



Economic and International Affairs Scrutiny Panel

Family Friendly Employment Rights

Witness: Jersey Advocate

Tuesday, 7th May 2019

Panel:

Deputy K.F. Morel of St. Lawrence (Chairman)

Deputy D. Johnson of St. Mary (Vice-Chairman)

Senator K.L. Moore

Witness:

Mr. D. Read, Jersey Advocate

[13:34]

Deputy K.F. Morel of St. Lawrence (Chairman):

Thank you so much for coming along.

Jersey Advocate:

You are welcome.

Deputy K.F. Morel:

Yes, really helpful, your submission, and also obviously you coming in. We have been working for a couple of months now trying to gather more evidence about this family friendly legislation and obviously legal insights are really useful. Before we get started we will just go around the table, the 4 of us, just stating our names for the record. My name is Deputy Kirsten Morel and I am the Chairman of the panel.

Senator K.L. Moore:

I am Senator Kristina Moore and I am a member of the panel.

Deputy D. Johnson of St. Mary (Vice-Chairman):

David Johnson, Deputy of St. Mary, Vice-Chairman.

Jersey Advocate:

Advocate Daniel Read from Walkers. I am an advocate specialising in employment law.

Deputy K.F. Morel:

Brilliant, thank you. Also can you just confirm, are you here in a personal capacity today?

Jersey Advocate:

I am here in a personal capacity in that this is not something that Walkers are commissioned, but I work at Walkers and I deal with employment law matters.

Deputy K.F. Morel:

Yes, that is fine. Thank you very much. Yes, it should be quite simple. We are really just going to go through your submission and ask you questions about that and then on to wider subjects. I have taken it kind of as read, because in your submission you say that you are not talking about policy, you are talking about the legal aspects, and I have assumed that is where you want to stick today, but if you do want to talk about policy, feel free.

Jersey Advocate:

Really my view is it is not for me as a lawyer to define policy. Policy rests within the exclusive ambit of the States and so it is up to the States to determine what the social policy is. I think that the challenge from my perspective would be is this social policy that they are looking to bring in, what they want to bring in and have they thought about it in a holistic fashion, rather than just focusing on amendments to the Employment Law and a minor amendment to the Discrimination Law? Have they looked at the segue between Social Security, discrimination in employment, the wider employment market? To me that is all a relevant consideration, but again, that is outside what I feel competent to be able to talk to you about. I think for me really where I was looking at it was to look at the structural issues and the technical points that arose from this Employment Law.

Deputy K.F. Morel:

Brilliant, thank you. That will be fine. We will keep you in that area then for your own comfort. We will start off with one of the first aspects you raise, which is this idea of the transferability of the leave, so if you are with one employer and you take leave, parental leave, but then you move to another employer, you raise questions about whether that can be done or not.

Jersey Advocate:

Yes, and I think from my experience, most employers would like to know exactly what their rights and obligations are. I know that you have had some comments before about there being a conversation in relation to a different area, but about the ability for the employer to be able to have a conversation with the employee. I think when you are looking at discrimination law, businesses are very risk averse, so if it is not spelt out in black and white what the rights are, they are going to struggle to do anything but apply what they see in the law and they are going to take the least risky approach, which is to not raise it as a conversation. If we look at the transferability provisions, I guess my concern there is, one, it is day one right, as it is at the moment, the ability to take parental leave, so an employee could start a new job, take parental leave. They could leave that job and then go to their new employer and take parental leave. You have got an issue there of each employer not knowing how much has been taken, not having automatic access to such security records, for data protection reasons not necessarily having access to the previous employer's employment files. So when I talked about that holistic review, I think that is a relevant consideration. Do you create an exemption in the data protection law to allow for the transfer of the data from one employer to another to facilitate parental leave? I think we have to appreciate that we have a relatively mobile workforce in Jersey and people can move, because of the scarcity of a viable workforce, good employees, they are in a market being able to market themselves and move. So we have got a potential system over a long period, 2 years, 3 tranches, where employers are going to have a potential administrative burden. I think that creates an unnecessary risk for employers. They need to do know. Does it apply? Yes. If it applies: "How can I control this in the sense of knowing what has been taken and what do they still have to take and therefore make adjustments for it before hiring the employee?"

Deputy K.F. Morel:

Absolutely.

Senator K.L. Moore:

It also raises the ability to negotiate on behalf of the employer's side, because it is very much: "This will be my decision moving forward" from the employee, but no right to negotiate with only 15 days' notice.

Jersey Advocate:

I think that is a real concern. Again, I know that the comments that you had back from the Minister were that that is the existing scenario, but you cannot compare the status quo with what is proposed, because you are comparing apples and oranges. The status quo is a very different system, it is 26 weeks for a female employee, which must be taken contiguously, so they have to take the 26 weeks, and up to a year for a male employee, 2 paid and the rest unpaid. You are going to a completely

different system where you have got shared rights, you have got both parents potentially taking up to a year off over that tranche. I think from an administrative perspective the unilateral notice is probably the biggest worry. I know reading some of the other responses you have had more recently that has been a particular concern, because a day one right and a unilateral power means that all of the control rests with the employee. I understand the policy reasons, why you may want to make sure that there is - and I do not know the exact answer to it - to consider whether you continue to ring-fence the first 26 weeks and say that any request in the first 26 weeks is a unilateral request, but after that the employer has the ability to agree when the periods are with the employee because of operational reasons. So much as you would run your holiday rota, you get your employee to agree so you can make provision for it. Because if you think about it in this way, you can have an employee who takes off the first 6 months and then it is the summer holidays, so they say: "Okay, I am taking that off" and the employer cannot do anything about that, and then they say: "Okay, but I am going to take off Christmas as well." So you have got the 2 main pinch-points for a business and no right to respond.

