STATES OF JERSEY

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DRAFT EMPLOYMENT (AMENDMENT No. 5) (JERSEY) LAW 200- (P.27/2009): AMENDMENT

Lodged au Greffe on 18th March 2009
by Deputy G.P. Southern of St. Helier

STATES GREFFE

1 PAGE 23, ARTICLE 5 –

In the inserted Article 60F –

(a) for paragraph (1) there shall be substituted the following paragraph –

"(1) Where an employer is proposing to dismiss as redundant at one establishment within a period of 90 days or less –

(a) 2 or more employees of a description in respect of which a trade union is registered under the Employment Relations (Jersey) Law 2007 and recognized in accordance with a code of practice approved under Article 25 of that Law; or

(b) 6 or more employees of a description in respect of which there is no trade union as described in sub-paragraph (a),

the employer shall consult about the dismissals all the persons who are the appropriate representatives of the affected employees;"

(b) for paragraph (3)(a) there shall be substituted the following sub-paragraph –

"(a) if the employees fall within the description in paragraph (1)(a), representatives of the trade union; or".

2 PAGE 31, ARTICLE 5 –

In the inserted Article 60N(1) for the number "21" there shall be substituted the number "6".

DEPUTY G.P. SOUTHERN OF ST. HELIER

REPORT

The Health, Social Services and Housing Scrutiny Panel (HSSH) asked me to examine the contents of P.27/2009 and to bring amendments to it for endorsement as appropriate. The comments of the panel are contained in their comments.

Firstly I have to start by warmly welcoming the approach taken by the Social Security Minister to the issue of redundancy payments outlined in this Amendment to the Employment (Jersey) Law 2003. I believe that it provides the basis for a practical way forward alongside some enlightened thinking.

In particular, I note the simplicity of the structures proposed in producing a single scale for payments influenced by length of service with no age-related weighting as found in the UK system.

Without having made detailed comparisons of the UK system and that presented today, it is difficult to say which is better for which class of employees. However the Minister's proposal has the advantage of simplicity. It is possible that the absence of a cap on the number of years service may balance out the absence of age-related weighting for older workers. For example an employee in the UK scheme will have –

20 years (capped) x 1.5 weeks pay = 30 weeks redundancy

in the Jersey scheme that works out to be the same –

30 years (uncapped) x 1 weeks pay = 30 weeks redundancy.

Similarly the removal of any limitation related to pensionable age is also to be welcomed as looking towards future working structures.

Equally I support the decision of the Minister to remove any lower limit on working hours as being potentially discriminatory to women employees in the near future.

I accept the recommendation of the Employment Forum that the minimum qualification period for redundancy payments should be 2 years in line with the UK and can see no overwhelming evidence to reduce this. I similarly accept that exception should not be made for shorter fixed-term contracts. I believe that the law on unfair dismissal provides a sufficient protection against abuse.

Level of Payments

I have paid particular attention to this section of the Forum's recommendations:

> So, the Forum considered this question in conjunction with responses to the question on whether the award should be capped in some way. Based on the responses received (discussed on page 27), the Forum considered that an uncapped amount is straightforward and will reward all employees accordingly, proportionate to what they have earned.
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> The Forum was particularly mindful of the following comment from JACS;
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> *"Compensation should relate to length of service and earnings level, not be restricted by any artificial barrier. However, if compensation is greater than 1 week's pay per year of service it may be necessary to introduce a cap."*
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> - **The Forum recommends that the award should be one week's pay per year of service.**
> - **However, if this recommendation is rejected and the legislation provides an award of more than one week's pay per year of service, the Forum recommends that there should be a cap on the award.**
> - **One week's pay should be calculated as provided by the Employment Law.**

A cap on earnings is **only** recommended in the case that more than one week's pay per year of service is awarded. In rejecting this recommendation, the minister may have made further problems for himself in the future. I believe that, whilst the compromise over a cap may appear generous, it may be short-sighted.

Whilst setting the cap at the average wage (£600 per week) compares well with the UK level (£350) and the IOM

(£425) one has to put this in the context of Jersey's high cost of living, and particularly the cost of housing. For those earning above the average wage, the cost of housing may well be in the form of a large mortgage.

