STATES OF JERSEY

DRAFT EMPLOYMENT (AMENDMENT No. 8) (JERSEY) LAW 201- (P.109/2014): COMMENTS

Presented to the States on 14th July 2014
by the Health, Social Security and Housing Scrutiny Panel

STATES GREFFE

2014 Price code: E P.109 Com.(2)

COMMENTS

The Health, Social Security and Housing Panel is comprised of the following members –

Deputy K.L. Moore of St. Peter, Chairman
Deputy J.A. Hilton of St. Helier, Vice-Chairman
Deputy J.G. Reed of St. Ouen

Review Advisor – Ogier Legal, Jersey

Introduction

The Draft Employment (Amendment No. 8) (Jersey) Law 201-, (Family Friendly Policy) is an important piece of legislation which the Panel believes is long overdue. The Panel believes it deserved thorough scrutiny to ensure it is fit for purpose however, with a lodging date of 4th June 2014 and a debate of 14th July, the Panel found itself with less than 6 weeks to undertake a thorough review. Due to the abundance of propositions brought before the Assembly before the summer recess and the Panel's already heavy workload, the Panel appointed local firm Ogier Legal to undertake a full desktop review on the legislation.

At the request of the Panel, Ogier Legal produced a report which included detailed comments on whether it was fit for purpose and if there were any areas which merited further consideration. The report by Ogier Legal is used throughout this Comments paper with their final report attached as an **Appendix**. Also provided are 3 Appendices provided to the Panel, the first succinctly identifying the key comparisons between the Amendment and the United Kingdom legislation, the second setting out a comparison of common law countries and the third listing the Articles that Ogier Legal has identified as requiring further consideration. The latter has been appended to this Comments paper and the others sent electronically. Hard copies are available from the States Greffe.

As part of the review process, the Panel undertook a call for evidence however, due to the tight timescale, this request was made to specific stakeholders, namely representative organisations to submit written responses. The Panel wrote to Citizens Advice Bureau, Jersey Chamber of Commerce, JACS, Jersey Childcare Trust, Jersey Farmers Union and the Institute of Directors. The Panel received submissions from all of these stakeholders and is grateful for the response and the time given to the matter, as submissions were well thought-out and very useful to the Panel in formulating these comments. Although the majority of stakeholders were supportive of the legislation, there were areas of concern particularly around the impact on small businesses. This is discussed in more detail later.

Background

The proposed amendment would introduce the employment rights that were recommended by the Employment Forum ("the Forum") in 2008 and set out in a response to the recommendation issued in 2010 by the former Minister for Social Security, Senator I.J. Gorst. The Forum's recommendation was based upon extensive public consultation. It had been intended that law drafting would begin in 2009 but, following the economic downturn, priority was given to introducing statutory redundancy pay and developing an insolvency scheme. Whilst the consultation was

undertaken some years ago, there is no reason to believe that anything has changed in the interim that would make the introduction of these basic rights inappropriate. The report by Ogier Legal also comments that the vast majority of the Forum's recommendations are valid however list matters that they suggest should be reviewed. These are detailed in the Conclusion at the end of this Comments paper.

Overarching Issue: small businesses

The Panel has been alerted to one very important aspect: the impact that the Amendment would have on small businesses with the Amendment being seen as a further disincentive to recruit and create employment opportunities. One small business said they would find the policies a "tremendous burden". This was not only highlighted in a majority of submissions but also by Ogier Legal where it states in section 5 of its report that the positions of small businesses need to be reconsidered. Ogier Legal have also raised the question that the comparison made between Jersey and the UK regarding the impact on small businesses may not be appropriate stating a comparison between a jurisdiction where small companies might make up a large proportion of business may have been more fitting. It is a reality that small businesses will find the implementation of the new legislation more challenging that larger ones.

Other issues

Aware of the concerns by Ogier Legal, the Panel has asked the Minister for Social Security to comment on all of these issues, the implications the Amendment will have on small businesses and the proposal to change some of the wording within the Proposition. The Panel shared its advisor's report with the Department as soon as it was received to assist it in making the comments as detailed as possible.

