

STATES OF JERSEY

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

**Lodged au Greffe on 8th September 2008
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 Employment Tribunal's jurisdiction in relation to unfair dismissal claims in 2 ways–

- Power to reduce an unfair dismissal award where an employee is found to have contributed to their own dismissal.
- 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

Reduced Unfair Dismissal Award

In its December 2001 recommendation on unfair dismissal^[1], the Employment Forum stated that: *“on occasions the Tribunal may be of the opinion that the employee contributed to their dismissal (e.g. through poor conduct), and recommends that discretionary powers be given to the Tribunal to reduce the award on such grounds in order that natural justice will prevail.”*

The report that accompanied the draft Employment Law to the States noted that *“detailed legislation regarding financial awards will be set out in subordinate legislation. It is recognised that on occasions an employee may have contributed to their dismissal through inappropriate behaviour which falls short of fully justifying a dismissal. If the Tribunal believe than an employee has contributed to their dismissal it will have the power to reduce the value of the compensatory award.”*

The former Employment and Social Security Committee's intention was that, as in other jurisdictions, the Employment Tribunal should have the power to reduce an unfair dismissal award on a discretionary basis. It had been anticipated that this could be achieved by Order, under Article 77 of the Employment Law. However, that was not possible and it was intended to bring an appropriate amendment to the Employment Law in the future.

The Minister received a number of representations from interested parties during 2007 regarding the bringing forward of such an amendment, and the Minister was concerned that the absence of this provision was causing discontent for employers and frustration for the Tribunal.

Right to re-employment

The Forum's 2001 unfair dismissal recommendation stated that, *“research has shown that in other jurisdictions, there is provision for Tribunals to order that the dismissed employee should be reinstated to their previous employment after a decision of unfair dismissal has been determined. Having carefully considered this issue the Forum is of the opinion that there is nothing to be gained by having such a provision present in Jersey legislation. Of course, should both parties wish to enter into a new contract of employment there would be nothing to prevent this.”*

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 was of the view that Jersey is a more restricted employment market than the UK, making the option of an award for re-employment more relevant and necessary, even if it would be rarely used, and the Forum therefore reassessed its earlier recommendation.

The first draft amendment

The Minister asked the Forum to consider these 2 potential powers in detail and in 2007, the Forum issued its recommendation to the Minister.

A draft amendment to the Employment (Jersey) Law 2003 was prepared accordingly, however the Minister became aware that further consultation on the particulars of the draft amendment would be necessary prior to debating the proposition in the States.

The Minister therefore asked the Forum to issue a public consultation on the draft amendment so that comments from the public could be considered more widely on the provisions as drafted. Having undertaken the necessary

consultation with the public, the Forum issued its further recommendations to the Minister and the draft amendment has been revised accordingly. The following summarises the effect of the proposed amendment and the revisions that have been made to the draft following consultation.

REDUCED UNFAIR DISMISSAL AWARD

Currently, the Tribunal must order compensation to be paid to an employee who is found to have been unfairly dismissed in accordance with a scale based on length of service (up to a maximum of 26 weeks' pay for an employee with 5 years' service).

The proposed amendment to the Employment Law provides that the Tribunal may reduce the amount of unfair dismissal compensation awarded to the employee. The first draft of the amendment provided a limited set of circumstances that the Tribunal may take into account in deciding whether or not to reduce an award, to summarise –

- Where the employee has unreasonably refused an offer which would have effectively reinstated them in their former position;
- Where the employee's conduct before dismissal (or before notice was given) makes a reduction just and equitable;
- Where the employee has agreed to receive a payment by way of settlement;
- A contractual or statutory redundancy payment has been awarded.

Revisions

In accordance with the Forum's recommendations following consultation, the circumstances to be taken into account by the Tribunal when deciding whether to reduce an unfair dismissal award have been revised –

- Article 77F(5) clarifies that, when considering whether it would be just and equitable to reduce an award, the Tribunal will take into account any conduct of the employee that contributed directly to the dismissal so that it does not become a debate about the employee's general conduct or attendance record, for example.
- Article 77F(9) specifies that the Tribunal has the power to reduce an award where, in advance of the Tribunal hearing, the employee has rejected an offer from the employer for the maximum amount that the Tribunal could award if it found the dismissal to be unfair.
- Article 77F(10) provides that the circumstances leading to a reduced award should not be exhaustive. The Tribunal may take into account other just and equitable circumstances that merit a reduced award. By comparison, the Employment Protection (Guernsey) (Amendment) Law, 2005 provides that the Employment and Discrimination Tribunal may take into account any circumstances in which it considers that it would be just and equitable to reduce the award of compensation, to whatever extent it sees fit.