If the minister is to consider some form of mortgage protection for the coming recessionary period (and we understand that this is under consideration) then redundancy payments which are capped may still leave families in a vulnerable position with regard to their mortgage. Some extremely complex calculations may be needed to protect mortgage payments and prevent families falling back on complete dependence on income support to cover rental payments.

Despite this reservation, however, I can support the cap at the level set (indexed to the Average Earnings Index).

Equally I can support the minister in rejecting the Employment Forum's time limit on lodging a claim for redundancy. No evidence was produced to suggest that an 8-week limit was appropriate.

Alternative positions/ Offers of work

I consider that the terms under which "reasonable" offers of alternative equivalent work, including a 4-week trial period, are presented offer sufficient protection to employees in avoiding redundancy if possible without compromising their rights to payment.

Consultation Requirements

It is only in this particular area that I take serious issue with the findings of the forum and those of the Minister in his response to the recommendations.

The Panel notes that there was a two to one support for additional consultation to take place over redundancies:

> Respondents were asked if provision should be made (in addition to the existing consultation requirements for unfair dismissal purposes) requiring employers to conduct a consultation process when proposing redundancies. 14 respondents agreed that additional provision should be made requiring a consultation process when proposing redundancies. 7 disagreed, or were undecided.

On individual consultation, support appears to be across the board from various sectors:

> 15 respondents agreed that individual consultation should be undertaken with employees when proposing redundancies.
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> *Ogiers – "For the purposes of unfair dismissal, fairness dictates that individual consultation be undertaken."*
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> JACS – "*Consultation is vital in order to explore all opportunities to avoid redundancy. It also helps prevent "knee – jerk" redundancies as a response to a short term reduction in available work. Not to provide for consultation would be contrary to international good practice and EU labour law directives."*
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> *Utilities employer – "Good practice – communication avoids guess work, bad feeling and fear factors. Also giving a warning is a prerequisite of the consultation process…To ensure a fair procedure, reasonableness should begin as far in advance as possible and before notice of dismissal is given – to inform on selection process that will be used."*

The Panel therefore supports the recommendation of the Employment Forum:

The Employment (Jersey) Law 2003 Article 64 (4) (a) and (b) provides that "the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case".

- **The Forum recommends that individual consultation requirements of employers should remain as currently required for unfair dismissal purposes (to show that a fair process was undertaken). It is considered that the process is sufficient and does not require further legislation.**

Collective consultation

Here we see a divergence of opinion, with the unions referring to various rights on representation:

TGWU – *"consultation with workers' representatives is a fundamental principle in international and EU Law…the EAT has also held in the UK that it may be an unfair dismissal to make a worker redundant without consulting her representatives."*

Amicus referred to Directive 2002/14/EC, which established a general framework for informing and consulting employees in the European Community. This Directive does not have to be enforced in Jersey. The Directive applies only to "undertakings" (meaning companies, partnerships or co-operatives) having 50 or more employees, or to "establishments" (meaning a branch or business unit) having 20 or more employees.

The Employment Forum refers to "best practice" and includes a useful piece of advice from JACS:

Although the international and EU law referred to does not extend to Jersey, the Forum is mindful that best practice dictates that employers should consult their employees or their representative at the earliest opportunity, by providing them with relevant information, with a view to reaching agreement on key issues, such as ways of avoiding redundancies, reducing the number of employees to be made redundant and mitigating the effects of redundancies. Where employees are already represented, or wish to be represented in this process, it would be unreasonable of an employer to fail to consult with those appropriate representatives.

JACS commented, "*Collective consultation (rather than simply with those "at risk") may well lead to innovative suggestions from others to help prevent redundancy – or volunteers for redundancy from those not at risk.*"

The Forum notes that, in the UK, consultation must begin at least 30 days before the first dismissal is due to take effect. Only where there are 100 or more proposed redundancies must consultation begin at least 90 days beforehand.