Following receipt of the comments from the Department, the Panel was able to meet the Minister and has been given assurances that the matters raised within the report by Ogier Legal will be considered. The Panel has also been assured that the Amendment will be reviewed one year following its introduction to look at the overall impact and any areas that may need to be amended can be done through future regulations. The Panel has also agreed that within its legacy report, it will strongly recommend that the next HSSH Scrutiny Panel follow up on these assurances and ensure the necessary scrutiny is undertaken.

Although Ogier Legal have commented that the legislation is fit for purpose, there are a number of areas which require further consideration. The Panel fully supports these recommendations and has replicated them together with Ogier's conclusion below.

Recommendations

1 Report 1) Forum's Recommendations

1.1 The Forum reported in 2008, over 6 years ago. Even so the vast majority of the recommendations are still valid today. A number of the recommendations may need to be re-considered. These are set out at paragraph 1.3 of Report 1.

1.2 Between now and the implementation of the sex discrimination law, we think particular consideration should be given to –

(a) small businesses;

(b) flexible working/maternity in light of impending alterations in the UK;

(c) the interplay with Discrimination Jersey Law 2013;

(d) fixed-term and agency contracts.

1.3 Further research and advice was suggested by the Forum. It is not clear whether this has been undertaken or not. We think that the following matters require particular emphasis –

(a) how will social security contributions be maintained during ordinary maternity leave? Will the burden lie on employers, or will employees (whether they receive maternity pay or not) be treated as if they are making contributions?

(b) what will the likely increase to social security contributions be?

(c) how to deal with accommodation when provided as a benefit?

1.4 Our view is that the staged approach is justified, partially due to the legislative and regulatory burden on employers, but also so that a proper analysis of likely impact of a 26 week maternity period on social security contributions can be carried out. There is no fiscal evidence to allow for an immediate period of ordinary maternity leave of 26 weeks. However this remains the ultimate goal.

2 Report 2) To compare the Amendment with the position in the UK

2.1 The overall framework is very similar to the position that existed in the UK prior to this year. A table of the key comparisons between the Amendment and the UK legislation is at appendix 2. A more detailed table of the legislation is at appendix 3. We also thought it would be helpful to consider the rights in various common law countries, and these are set out at appendix 4.

2.2 The UK has recently brought in a number of changes to Family Friendly Regulations that are dealt with in the body of the report. We recommend observing the impact of these changes to see whether they will be viable in Jersey.

2.3 Overall the provisions in Jersey will be less generous than in the UK. This is partly due to the fact that the UK has had legislation in relation to various aspects of the Family Friendly Regulation since the late 1970s. In contrast Jersey is starting from a position of no such rights. It is also due to the staged implementation of the rights.

2.4 The key difference is the period of maternity leave. All women are entitled to 52 weeks maternity leave in the UK, whether they have long service or not. However they only qualify for paid maternity leave from their employer if they have 26 weeks service. In Jersey all employees will qualify for 2 weeks pay, regardless of service and up to 18 weeks leave in total. There is therefore better protection for employers in the UK.

2.5 The level of the maternity allowance in Jersey is more generous than the UK, although this has to be balanced against the shorter leave period. Once stage 2 has been implemented, then the provisions in Jersey will be comparable to a number of other jurisdictions, and financially there will be little difference with the UK.

3 Report 3) Is the Amendment fit for purpose

3.1 To ensure the amendment is fit for purpose, there are two outstanding documents that will directly impact on whether the Amendment is fit for purpose. These are due to come in the next stage of the process and are –

(a) Approved Code of Practice dealing with the various Family Friendly Regulations; and

(b) the updated Discrimination (Jersey) Law 2013, and how this treats Family Friendly Regulation as a protected characteristic.

3.2 The majority of the Amendment is fit for purpose. Attached at appendix 5 is a table of the provisions that we think need to be reviewed or altered.

3.3 Further consideration needs to be given to the treatment of fixed term contracts. A firm decision also needs to be reached over zero-hours and agency workers. The Amendment does not deal with any of these situations sufficiently.

