

STATES OF JERSEY



DRAFT EMPLOYMENT AND DISCRIMINATION (JERSEY) AMENDMENT LAW 202- (P.78/2024) : SECOND AMENDMENT (P.78/2024) – COMMENTS

**Presented to the States on 31st January 2025
by the Minister for Social Security**

STATES GREFFE

COMMENTS

Executive Summary

The Jersey Employment Forum is an apolitical group, established by the Employment Law. The Law establishes the Forum with an equal balance of employer, employee and independent representatives appointed by the States Assembly. The Forum considers issues of employment law independently of government. The proposed draft amendment to the Employment and Discrimination Laws relating to the compensation awards regime in Jersey, represents the unanimous view and recommendations of the Forum. The Forum's report and recommendations have been prepared after broad and open consultation, and careful consideration of the issues. The Forum's report sets out clearly the rationale for its recommendations.

The Amendment lodged by Deputy Ferey seeks to replace the Forum's recommendation of a maximum award of £50,000, or 52 weeks' pay, whichever is greater, with a lower cap of £30,000 or 52 weeks' pay, whichever is less.

The Minister urges the Assembly to reject the Amendment.

Introduction

Deputy Ferey has lodged an amendment to Proposition P.78/2024. P.78 sets out amendments to aspects of the Employment and Discrimination Laws relating to compensation awards for breaches of employment and discrimination rights, following the Minister's acceptance of the recommendations of the Employment Forum in summer 2024. The Deputy's amendment (no.2) relates to the maximum award in a claim for discrimination.

The maximum award currently is £10,000 per claim. The Proposition seeks the approval of the Assembly to increase the maximum award to £50,000 or 52 weeks' pay, whichever is the greater. The Deputy's amendment would set the maximum award at £30,000 or 52 weeks' pay, whichever is less.

The Jersey Employment Forum

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In 20 years of the operation of employment legislation in Jersey, successive Ministers have directed the Forum to investigate potential changes to the Employment Law and provide reports on their findings and recommendations. Other than in exceptional circumstances, Ministers at the time have accepted the Forum's reports and have brought forward legislation in line with the Forum's recommendations.

Review of compensation awards

In line with established practice, in 2023 the former Minister instructed the Forum to review the level of compensation awards. The current Minister received the Forum's report last year and accepted all of its recommendations. Following the usual practice,

the Minister published her response in Report R.129/2024 in August 2024 and lodged the draft legislation in November.

The Minister's personal political position, and the position of her party, is to campaign for higher or unlimited awards of compensation to be made available. Uncapped awards are already in place in the UK.

However, in her role as Minister for Social Security, she recognises the importance of supporting the recommendations of the independent Employment Forum. That includes the increase from £10,000 to £ 50,000 in respect of discrimination claims.

The Forum's report sets out the rationale for its recommendation:

“Given its serious concern that discrimination should not be tolerated in the workplace, the Forum considered very carefully whether to recommend that the future compensation structure should allow for an uncapped amount to be awarded, as is the case in the United Kingdom. The Forum is of the very firm belief that this should be the legislature's ultimate objective.

The Forum concluded, however, that the move from a £10,000 cap to an uncapped system would be too great a step at this time and that an opportunity needs to be given to employers to adjust their internal processes before an uncapped system is considered in the future.

Having decided that a maximum cap continues to be necessary at this time, the Forum then reflected upon an appropriate level of increase. In this regard, the Forum agreed that the objectives were to:

- *recognise that discrimination in the workplace can be deeply damaging and cause long-term issues for the victim; and*
- *encourage employers to take this issue seriously and to prioritise workforce training and a healthy workplace culture which rejects discriminatory behaviour*

In this context, the Forum recommends that the maximum joint award for financial loss and hurt and distress should increase from £10,000 to either £50,000 in total, or 52 weeks' pay, whichever is the greater. The Forum recommends that the maximum award for hurt and distress should be £30,000.”

Tribunal Guidelines

When considering individual cases brought before it the Employment and Discrimination Tribunal has adopted guidelines which govern its approach to deciding the level of compensation awards for breaches of the Employment and Discrimination Laws. These are guidelines which the Tribunal has applied for many years:

- *Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the discriminator. The*

Tribunal should remain objective of their personal feelings of indignation at a Respondent's conduct.