The Deputy of St. Mary:

We have thought about that and we are concerned about that, because in a sense it affects other employees as well. They appear not to be thought of in this whole thing.

Jersey Advocate:

I think that is a really relevant point. It is that when you are looking at the employment relationship, it is not just about the individual employee who is taking the parental leave, you have got a workforce and that can be a workforce of 5 or that can be a workforce of 800. You have still got individual teams, you have still got tensions, you have still got, as I say, these pinch-points. You always get pinch-points in the workplace. If the purpose of the law is to shift the unconscious bias, it is to shift the way people think about people taking parental leave, which I think is an admirable policy, we need to make sure that the structure that is in place does that and it does not aggravate the tension in the workplace and does not aggravate the unconscious bias for employers that they may feel about someone taking parental leave. I think a proper balance should be sought so that you balance the employee rights and the employer rights.

The Deputy of St. Mary:

I am glad you mentioned the word "teams" there, because there is an amendment out there which applies to small businesses. I take your view that it is difficult to impose a minimum number. The same effect is going to happen on a big business or a small one, depending on the size of their department.

Jersey Advocate:

I think that is right. It is very, very difficult to legislate for a micro-employer. I think that for a big business, more naturally they have more capacity to make adjustment, but simply saying a small employer is the only one who is going to be affected by this is too reductive a view. All businesses are going to be affected by this, because all businesses have to manage their teams and have to manage their staff.

The Deputy of St. Mary:

Thanks for that clarification, yes.

Deputy K.F. Morel:

Can I just ask you about the idea of switching employees while in a period of leave? We have been asking and are trying to find out more about this and it has been suggested that in the proposed law, it says you have to give notice of your leave 15 weeks before the due date of the birth. It has been suggested that that stops the transference, because as we understand it, the department do not intend this to be transferable between employers and so we are looking for is there anything which stops it being transferable. This has been suggested as a way of stopping it being transferable. I just wondered what you thought about that as a mechanism to stop this transference.

Jersey Advocate:

I do not think that stacks up, because if you look at the way it is drafted, it is the same as the current law. It is a 15-week notice period under the current law and it says "where practicable" and it allows you to give notice at a later date. Because there is no absolute and there is no express sanction in the law that prohibits notice after that date, the argument will always be made - and I suspect it would be treated very sympathetically - that it was not practicable for me to give notice 15 weeks before. I have gone to a new job. I have a statutory right with no qualification period. The law does not say I cannot transfer it and therefore, as you probably know, the way statutory interpretation works is you need to look at the express terms of the law. If there is not anything express, you then look at the wider context. In my view, if you look at the wider context of this, the fact that you can change your leave periods with only 2 weeks' notice, which is less than the 15 weeks, all of that suggests, looking at it purposively, an employee would be allowed to switch their employment to a new employer.

Deputy K.F. Morel:

So you are quite convinced that a convincing argument could be made?

Jersey Advocate:

I think a very convincing argument could be made.

Deputy K.F. Morel:

That is interesting.

The Deputy of St. Mary:

That is an interesting point, yes, because ...

Deputy K.F. Morel:

Yes, it is a really important aspect.

The Deputy of St. Mary:

... you get 2 lawyers in a room, there is going to be disagreement, is there not?

Jersey Advocate:

Of course there is, absolutely, but I think if you are saying that the 15-week notice period is an absolute brake on the ability to switch employers, it does not do that. That is not what it is there to do, it is there to allow an existing employer to hire maternity cover or parental leave cover with sufficient time, but it has already got built in a mechanism to allow an employee to give later notice, for whatever reason.

[13:45]

It is not like a request for flexible working, where you have your set parameters than an employer can look at and consider, or for an employee set parameters where you can give notice outside the 15-week window. It is deliberately drafted to be open and wide because it is meant to allow sufficient flexibility for a number of different variables to happen, but because of that flexibility, my view is, yes, a very good argument could be made that it is a transferable right.

The Deputy of St. Mary:

Again, were you involved at the time the Employment Forum came out with recommendations? Were you involved at that stage or ...

Jersey Advocate:

I was not involved. I have read the E.L.A. (Employment Lawyers Association) response. I am a member of the E.L.A. and they responded to that consultation, but I did not personally, and I did not feed into it at that time. I did not look at the consultation then. Of course now I have read the forum's committee transcript and I endorse what they say there. It is that they do not do the drafting, it is not for them to put in place the mechanism.

The Deputy of St. Mary:

From what you read, are you convinced that the department expect the rights to be transportable?

Jersey Advocate:

I say it is ambiguous.

The Deputy of St. Mary:

It is something for us to find out, but I do not mean ...

Deputy K.F. Morel:

I believe they told us that they do not expect it to be transportable.

The Deputy of St. Mary:

In which case we can kill it with an amendment, presumably.