4 Report 4) Impact on businesses and employees

4.1 This report is necessarily hypothetical. We do not have detailed data to provide a complete or accurate indication of the actual impacts and burdens on employers.

4.2 The direct financial impact of the Amendment is relatively clear, and it is primarily the cost of 2 weeks maternity leave. However there are wider financial costs, including the costs of recruitment, increased administrative and human resources costs. It is these that will create the biggest impact on businesses, as they have to adapt to the new system.

4.3 Small businesses will probably suffer a greater impact than larger businesses, as they are less likely to have the staffing resources or support resources to deal with the additional financial burden of the Family Friendly Regulations. They will also require greater support and assistance to implement the changes.

4.4 As for employees, the impact of the Family Friendly Regulation is predominantly positive. There is little direct financial impact, and the right to request flexible working and return to the same job after taking family leave will provide a better working environment. There is however the possibility that the FFR will lead to certain employers refusing to hire female employees who might take maternity leave.

5 Conclusion

5.1 There is often incredulity amongst international clients, in particular those based in the UK, that there are no Family Friendly Regulations in Jersey. These rights are virtually standard across developed nations.

5.2 We think there is a positive social and business benefit to implementing Family Friendly Regulations. There is however a balance to be struck between providing sufficient security and protection for employees, whilst ensuring that employers are not overburdened or vulnerable to being exploited.

5.3 We think that the position in relation to small businesses should be reconsidered. We suggest considering some partial exemptions or qualifications to the Family Friendly Regulations and also whether the administrative burden of the Family Friendly Regulations can be reduced. For instance small businesses could be exempted from paying for maternity leave or keeping a job open, but they could be bound by the other provisions on detriment, automatically unfair dismissal and discrimination.

5.4 There is time for further consideration for the impact of this Amendment prior to the implementation of the sex discrimination law as it is not due to be implemented until September 2015. It will be key to ensure that the proposed sex discrimination law is consistent with the Family Friendly Regulations. The recent response to the sex discrimination legislation suggests that there is some uncertainty over the difference between the two, and also over how maternity/paternity is going to be a protected characteristic.

5.5 One of the interesting viewpoints that we came across whilst writing this report was the benefit of flexibility. Small businesses actually have an advantage over big businesses when it comes to the structure of the workforce, as they are not normally as regimented. They can therefore adapt their policies to fit their business. If the Family Friendly Regulations are approached positively and used creatively by employers, then they can be used as a tool to retain and support the best staff.

Articles that Ogier Legal has identified as requiring further consideration

Article of the Amendment	Current Wording	Recommended Wording	Comments
Part 3A – Flexible Working			
Dealing with an application Article 15B(1)	*"may agree the change in the terms or conditions applied for under Article 15A or agree different terms and conditions of the employee's employment to those applied for; "*	*"may agree the change in the terms or conditions applied for under Article 15A, agree different terms and conditions of the employee's employment to those applied for, or refuse the application so long as one of the grounds under 15B(5) below is satisfied; and"*	The current wording gives the impression that an employer can only do one of 2 things – (a) agree to the employee's proposal, or (b) agree to a slightly different variation. There is no express provision within this article to allow an employer to refuse an application under Article 15A. We think that this is an unnecessary ambiguity.
Grounds Article 15B(5)	*"would create a burden of additional costs."*	*"would create the burden of additional costs"*	
Variation Article 15A	Under the current wording there is no statutory right to allow an employer to vary any contractual changes agreed to under a request made under Article 15A. Any variation would become part of the new terms and conditions of an employee's contract, and so any variation could be dealt with using customary law principles such as discussion and consent.	N/A	This could probably be dealt with under the ACOP issued by JACS, which can make specific reference to the possibility of variation, and that employers may want to put in place a review to ensure that the Article 15A variation is suitable for both parties.
Part 4 – Minimum Wage			
Detriment Article 31	Currently detriment is not defined in the EJL 2003, and this has not been discussed in the few JET cases that have	This is a point that could probably do with clarification from JACS in the future.	.