RIGHT TO RE-EMPLOYMENT

The Employment Law currently provides that the Tribunal must award financial compensation if an employee is found to have been unfairly dismissed; it may not award that the employee must be re-employed by their former employer. This is the case irrespective of the reasons for the dismissal, which might, for example, have been on the grounds that the employee asserted their right to the minimum wage or written terms of employment.

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

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

Where **re-engagement** is awarded, the employee must 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, unless the employee was partly to blame for the dismissal. In this case, the employee may be put into a job which is comparable, possibly with an associated or successor company.

When an employee wishes the Tribunal to consider re-employment instead of financial compensation, in deciding whether or not to make such an order, the Tribunal will take into account 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.

If the employer fully or partially fails to comply with an order for re-employment, the Tribunal may award additional compensation up to a maximum of 26 weeks' pay, unless the employer can satisfy the Tribunal that it was not reasonably practicable to comply with the order.

Revisions

In accordance with the Forum's recommendations, the following provisions have been amended since the draft was consulted upon –

- Article 77G clarifies that where the Tribunal has ordered that an employee must be re-employed (whether reinstatement or re-engagement), the employee's continuity of employment must be preserved for the period between the dismissal and the order to re-employ and the interim period counts as a period of employment.
- Articles 77B and 77C have been amended on the grounds that the Forum recommended that the Tribunal should not have the power to compensate an employee for financial losses, such as arrears of pay, for the period between the dismissal and the order for re-employment, until such a time as the award-making powers of the Tribunal have been reviewed more generally. To make the option of reinstatement more financially beneficial to employees than the unfair dismissal award would be potentially detrimental to local businesses. Equivalent financial compensation is not available to unfairly dismissed employees who are not seeking re-employment and the Minister accepted the Forum's concern that the possibility of receiving additional compensation on these grounds may lead employees to apply for re-employment as a matter of course, resulting in a reduced number of pre-hearing settlements. The draft provides that any other rights and privileges, including any improvements in terms and conditions that the employee would have been entitled to, must be restored to the employee from the date of re-employment.

Further to that recommendation, it became clear during the drafting of this amendment that preserving an employee's continuity of employment from the date of dismissal will not protect the continuity of contributory pensions, other contributory benefit schemes and bonus entitlements. The draft therefore reflects the recommendation that employees should not receive arrears of pay for the period between dismissal and re-employment, however gives the Tribunal the power to award some financial recompense, in that that pension schemes and other contributory schemes for the benefit of the employee must be reinstated from the date of dismissal, rather than the date of re-employment, as well as any bonuses an employee might reasonably be expected to receive.

The Minister did not accept one of the Forum's recommendations. The Forum recommended that the amendment should be clarified to require the Tribunal to take into account the evidence presented by both parties in its consideration of whether re-employment is "practicable". The Minister understands that this recommendation was provided to allay the concerns of employers regarding the evidence that the Tribunal will take into account in determining whether re-employment is "practicable".

The Minister has received advice that, as currently drafted, the Tribunal would already be bound to require and consider evidence from both parties in its consideration of "practicability". The Minister understands that it is inappropriate to insert such a requirement explicitly in relation to this Article because it suggests that the Tribunal will not consider both parties' evidence in relation to other factors, such as in considering whether the employee had contributed to his or her dismissal to any extent.

Although the Minister appreciates the desire for an explicit duty for the Tribunal to take both parties' evidence into account, in view of the advice received, the Minister considers that this additional provision should not be made and that detailed guidance based on the UK precedent of the test of practicability would allay the concerns of employers.

CONCLUSION

Having conducted additional public consultation on the draft amendment at the direction of the Minister for Social Security, the independent Employment Forum has reaffirmed its recommendation that the Employment Law should be amended to give the Tribunal the 2 proposed additional powers in relation to unfair dismissal awards; giving the Tribunal the power to reduce an employee's unfair dismissal award in certain circumstances and the discretion to consider whether it would be practicable to award re-employment instead of financial compensation.