Jersey Advocate:

You could kill it with an amendment. Unless and until it is debated and it is then recorded in Hansard, it is going to be difficult to be able to rely on that when you are in court to say: "This is the intention behind the draftsmen when they were putting it in place" and so you either do it by amendment, you do it by Hansard. Hansard is soft; an amendment is hard; it is black and white letter of the law. That to me is advantageous. Employers and employees want to know exactly what their rights are. I think it is wrong to look at it from one perspective or the other. Certainly when the E.L.A. met to discuss this, we advised both parties. Employees need to know what they can and cannot ask for, because that is why tension arises in the workplace.

Deputy K.F. Morel:

As an employee, knowing what you can and cannot ask for gives you the strength to ask for it ...

Jersey Advocate:

Absolutely.

Deputy K.F. Morel:

... because if somebody is quite timid, they do not ask for these things.

Jersey Advocate:

Absolutely. I endorse that wholeheartedly. I think that is absolutely right.

Senator K.L. Moore:

Are there examples in other jurisdictions of good practice, where the law that has been drafted has overcome some of the blockages you have highlighted in terms of workability?

Jersey Advocate:

I think it is hard to compare us with the U.K. (United Kingdom), which is the only other jurisdiction where we might look at. Guernsey is an unpaid system, so it is a completely different period. The U.K. have gone for a shared model, but so much of that is underpinned by statutory parental pay, based on Social Security contributions, asexual in that regard. So obviously our system continues to have an inbuilt element of discrimination that I pay exactly the same Social Security contributions as a female employee, but I have no access to any form of paid parental leave from the States. Again, that is not an amendment that has been considered to try and equalise the statutory pay, even though we pay exactly the same Social Security contributions. The U.K. have gone for that model. They have got a qualification period; they have got a formal notice provision in play. All of those are the types of mechanisms you would expect to see in place so that everyone knows where they stand.

Deputy K.F. Morel:

Could I ask, just going back to the idea of this unilateral notice period - and really throughout the whole law it is a very one-sided conversation; in fact, it is not a conversation - in your experience, we have talked about the possibility of having kind of set criteria within the law that an employer could use to say: "Well, no, please. We cannot do Christmas because of X, Y and Z." Do you think that is a way forward in order to allow a conversation or do you think it is possible to write the right to a conversation within the law? I think as a panel we are looking at this idea of allowing the employer some aspects, some flexibility on their side as well and it is just a matter of trying to understand how best to go about that.

Jersey Advocate:

I think the mechanism that is put in place would need to be well thought out. Without seeing what is proposed from the draftsmen, it is difficult to comment on that.

Deputy K.F. Morel:

Yes, I appreciate that.

Jersey Advocate:

I think the flexible working regime has worked in the U.K. because people know the approach that is going to be applied, they know the reasons why an employer might be able to say no. I think if you are looking at a mechanism, that is a good model to consider adapting, but it will not be a one size fits all structure. I think really you have got operational reasons, and that is probably going to

be your main reason, to be honest, is going to be operational reasons. In terms of the specific structure, I probably cannot give you much more than that, I am afraid.

Deputy K.F. Morel:

Yes. No, it is whether it is possible to have a more open kind of way or whether it is better just to direct the reasons.

Jersey Advocate:

I think that flips the other side and so you then end up with the employees not knowing where they stand and the employer having too much of a right to reject. I guess also what works with the flexible working mechanism, not that there have been any cases in Jersey, but if an employee disagrees with a decision, they have a right to appeal under the law. Again, if you work in a right of appeal to the employer and then have a right of access to the tribunal, so if there is a rejection to a request for extended maternity, for extended parental leave, they can go to the tribunal and then you have a dedicated body, independent, expert, who is able to determine it and then those judgments would set parameters for employers and employees alike in the future.

The Deputy of St. Mary:

I mentioned before the same draft law, the duties to provide facilities for breastfeeding in 15K(2), they seem fairly general. Could that be usefully used as a precedent to set the parameters for the parental leave aspect?

Jersey Advocate:

They are very similar. Those parameters are very similar to the reasonable adjustments parameters for disability discrimination law. I suspect they have taken those as a model. I think you have got different considerations because you are looking at physical access to a room rather than dealing with your workforce and forward planning and how you are managing that absence, but that is really what you are looking at.

The Deputy of St. Mary:

I accept that, but the actual extent of financial, administrative and other resources available and the characteristics of the employer, the size of business, they all seem to be fairly relevant.

Jersey Advocate:

Those would all be potentially relevant. It also puts a heavy burden on the employer, do not forget, because it says the employer must take all reasonable steps, so that is suggesting it is not just the employer needs to consider it, the employer needs to facilitate this where they can. I think making it quite a positive duty ...

The Deputy of St. Mary:

Yes, so we are being quite strong if we suggested something on those lines, the reasonable steps?

