a code of practice that is consistent with the Freedom of Association and Protection of the Right to Organise Convention (No. 87) and the Right to Organise and Collective Bargaining Convention (No. 98 of the International Labour Organisation)".

DEPUTY G.P. SOUTHERN OF ST. HELIER

REPORT

Members will be aware of the many fundamental reservations that have been expressed by both trade union representatives and their members concerning many issues contained in this draft Law over the past months. In its earlier drafts it appeared to restrict the ability of trade unionists to represent their members to such an extent as to render their task nigh on impossible. This version, lodged on 1st February, has gone some way to meet those reservations, but still in my opinion, contains much that may be harmful rather than helpful to fostering good industrial relations. These amendments have been brought in an attempt to achieve the fundamental aim of this Law, which is to have “fair play in the workplace”.

Members will be fully aware that as a result of the successful call for a reference back further meetings have been held most notably on 15th April, when positions were clarified and some progress was made. However agreement could not be found on many of the areas of contention, therefore necessitating these revised amendments.

Proposed Amendment 4

I shall start this report with Amendment (4), which despite being last in the order of the Article that it affects, is in fact the most critical in giving reassurance to those with the reservations outlined above, and I believe central to the effective operation of the Law. As has been pointed out by several members prior to this stage, the Law will take effect through a series of codes of practice. This amendment attempts to ensure that any such codes of practice are consistent with such international obligations as are applicable to Jersey.

These codes will deal with the sensitive areas around balloting for action, rules concerning picketing, and secondary action. In particular, many concerns have been expressed about the powers of the tribunal to go to binding arbitration following application from a single participant on the grounds of the “unreasonable” behaviour of the other party. There is a danger that the action of proceeding to a ballot for action (the right to strike) could be deemed as “unreasonable” in certain circumstances depending upon the manner in which the appropriate code is drafted.

I am now proposing that this amendment should be narrowed and limited in its application to ILO Conventions 87 and 98.

The following is a relevant passage from the ILO Committee of experts, 1989 on this critical issue:

“It appears to the Committee that where a boycott relates directly to the social and economic interests of workers involved in either or both of the original dispute and the secondary action, and where the original dispute and the secondary action are not unlawful in themselves, then that boycott should be regarded as a legitimate exercise of the right to strike. This is clearly consistent with the approach the Committee has adopted in relation to “sympathy strikes”: It would appear that more frequent recourse is being had to this form of action (i.e. sympathy strikes) because of the structure or the concentration of industries or the distribution of work centres in different regions of the world. The Committee considers that a general prohibition of sympathy strikes could lead to abuse and that workers should be able to take such action provided the initial strike they are supporting is itself lawful.”

(General Survey, paragraph 217)

This amendment ensures that the assurances given by the President of the Employment and Social Security Committee on many occasions that it is his intention to abide by international obligations are translated into their proper place in the main legislation.

Proposed Amendment 2

Amendment (2) is a very straightforward matter which strikes out the words “relevant handbook for employees” from Article 23(3)(a). The grounds are equally straightforward in that the two other elements in the Article are clearly open to negotiation and agreement by both parties; the third element, the company handbook, may not be. The Union representatives are currently giving consideration to whether the revised wording before members

today is sufficient to cover their reservations.

Proposed Amendment 3

This is designed to enable JET to make an award which will unilaterally vary terms and conditions of employment where an employer has failed to recognise a Union following a declaration by the Employment Tribunal. It is designed to provide a means of encouraging employers to comply with such orders without the coercion of a direct legal sanction. A precedent for such an award is to be found in U.K. legislation TULRCA 1992, Section 185.

I believe that in a recognition dispute in Jersey, a Union could make a complaint to the JET under Article 22 of the Draft Employment Legislation Law where an employer has failed to comply with the terms of the Code of Practice. The powers of the JET are currently limited by Article 24 which is unclear about how far the term 'relevant terms and conditions' extends. It is, therefore, suggested that Article 24 should be amended.

Proposed Amendment 1

The introduction of the new Article 21A seeks also to facilitate the smooth operation of the tribunal process and to maintain standards of "fair play" in employment relations. In this case, employers in the U.K. and elsewhere have resorted to the courts to find ways of putting a stop to the possibility of forthcoming action in a dispute that would otherwise be perfectly defensible under what we are to introduce in Article 19– Immunities from liability in tort for industrial action. These employers seek to use other mechanisms within the Law to render trade disputes illegal in effect avoiding or short-circuiting the basis envisaged for the Employment Relations Law. Paragraph (1) of the Article seeks to prevent the application for an injunction in the absence of the other party to a dispute. Paragraph (2) seeks to prevent use of an application for temporary relief from being used to bypass Article 19 of this Law, thereby preventing the effective operation of this Law and the States intentions for it.

The union's legal advisor has now had an opportunity to look at UCW v Le Maistre, 30th November 1992, which has been cited in support of the argument that amendment 1 is not needed as there is already sufficient safeguards built into Jersey law. However, this case does not, in his view, displace the need for the proposed amendment for the following reasons –

The case is concerned with a mandatory injunction in a claim in contract.

The proposed amendment is designed to deal with prohibitory injunctions arising in the context of tort, where the courts are much less restrained.

The case reveals that the House of Lords decision in American Cyanamid v Ethicon Ltd (1975) AC is authority in Jersey. This is a worrying part for the union as it is precisely because of this decision that what is now TULRCA 1992, section 221(2) was introduced into English law by the EPA 1975.

It is the advisor's view that the case for the proposed amendment is strengthened rather than weakened by what is revealed by the UCW v Le Maistre, 30 November 1992.

Financial and manpower implications

There are no financial or manpower implications arising from these amendments.