- *Awards should not be too low, as that would diminish respect for the policy of anti-discrimination legislation. The Jersey legislature has condemned discrimination, and awards must ensure that it is seen to be wrong. However, awards should be restrained since awarding sums of compensation which are generally felt to be excessive can do almost as much harm to the policy, and the results which is seeks to achieve, as awards that are too low.*
- *Tribunals should bear in mind the value in everyday life of the sum that they have in mind. This may be done by reference to purchasing power or earnings.*
- *Tribunals should remind themselves of the need to maintain public respect for the level of awards made.*

As the guidelines clearly demonstrate, it is important that Tribunal awards are not set too low but also that they should not be set too high. The increase in the maximum award to £50,000 has been judged by the Forum to set the right balance to allow the Tribunal to make awards that provide appropriate respect for the Discrimination Law but are not so excessive as to harm the aims of that law.

Deputy Ferey's amendment reflects the views principally put forward by small business representatives that the higher limit will pose an inappropriate burden on employers. These views fail to take account of the published guidelines or the many different scale and size of businesses that employ people on the Island.

Tribunal Powers

The Minister acknowledges the concern that an increase in the maximum award levels may lead to an increase in claims, at least temporarily, and appreciates the effect this may have in terms of the costs to an employer of defending such claims.

The Forum's recommendations including extending the power of the Tribunal to award costs in vexatious cases, in addition to its existing power to strike out such cases. The Minister has already included this item in her 2025 work plan. In addition the Minister will consider what steps need to be taken to enable the Tribunal to make Orders for compensation and have them enforced without requiring reference to the Petty Debts Court or the Royal Court. This will address the issue of the current £30,000 limit for Petty Debts Court judgements.

Tribunal awards under the Discrimination Law

In the period 2020 to 2024, only six discrimination cases succeeded, and in only one claim was the maximum awarded by the Tribunal for financial loss and hurt and distress. This demonstrates that awards reflect the varying severity of the discrimination complained of and are only made where significant breaches occur.

The Minister considers that employers who comply with the law have nothing to fear from these proposed changes. The Minister has made it clear in her response to the Forum's recommendations the importance she attaches to the effective promotion of

advice and assistance to employers, together with proper support to enable compliance with the law, which helps to educate, reassure and ultimately to rid the workplace of acts of discrimination more effectively. This will help to mitigate any risks an employer might feel when considering whether to employ individuals with particular needs.

Aligning the maximum award with the jurisdiction of the Petty Debts Court

Deputy Ferey's amendment seeks to limit the maximum award for financial loss to align with the jurisdictional limit of the Petty Debts Court, which currently stands at £30,000.

The Minister notes that when the original Proposition which lodged the draft Discrimination Law was debated (P.6/2013), there was a brief reference to the jurisdiction of the Petty Debts Court, which then stood at £10,000, but the Proposition itself made the following points:

"It was suggested by respondents during the latest consultation (2012), as well as during consultation undertaken in 2006, that the £10,000 limit of compensation is too low.....the Minister is satisfied with the proposed cap on compensation of £10,000 as an appropriate starting point, but it may be subject to review in the future." (Page 11, P.6/2013).

The Minister considers that a re-evaluation of the maximum award is long overdue (and was apparently long overdue in past years). In relation to the Petty Debts Court, the Forum considered whether aligning would be the correct approach but rejected that argument on the basis that equating the breach of a contractual right (claims for which the Petty Debts Court is the appropriate forum), such as, perhaps, the failure of an employer to pay an agreed bonus, with the actual effects and consequences of acts of discrimination would be a retrograde step.

The Forum described it thus in its report:

"The Forum considered whether to recommend a maximum cap in line with the Petty Debts Court jurisdiction. However, the Forum unanimously agreed that to do so would undermine the core message that workplace discrimination is considered more serious than a breach of contract and is not acceptable in a civilised society."

As noted above, the Minister will consider extending the power of the Tribunal to enforce judgements without recourse to the current Petty Debts Court and Royal Court routes in the planned review of Tribunal powers.

Medical model versus social model in the Discrimination Law

Deputy Ferey's Report refers to elements of both medical and social models of disability being present in the Discrimination Law and the need therefore to take a more nuanced approach to some claims of discrimination in Jersey.

Both UK and Jersey legislation take a similar approach to disability – an individual must have a long term impairment that has a negative impact on the ability of the person to undertake normal day to day activities. This can be seen as a medical model. Both laws also require employers and service providers to make reasonable adjustments to take account of disabilities. This can be seen as a social model.

The Minister notes that the Discrimination Law also covers the protected characteristics of race, age, sex, sexual orientation, gender reassignment and pregnancy and maternity, as well as disability. Each of these protected characteristics are reflected in the body of judgments of the Tribunal.

The Minister considers that the approach to the appropriate level of compensation awards cannot be justified by reference to a single protected characteristic, as the Deputy's Amendment and report seek to do.

Conclusion

Given the careful and thorough work done by the Employment Forum, the Minister for Social Security urges Members to support its findings and recommendations and reject this Amendment.