Jersey Advocate:

Yes, because you are saying it is more than taking steps, it is all taking all reasonable steps, doing whatever they can to make sure that this happens. On the breastfeeding, I noticed when I was looking through it yesterday - I do not know whether you have had anyone talk to you about this - is there is a provision in there about paid time off work in the first 52 weeks. Again, I do not want to talk about it too much because it strays into social policy, but I guess my challenge there is is there any scientific evidence to support the basis for that and is there any actual industry evidence to support the basis for that? Is that going to solve a problem? Because what you are doing with that provision is you are creating ... sorry, I am not explaining it very well, but there is a term in the law that says if a mother is breastfeeding and she makes an application within the first 52 weeks, she is entitled to time off to breastfeed and entitled to be paid her normal pay for that time off to undertake that activity. It effectively equates that time off ... it applies the same test to time off for antenatal appointments, so it is saying that breastfeeding ... it is equating breastfeeding to effectively medical appointments. I am not sure that is the right analogy to apply and I am not sure whether that is potentially corrosive by applying that analogy. I think you are also looking at again a point of social policy there. I do not know the rights or wrongs from it, and I think it is for the States to discuss and to consider very carefully. If you are saying: "As a matter of social policy we want to encourage women to breastfeed for 52 weeks, a prerogative of the States", absolutely, but the burden is being put on to employers and employers solely. It seems to me where you are talking about matters of social policy, the lead should come from the States. Again, I know the challenge there as well. We need to look at increasing tax or increasing Social Security contributions. Again, that points to the wider policy discussion behind it. This is a very sweeping change, very positive on a social progressive policy basis. If it has higher costs, that needs to be considered, and not just costs for the States, but costs for business as a whole. I just think that is something that I certainly have not seen anyone else comment on, the fact that that burden is going to be entirely with employers to allow paid time off so the employee does not have to work additional hours, so the employer will be losing 3, 4 chunks of time within their day. That needs to be considered.

Deputy K.F. Morel:

Yes, that is very interesting. Can I ask, just going back to where you said it is corrosive to equate breastfeeding with medical appointments, I was just wondering what ... purely because I genuinely did not understand in what way was it corrosive.

Jersey Advocate:

You are using language or ... so whenever you look at a disability, often a lot of the challenges come because of the way people frame it and the language people use to describe a disability. There is a lot of conversation at the moment around the medical model of disability and the social model of disabilities. Our sister island is putting in place a social model, which looks at how we change our behaviours to facilitate people with disabilities getting back into work. We have taken the medical model. We look at medical definition. By using a medical definition or by equating something to something that is medical, you are using a very stark scientific interpretation for something and you are saying: "We need to give them this time off." To me, what I am thinking, you are saying: "We need to give paid time off for breastfeeding because it is a medical condition" and that is not the policy behind it. You are saying we need to give them the paid time off because of all of the potential social benefits for ...

Deputy K.F. Morel:

The benefit that will accrue to the child and the family and so on, yes.

Jersey Advocate:

Exactly, and for a woman who is breastfeeding, the ability to have the time off and the ability not to stress about missing time off work, the ability to get their headspace right, the ability to express and remove the pain, all of those issues would be very positive for that female employee. But I think simply equating it to time off for antenatal appointments could potentially undermine all of those positives.

Deputy K.F. Morel:

That is interesting.

Senator K.L. Moore:

So there needs to be a different way of expressing the law in terms of the draft law?

Jersey Advocate:

I think so, for me, and that is a view for me, looking at it on a more holistic social view.

Senator K.L. Moore:

Are there any models that you are aware of that might offer the correct ...

Jersey Advocate:

I am struggling on the model front, really, because ...

Deputy K.F. Morel:

Yes, that is fine.

Jersey Advocate:

... if you look at the U.K., that is probably going to be the closest. Other common law jurisdictions, you might want to look at Australia and New Zealand and see how they do it. It is difficult to say: "Go out to Scandinavia and look at what they do." They do things very well there, so in Finland all male employees have to take 4 months off, they have to take that time off. That is all about making sure that both parents have time with their children, but it is also about challenging attitudes in businesses. If you are hiring a male employee and they have a child, you know they are going to have time off and it just shifts that unconscious bias, but whether we can look at their actual structural model, it is difficult, because we have to tie it in with our existing suite of laws. When we are looking at an amendment to the Employment Law and we are looking at unfair dismissal rights and we are looking at discrimination, we have based those laws on the English system, so more naturally we know it is going to be easier to look at the English system and how that can be adapted for our purposes and how we can make it work for a much smaller jurisdiction.

Senator K.L. Moore:

Thank you. Talking about legal models and frameworks, Amendment 2 by the Constable of St. Mary is rather interesting.

The Deputy of St. Mary:

Not me.

Senator K.L. Moore:

The Constable, in that he is asking the Assembly to consider carving out the micro-businesses you talked about, those with 5 or fewer employees. Are there, in your experience, any other areas of employment law that carve out or offer a carve-out to such employers and for any other reasons?

Jersey Advocate:

Not really, not that I am aware of. I know that in America they have a micro-employer policy in relation to their maternity leave.

[14:00]

I remember when the maternity law came in I looked at this, because we drafted an advice on this and looked at that model very briefly to say how they defined micro-employer. I think it is less than 20 employees and I think they had an exemption from certain of the maternity provisions. It is difficult, I think, for the point you made, that it has an impact on all businesses and should we just

be looking at those businesses or not, should we be looking at the wider picture about what support is given to all businesses to make sure that this remains a jurisdiction that is open to new businesses, big businesses, that allows everyone the opportunity to make sure that their business operates effectively? I think if you single out the micro-businesses, I am not sure. What about the businesses with 20 employees? They are also going to be affected disproportionately; 40 employees, they are also going to be affected disproportionately. The scale does not necessarily change.