The Forum then recommends collective consultation of at least 30 days duration:

- **The Forum recommends that employers should be required to consult collectively where two conditions are met (as set out in the following two recommendations), and that consultation must begin at least 30 days before the first dismissal is due to take effect.**

The recommendations to consult collectively and the period of 30days receive my wholehearted support.

The Employment Forum then goes on to state that where employees are already represented by a trade union or recognised staff association:

> - **The Forum also recommends that, where there is a recognised union or staff association (that is registered under the Employment Relations Law), collective consultation requirements should be triggered where there is proposed to be more than one redundancy in a 90 day period.**

Where a union is recognised within the structure of the current Employment and Employment Relations Laws, it is clear to me that its right to recognition and representation must be recognised and respected. Where management and union structures are established, then it is common sense to make use of the channels of communication to deal with redundancy issues.

The Forum's recommendation deserves support for the following reasons –

- Every individual employee has the right to representation in an employment grievance or disciplinary issue under Part 7A of the Employment Law.
- Where a recognition agreement exists, whether enforced (in a company of over 21 employees) or voluntary (where fewer than 21 are employed) it would be very dubious practice under the Employment Relations Law not to allow collective representation over two or more redundancies.

The Social Security Minister has chosen to ignore this recommendation of the Forum. His intention to limit the recognition and representation rights already granted under Jersey's Employment and Employment Relations Laws in redundancy cases to those where 21 or more employees are to be made redundant is illogical, impractical and open to challenge under current employment law.

The Minister presents no argument to support his position, which unfairly limits the right to collective representation and thereby prevents proper consultation through already established channels.

The panel now turns its attention to the exemption contained in the Forum's wider application of the "over 21" rule.

In its recommendations the Forum refers to one contribution thus:

> As one employer association pointed out, the UK model requires collective consultation only when 20 or more employees are proposed to be made redundant (which would apply to 7% of Jersey employers).

This appears to have led the Forum to conclude that in the absence of a collective bargaining agreement with a union:

> - **The Forum recommends that the requirement for employers to consult collectively when proposing redundancies should apply only where there are 21 or more proposed redundancies in a 90 day period.**

I am forced to draw attention to the fact that only 7% of Jersey employers even employ 21 or more workers. Redundancies of over 21 employees will only occur once in a blue moon. The panel therefore considers that this recommendation, in effect, denies the right to collective consultation to all but a tiny minority, and thereby disproportionately restricts that right.

The Forum's justification for such a restriction is in my opinion extremely weak:

> 21 or more proposed redundancies is considered to be an appropriate threshold as it is similar to the UK (20 or more), and also matches the draft Employment Relations Law minimum number of employees whereby a union may apply to the Tribunal to enforce recognition for collective bargaining purposes.

Comparison with the UK in this instance is entirely inappropriate. The scales simply do not match. In the UK establishments of under 21 employees are classed as small businesses. Here in Jersey the vast majority of businesses are far smaller. In the UK they would be described a micro-businesses. 93% of Jersey businesses employ fewer than 21 workers; of the order of 98% employ fewer than 10.

If one examines recent redundancy situations, whether through insolvency or otherwise, only RBS and Woolworths would have fallen into the over 21 category; all the rest would not: Mercury Construction, Pound World, Regal Construction, Jersey Coal (JCD), Museum Brasserie, Memorybits. Who knows who will be next? Whoever it is they are likely to employ fewer than 10 people.

The second statement in the rationale above may be an interesting "match" as the Forum has it; unfortunately it is also completely irrelevant. One cannot draw a realistic comparison between employing 21 workers and making 21 employees redundant. Most cases will be lay-offs of part of the workforce; they will not be insolvencies where the company ceases trading. Even if they were, only 7% of employers would be affected.

I cannot accept that this straight adoption of UK standards is appropriate. I therefore recommend that a more relevant figure to trigger collective consultation in the Jersey context would be 6 or more redundancies. This would both ensure a greater level of protection for these employees and also trigger notification to the Social Security Minister under the provisions of 60N to make sure that sufficient support was in place for those employees affected.

Financial and manpower statement

There should be no additional costs to this amendment above those indicated in the Department's statement.