Article of the Amendment	Current Wording	Recommended Wording	Comments
	dealt with a claim under this Article.		
Part 5A – Maternity, Adoption and Parental Rights			
Holiday Article 55D(2)(b)	*"(2) An employee who is not permitted to work under paragraph (1), but who would normally have been required to do so during that period under her contract of employment –* *(b) is entitled, during the compulsory maternity leave period, to the benefit of all of the terms and conditions of employment which would have applied if she had not been absent;"*	We recommend considering wording to make this point clear.	We anticipate that unless it is made clear that maternity leave is not the same, and that there is a separate entitlement.
Benefits Article 55D(2)(c)	*"(2) An employee who is not permitted to work under paragraph (1), but who would normally have been required to do so during that period under her contract of employment –* *(c) is bound, during that period, by any obligations arising under those terms and conditions, subject only to the exceptions in this Part."*	We recommend reconsidering this as there is a potential conflict with the Forum's recommendation that all benefits continue to accrue during period of maternity leave, including employer contributions, and the current drafting. 22. There may also be a problem, in that the rules of the pension scheme may prohibit employer contributions in the absence of any employee contribution.	This applies equally to similar provisions for ordinary maternity leave (Article 55G(1)(b)) and adoption leave (by virtue of Article 55M).
Reduction for Social Security Maternity Allowance – Article 55D(5)	*"(5) Any remuneration to be paid by an employer to an employee under paragraph (2) shall be reduced by any amount that the employee receives by way of short term incapacity allowance under*	*"Any remuneration to be paid by an employer to the employee under paragraph (2) shall be reduced by –* *(a) the amount of the maternity allowance under Article 22 of the Social Security (Jersey)*	We recommend altering this so that it is clear that the employer can reduce the pay by the amount of the maternity allowance in any event, and by any sick pay the employee actually receives.

Article of the Amendment	Current Wording	Recommended Wording	Comments
	Article 15 of the Social Security (Jersey) Law 1974, or any maternity allowance under Article 22 of that Law, in respect of the compulsory maternity leave period."	*Law 1974, whether the employee qualifies for the allowance or not; or* *(b) any amount that the employee receives by way of short term incapacity allowance under Article 15 of that Law."*	
Ordinary Maternity Leave Article 55E(1)(a)	"*(1) An employee is entitled to ordinary maternity leave (in addition to compulsory maternity leave) provided that she satisfies the following conditions –* *(a) no later than the end of the 15th week before her expected week of childbirth, or, if that is not reasonably practicable, as soon as is reasonably practicable, she notifies her employer of –* *(i) her pregnancy,* *(ii) the expected week of childbirth, and* *(iii) the date on which she intends her ordinary maternity leave period to start,"*	There is an inherent contradiction in the way the law is framed, which comes out in the Forum's recommendations, and this is the way that notice of the right to take maternity leave, adoption leave or parental leave is notified to employers. We think it would be better to ensure that there is consistency in the way these terms are meant to work. This may mean being clear that the qualification period is 15 weeks, and notice is required to become "*entitled*" for FFR leave, or that notice is not required but will normally be expected to be given at least 15 weeks before the expected week of childbirth but that later notice does not affect an employee's entitlement to leave.	– Our comments apply equally to Article 55K(2) and Article 55P(2)(c). – There is no guidance as to how the reasonably practicable provision will be applied in practice. – This is an area that requires more thought, and a consistent approach in respect of the different FFRs being brought into force.
Termination – Articles 55F(5), 55L(7) & 55Q(3)	*"(5) Where the employee's employment terminates after the commencement of the ordinary maternity leave period but before the time when (apart from this paragraph) that period would end, the ordinary maternity leave period ends at the time of the termination*	We think that Articles 55F(5), 55L(7) and 55Q(3) would be improved by the inclusion of the words "for whatever reason," e.g. "*Where the employee's employment terminates for whatever reason after the commencement of the*	