The Deputy of St. Mary:

It could lead to unintended consequences. Firms could keep their level of employees down to a certain level to come within the exemption and that sort of thing.

Jersey Advocate:

Yes. That is a strained example, but I guess you have got to test all law by looking at the extreme. You are right, theoretically an employer, given the option of expanding and saying: "Look, I could really push this business, I could make it something", look at all the fintech businesses we wanted to promote, those normally start with 2 or 3 guys working on a laptop, and then they get a great product and they want to scale that out. Do they decide to keep at 5 employees because they do not want to take the risk of opening themselves up to disproportionate costs? Conceivably so.

Deputy K.F. Morel:

I was going to say more likely in let us say the construction trade, where you have got a small electrical firm or something, which just thinks: "We will stay here" rather than tend to start with the ambition of growing.

Jersey Advocate:

Again, theoretically, although they would just structure it via subcontracts of course, so they would not take on people, they would shift the risk down to subcontractors.

Senator K.L. Moore:

That was pretty much the direction of my question, that this is more a matter of company law rather than employment law, but that could potentially be the consequence, that people would have subsets of businesses.

Jersey Advocate:

Yes, absolutely, although there is an interesting point about the Employment Law. I just wondered whether, given that there is a review of the Employment Law, whether any consideration has been given to the defective definition of "employee" within the law in Article 1(1)(a), because you have got a situation where our law, we do not have a distinction between "employee" and "worker", so we

have got your traditional employee is someone who is controlled by the employer, they define where they work, how they work, what they do when they work. The way our law is drafted, it also captured what in the U.K. would be a worker, so you look at the Uber cases. It captures people who might work under a zero-hours contract, provided there is this level of control, provided the person working under the zero-hours contract is not working in their own business, they would be captured by the law as an employee and therefore all of these rights would apply to all of those people who, if you looked at the U.K. system, would be workers and would not have these paid maternity, paid parental leave rights. Again, that is a policy decision. Is the law meant to be drafted that way? I suspect not. Is now the opportunity, if we are looking at creating these wider rights, to look at that and decide whether that definition of employee is fit for purpose? If not, do we alter it so there is a proper employee/worker distinction, or is the States going to take a view that these parental leave rights apply to all people who are working in Jersey?

Deputy K.F. Morel:

We have had a submission from the Jersey Recruitment Association - I think that is what they are called - and they raised that issue entirely, because obviously they employ people who do not work for them and they employ people who go off and are signed up to other businesses. As they understand it, they are saying, as the employer, this amendment to the employment legislation is their responsibility, they have to pay the 6 weeks paid leave, even though they might not be generating any business out of the employee in this case. Is that how you understand it, because ...

Jersey Advocate:

Without a doubt a recruitment agency would be deemed to be the employer under the law. That is the way it works. They are the ones who have the contract, they are the ones who control where the individual goes and that ...

Deputy K.F. Morel:

I was just wondering if the people are kind of dormant, for want of a better word, on their books, so if I am a temporary worker and I work for 3 months at a certain rate but then that contract finishes, and I am just on their books, but I have not taken employment elsewhere. Then let us say I decide to go on paternity leave, how would they decide what rate to pay for the payment of that 6 weeks' pay?

Jersey Advocate:

The law has a mechanism in it which looks at pay historically, so it does it on the basis of a look-back, so the starting point is to look back at the year, but if you do not have sufficient records within that year, it goes back further, so it could go back 2 years, 3 years until you get to an average of a

year's salary. If it is not possible to do that, then the tribunal is empowered to do the best it can, basically, and to basically say: "This is what we think your salary would have been, one week's salary would have been for the purpose of the law."

Deputy K.F. Morel:

But in your view it is the case then that even though I am a dormant worker on a recruitment agency's books, I would still be entitled to my 6 weeks?

Jersey Advocate:

Again, potentially, yes, absolutely. You could be captured even if you were, to use your words, dormant. I mean, it is a classic zero-hours employee situation and that employee might not always be in the business, it might be because you have fluctuations in work, like in catering, so the summer season and the Christmas season you are going to need more people on your books. The rest of the year they might not do work for you, but they are still potentially captured, depending on the way you structure your contractual arrangement, they are still potentially captured and then could still potentially claim the rights.

Deputy K.F. Morel:

So would the contractual arrangement possibly push these rights outside of my reach as a worker?

Jersey Advocate:

It is complicated. Starting with what it is now, you can try and contract out of it by putting in place a different structure, but that is not a complete answer, because again, the way you look at this is you do not just look at what the contract says, you look at whatever the factual reality is. That is the way we would analyse it, that is the way the tribunal would analyse it, it looks at the employment relationship. So not necessarily, I do not think a recruitment agent would be able to completely insulate themselves from the risk of someone being an employee.

Deputy K.F. Morel:

I was just going to ask, my last one on that point, again the association also pointed out, quite rightly - I have done this in the past - you can be a temporary worker on a number of agencies' books, so where would the liability, for want of a better word, lie if I was to have a right to parental leave?

Jersey Advocate:

It is a very good point. I think it goes back to pretty much the first one we discussed, which is that certainty is key. Certainty is key. The law needs to be crystal clear about these points and if there are sufficient ambiguities, I do not think it does anyone a service and I think it creates too many problems. So to me, taking a step back and considering matters and making sure the drafting is

absolutely nailed on to meet whatever social policy is determined is the appropriate social policy is the right approach rather than rushing, because people feel that they have committed to a deadline. We are looking at quite a short deadline now because by the time this all comes into force, if it is voted on and passed, you are looking at 2nd June I think the debate is now listed.