Given the support for the new powers from the Employment Forum, which is balanced in its membership;

consisting of 3 employer, 3 employee and 3 independent representatives, the Minister is confident that the amendment provides an appropriate balance which can be of benefit to both employers and employees.

The Minister accepted all but one of the Employment Forum's recommendations (which was rejected on the grounds of advice that it would be unnecessary) and the draft amendment has been revised accordingly. The Minister is satisfied that Members should be asked to adopt the amendment.

Financial/manpower implications

There are no financial or manpower implications arising from 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 5th September 2008 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 77H 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 as if the dismissal had not taken place in most respects. Arrears of pay between the date of dismissal and reinstatement are not payable (with certain specified exceptions) and any improvement in the terms and conditions of employment between the date of dismissal and reinstatement apply to the terms of employment from the date of reinstatement, not the date of dismissal.

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 – Continuity of employment

This Article provides that reinstatement or re-engagement by an employer does not break a period of employment and counts in the computation of that period of employment.

Article 77H– 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 crossrefers 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

4 Citation and commencement



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, subject to paragraphs (3) and (6).
- (2) On making a direction for reinstatement, the Tribunal shall specify –
 - (a) any rights and privileges (including seniority and pension rights) which must be restored to the complainant upon reinstatement; and
 - (b) the date by which the direction must be complied with.
- (3) A direction shall include any amount payable by the employer in respect of any benefit the complainant might reasonably be expected to have had but for the dismissal, excluding arrears of pay, during the period between the effective date of termination and the date of reinstatement.
- (4) For the purposes of paragraph (3), ‘pay’ excludes –
 - (a) any contributions payable by the employer in respect of the complainant to any superannuation scheme or any bona fide pension scheme or any other scheme for the benefit of employees or for the benefit of any wife or widow of such employees or of employees’ children or other dependents;
 - (b) any bonus the complaint might reasonably be expected to receive during his or her employment by way of remuneration.
- (5) For the purposes of paragraph (4)(b), ‘bonus’ does not include tips, commission or similar payments.
- (6) 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 benefit from that improvement as if the improvement were included in the terms and conditions of employment from the date on which the complainant is reinstated.

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 the complainant might reasonably be expected to have had but for the dismissal, excluding arrears of pay, for the period between the effective date of termination and the date of reinstatement.
 - (e) any rights and privileges (including seniority and pension rights) which must be restored to the complainant upon reinstatement; and

- (f) the date by which the direction must be complied with.
- (3) For the purposes of paragraph (2)(d), ‘pay’ excludes –
 - (a) any contributions payable by the employer in respect of the complainant to any superannuation scheme or any bona fide pension scheme or any other scheme for the benefit of employees or for the benefit of any wife or widow of such employees or of employees’ children or other dependents; and
 - (b) any bonus the complaint might reasonably be expected to receive during his or her employment by way of remuneration.
- (4) For the purposes of paragraph (3)(b), ‘bonus’ does not include tips, commission or similar payments.

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) The amount of the compensation shall be such as the Tribunal thinks fit of an amount up to 26 weeks' pay.
- (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), (8), (9) and (10).
- (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; 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) that contributed directly to the dismissal 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.
- (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.
- (9) The complainant has refused an offer by the employer made before commencement of proceedings before the Tribunal for an amount equal to the maximum award that the Tribunal could award in respect of the complainant under Article 77(2) or Article 77E(3)(a) (as the case requires).
- (10) Any circumstances that the Tribunal considers would be just and equitable to take into account.

77G Continuity of employment

If, following a direction under Article 77A, a complainant is reinstated or re-engaged by his or her employer or by a successor or associated employer as defined in Article 79(7) (as the case requires), the period beginning with the effective date of termination and ending with the date of reinstatement or re-engagement –

- (a) does not break the continuity of the period of employment; and
- (b) counts in computing the period of employment.

77H 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.

[1] http://www.gov.je/NR/rdonlyres/EA93958E-CF6E-497D-B7C2-114AADEE6D41/0/reccomendation_unfair_dismissal.pdf

[1] *chapter 05.255*