Deputy K.F. Morel:

At the moment, thereabouts, yes, early June.

The Deputy of St. Mary:

Fourth, I think, yes.

Jersey Advocate:

So then you have got a 3-month window for employers to put this in place.

Deputy K.F. Morel:

Yes, that is right.

Jersey Advocate:

Very short.

Deputy K.F. Morel:

Yes, although I think we would miss the beginning of September. Because of Privy Council approval et cetera, I do not think that is a possibility now, but it would be shortly afterwards. Sorry, David.

The Deputy of St. Mary:

Sorry, you pinched my question there. But if I go back to another point, one of the points you made was on statutory holidays. Now, I cannot quite ... I am not too sure what you mean. You say: "Ordinarily, employers are able to deal with a 2-week statutory holiday if this accrues over a one-year period. There should be clarity over how and to what extent the statutory holidays can be joined with parental leave, particularly if it extends over 3 years."

Jersey Advocate:

So there is a decision of the tribunal that confirms that an employee has the right to statutory holiday, and you cannot contract out of that. The statutory holidays are only 2 weeks paid, so if you are dealing with a maternity or a parental leave period of a year, at the moment you have got 26 weeks for maternity leave and up to a year for parental leave, as it currently is. You have got a single holiday year, so if you are thinking about the way an employer manages their holiday rotas and manages their holiday leave, they can look at it and they can say: "Okay, they have been off for X

duration of the year. They have accrued 3 days of their statutory leave during the period they have had off as maternity leave or parental leave.” They are still entitled to take that, so what would normally happen is that would just be tacked on to the end of their parental leave or maternity leave and they would have that paid time off. Where you are looking at running a parental leave period over a number of years, you are effectively running these holiday periods into a number of years and what you are creating, to me at least, is an administrative burden for employers because they are having to look at multiple holiday years and multiple periods, up to 3 periods over those holiday years. You could end up with a parental leave period that straddles 2 company holiday years, so you are then looking at how to organise it. The law is not clear whether a statutory holiday accrues during maternity/parental leave. The tribunal decisions are in relation to when you are off on sick, but obviously sick leave, as I have already said, you should not be equating sick leave to parental leave. They are different concepts to cover different issues in the workplace. The law does not deal with this, so again, to me, I would like there to be a mechanism, in an ideal world, that makes it clear what happens with statutory holiday during a period of parental leave.

Deputy K.F. Morel:

In the proposed amendment it says that: “An employee who would normally have been required under his or her contract to work during a paid parental leave period is entitled during that period to the benefits of all terms and conditions of employment.” To my non-legal head, that would include the holiday that would ...

The Deputy of St. Mary:

That is what I thought, yes.

Jersey Advocate:

But you are then on a period of unpaid leave potentially, so if you are entitled to all of your terms and conditions of employment, but you are on unpaid leave, are you on unpaid statutory leave? No. You should be getting your paid statutory leave. That kind of cuts across the point, it is ...

Deputy K.F. Morel:

There is a payment schedule. I do not have it in front of me, but it does say “not paid”, it does exclude paid ...

Jersey Advocate:

Yes, exactly. That excludes remuneration, so remuneration is cut out. You are on unpaid leave, but you are continuing to accrue ...

Deputy K.F. Morel:

Paid holiday.

Jersey Advocate:

Yes, you should be continuing to accrue paid holiday and if you are, again, I would like to see that clear so that people know where they stand. If you are not, again it should be clear that the statutory holiday accrual is stopped or however it works. For me, again, it is that unnecessary ambiguity.

Senator K.L. Moore:

Sticking with ambiguities, we have entertained ourselves somewhat thinking of what potentially could be considered as outlandish possibilities, but still need to be considered within the realms of possibility in the world of employment, and that is circumstances such as say particularly with a man, if they were to father more than one child around a similar period of time, would they - in the law as it is currently drafted - be able to request a period of leave for each child?

Jersey Advocate:

I saw you asked another advocate the same question when he was giving evidence. Again, conceivably so. I think there is a check in the law and the person requesting parental leave has to have primary responsibility for the care of that child.

Deputy K.F. Morel:

Because I do not believe there is, because I believed that there was, and then I kind of ...

Jersey Advocate:

I noted it this morning.

Deputy K.F. Morel:

I thought there was and then looked again.

Jersey Advocate:

So: "This Article applies to any employee who - (a) is the mother of a child, and fulfils the requirements in Article 55F; (b) is a person who - (i) has a qualifying relationship with the mother" which would be the qualifying relationship with the father: "(ii) fulfils the requirements in Article 55F, and (iii) has, or expects to have, responsibility for the upbringing of the child, or the main responsibility (apart from any responsibility of the mother) for the upbringing of the child." So to me that creates a potential mechanism, but again, if the feedback you are getting is that you are not meant to be able to get multiple periods, I think that is a potential ambiguity that would be nice to challenge and clarify.

Deputy K.F. Morel:

In 55D, if you have got that in front of you: "Entitlement to parental leave" and it was ... oh no, is that the one you were reading?

[14:15]

Jersey Advocate:

That is the one I was reading, so it is in (4)(b)(iii) and the father is in (5).

Deputy K.F. Morel:

The father's side is (b), yes: "the father of the child."

Jersey Advocate:

So that is a qualifying relationship, so you have to go back up to (4)(b). So: "Entitlement to parental leave." This applies to an employee who is a person who has a qualifying relationship, which is a father of a child. That is the scenario we are talking about. As the father of a child, do they have responsibility for the upbringing of the child or the main responsibility for the upbringing of the child? Conceivably, yes, because if they have responsibility for the upbringing of all 3 children ...

The Deputy of St. Mary:

You could say: "I will see you right." In financial terms, he could do that for any number of children, could he not?

Jersey Advocate:

So you are then looking at analysing it on the facts. Again, if that is an ambiguity that you are concerned about, I think you are really pushing at the margins of what is plausible there, because you are looking at ... it is a small population, you are looking at the chances of that happening being relatively limited, but conceivably it could happen.

Senator K.L. Moore:

I am sure other circumstances could arise, but it was an example that came to mind.

Jersey Advocate:

It is an understandable concern and I think the law has a check in there, but ...

Deputy K.F. Morel:

You think it is sufficient? Because that is all we are looking for ...

Jersey Advocate:

Whether it is sufficient or not.

Deputy K.F. Morel:

... we have been discussing the possible need for a check or a stronger check.

Jersey Advocate:

I think it is ambiguous. As I have already said, I do not think ambiguity helps anyone.

Deputy K.F. Morel:

No. In legal terms, no, it does not. A really important question therefore. Where is the next bit? Surrogacy, that was another bit we had a concern. Can I just turn your attention, if you do not mind, again to 55F and it was in 55F(b)? It talks about notification of an intention to take parental leave from surrogate parents. My concern - and I guess it really is my concern more than anyone else raising it - is just that a surrogacy arrangement is between at least 2 parties, so we have got the parents receiving the child and the mother giving up the child, so to speak; I wish I had better terminology. But there is nothing in 55F, there is no requirement to prove that there was this relationship between people. All there is is the requirement to get a ... the employer can demand a medical certificate from the birth mother. So I have just been concerned that given that surrogacy is a contractual arrangement and we rely on the U.K. Human Fertilisation and Embryology Act, that says that a surrogacy order can only be made after the birth of the child, so is pre-empting the birth of a child.

Jersey Advocate:

Have we adopted the surrogacy order in full?

Deputy K.F. Morel:

Not that I know of, from what I have been told, and I am no legal expert, but I do not believe so. I keep being told we have no surrogacy laws in Jersey, we rely on the U.K.

The Deputy of St. Mary:

No, that is right, we have not. They are pushing to bring one, but ...

Deputy K.F. Morel:

They are pushing to bring one in, exactly. But the point being here all I am concerned about is that is the employer having enough proof that there is a genuine surrogacy relationship going on here and whether you felt that this is the right amount of proof and so on.

Jersey Advocate:

Again, I would be interested to know the statistics from the hospital on the number of surrogate relationships we have. Again, when you were looking at the effect of adoption leave on employers, there are only about 5 to 10 adoptions in Jersey a year, so you are really looking at *de minimis* risk. You are back to ambiguity. That to me seems like it might be slightly too onerous to put in place something there. It is going to be pretty limited. You would hope there is no need. I know I said earlier employers would like to have a right to have a conversation. Their employer may well say: "Look, I just want to check, what is the situation?" But the reality is I would not have thought an employer is going to want to challenge that, if they have been told an employee is getting a surrogate child. It is either going to be true or not and they are going to know pretty quickly if it is not true and that gives rise to different rights for the employer. I think given it is a one a year, there really is *de minimis* risk.

Deputy K.F. Morel:

Thank you very much. It is just one of those things that has been scratching away at me.

Jersey Advocate:

Sure. No, I understand.

Deputy K.F. Morel:

Wondering whether ... yes, there is ambiguity, that is the point. Was there anything else from you?

The Deputy of St. Mary:

It is quite a pedantic point I raise elsewhere.

Deputy K.F. Morel:

No, this is the time to get pedantic.

The Deputy of St. Mary:

Right to return to work after parental leave and returning with previous seniority. I raised the point before that are you almost bound to lose your seniority if you are level-pegging with another associate, shall I say, and you go away. You are going to be demoted effectively, are you not, in the pecking order of things?

Jersey Advocate:

That is the entire mischief that the law looks to get around, that we have a situation where at least colloquially employers discriminate against people who take parental leave or maternity leave at the moment. What the law is aimed at is reducing that barrier or removing that barrier so that we do not

have that unconscious bias, that we say: "Okay, people taking parental leave is a positive and we need to make sure that we do not inhibit access to the workplace." So by making it mutual, asexual, by making for any person who is going to be a parent, what you are effectively doing is trying to stop that happening, because you are not going to have a situation which we have at the moment, where women tend to take more time off than men for parental leave and therefore women are more likely than men to be affected by a man staying in the role and being promoted. So if you can shift the way we think through a piece of legislation that creates a minimum set of rights for both people and we can get people to buy into it, employers to buy into that statute, you are looking to erode that concern so that people go off on parental leave, come back and then they have not been affected by it, so that men and women feel free to take the time. That would be the panacea. I mean, it would be absolutely amazing if we ended up in a workplace without discrimination and in a workplace where everyone was that open-minded. This is a start towards that route, so I think that right to return should be there and should be black and white. That is the way the U.K. has done it, is to ring-fence people to say: "Okay, if you take that time off, we know you are more vulnerable because you have been away and we are going to look to ring-fence that to encourage you to take the time off." It is a balance between the social good and taking the time off and then the commercial relationship with their employer.

The Deputy of St. Mary:

I hear all that. In practical terms, if such an employee perhaps sought to move jobs, I am sure the new employer would take account of the fact that he or she had perhaps done a year less post-qualification than their rival.

Jersey Advocate:

Although the point is that there should not be. Again, the point is that that kind of thinking is what this law is aimed at chipping away at and saying: "Look, we are in the 21st century. We are a modern jurisdiction. We are open for business, but we are open for business in the right way and we are looking to support everyone. We are looking to make sure that businesses are viable, we are looking to support new parents, we are looking to support existing staff." You chip away at those issues the same way we have done with the race discrimination and sex discrimination, age and disability. Those were all brought in to start to chip away at those preconceived ideas and to try and change the narrative, effectively.

The Deputy of St. Mary:

I hear you.

Deputy K.F. Morel:

Thanks. I am going to ask before we go on to that, in part 7 of your submission you talk about the issues of discrimination law. I just wanted to understand how important you feel they are in the sense that the discrimination law protects, as you say, maternity leavers specifically. We are moving into our parental leave. The consequential amendments do not ...

Jersey Advocate:

They have not been tracked through.

Deputy K.F. Morel:

Exactly. It has also been suggested that it does not need to be changed because as an employer, if you were to discriminate against the person, the non-mother in the relationship, then there are other aspects of the discrimination law which would pick that up. I wish I could point to those aspects off the top of my head. I cannot.

Jersey Advocate:

Again, it is one of those points that lawyers could spend a lot of time arguing over. I mean, in the U.K. they are and there are a couple of cases on the go that are looking at where an employer offers enhanced paid maternity leave, but does not offer the same enhanced paid paternity leave. At first instance the men have all succeeded and in an appeal that has been overturned. Their structure is different. It has got tribunal, E.A.T. (Employment Appeal Tribunal), Court of Appeal, Supreme Court. We have tribunal, Royal Court of Appeal, Privy Council. It has not gone beyond the E.A.T. stage yet. Of course our law has a specific provision that says any effectively positive discrimination on the grounds of maternity or breastfeeding cannot give rise to a discrimination claim; that is Article 6(8), I think, of the existing law. So you have got a piece of legislation there that prohibits someone bringing a direct discrimination claim on the basis of sex because the law allows it happen. I guess my point is this: if, as is stated in the headnote to the law, we are looking to create a situation where we have got truly equal rights and if we are looking to create a system where we are trying to encourage men to take the time off as well as women, so that we do not have the perception that this is something that affects female employees more than male employees, they have got to have equal protection from discrimination, direct discrimination, because the direct discrimination flows through the recruitment. To your point about when someone is shifting jobs, it flows through in pay, it flows through in promotion. So if you have got a law that inherently discriminates against one sex compared to another, which this seems to, on its face, again you are sending a contradictory message. If the point is we are putting in place a law that does not seek to discriminate, that looks to promote access and to promote both sexes taking this time off, that is something that should be looked at is my view.

Deputy K.F. Morel:

Does your concern there also extend to the financial aspect, which is obviously mothers can receive maternity benefit and so the employer can claim that £218?

Jersey Advocate:

They can offset that against the paid parental leave.

Deputy K.F. Morel:

Exactly, but obviously again for the non-mothers in the relationship, that is not possible, so effectively it is more expensive to cover the non-mother side of parental leave.

Jersey Advocate:

I think it tracks through. If you are looking to create an even system and again, if you are looking - I have used "you" pejoratively perhaps too much - if the States are looking to put in place a system that is equal with social policy drivers behind it, a lot of employers on the Island are saying: "Put your money where your mouth is. This should not just rest entirely on business. It is not fair to the retail industry, it is not fair to agric, guys who are struggling to get decent staff" and obviously it is a challenging environment out there. You are putting all of the burden on them without looking to equalise it.

Deputy K.F. Morel:

You have just made me think as well, seasonal workers from the agricultural industry, would they benefit from all these rights as well?

Jersey Advocate:

Well, anyone who is an employee is potentially covered, yes.

Deputy K.F. Morel:

Yes, exactly. That is how I read it. I just thought maybe there was a carve-out somewhere in some piece of legislation.

Jersey Advocate:

I would need to check. That is not something I have had to look at before regarding salaries. At least on the face of it though they would be covered by it.

Deputy K.F. Morel:

Yes, that is interesting.

Senator K.L. Moore:

You have been very helpful and thorough in your approach, but we are just wondering whether there were any other unintended consequences that have perhaps arisen from your look again the law and what they might be.

Jersey Advocate:

I just wanted to check my notes. I think I have touched on most of them in the letter and you have certainly been thorough today in going through them, so I do not think there is anything else.

Senator K.L. Moore:

Okay, thank you.

Deputy K.F. Morel:

That is absolutely wonderful. Thank you so much for coming in.

Jersey Advocate:

You are welcome.

Deputy K.F. Morel:

Really helpful, thank you very much.

[14:28]