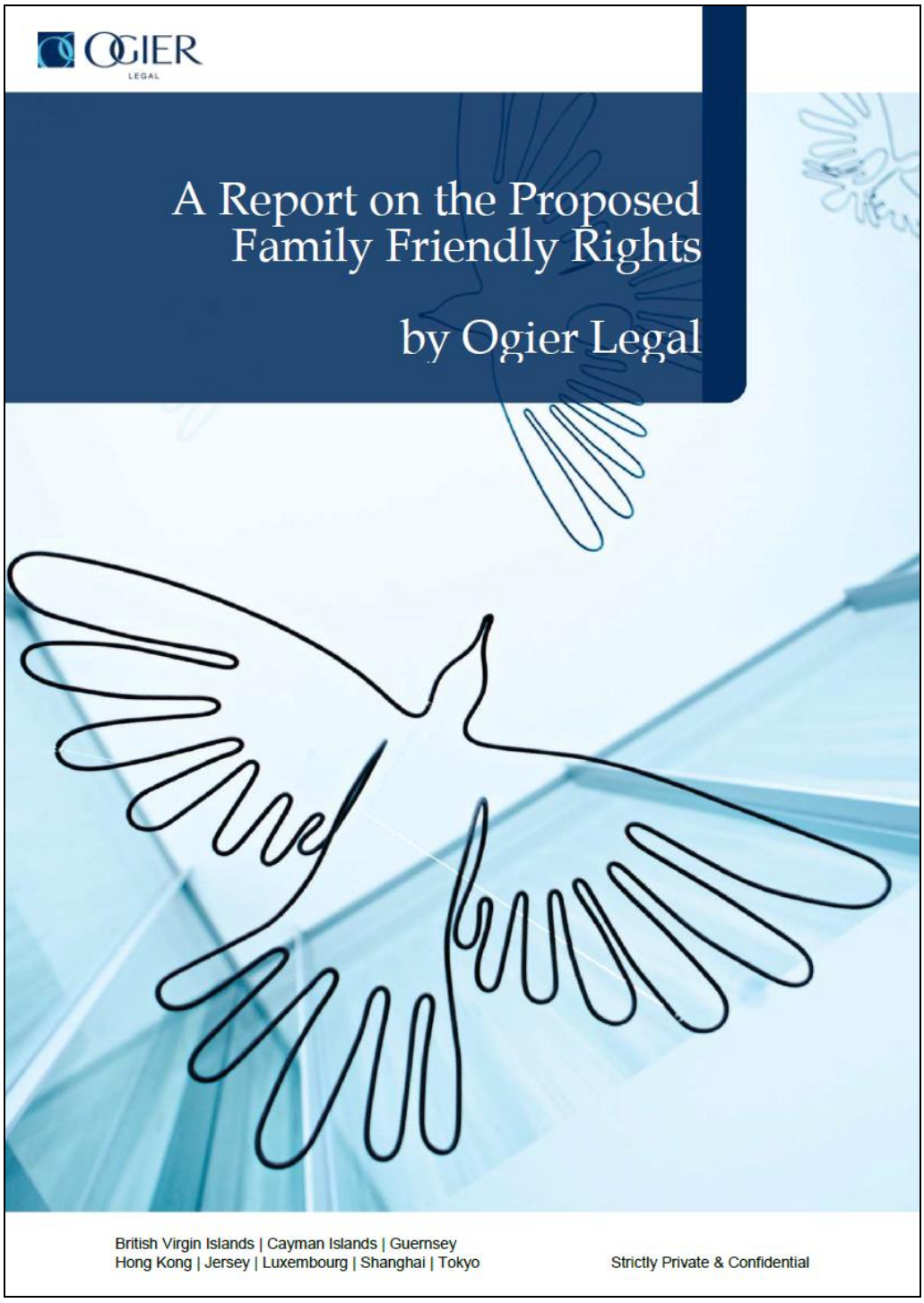
Article of the Amendment	Current Wording	Recommended Wording	Comments
	of the employment." *"(7) Where the employee's employment terminates after the commencement of the adoption leave period but before the time when (apart from this paragraph) that period would end, the period ends at the time of the termination of the employment."* *"(3) Where the employee's employment terminates after the commencement of the parental leave period but before the time when (apart from this paragraph) that period would end, the period ends at the time of the termination of the employment."*	*ordinary maternity leave…*"	
Work during maternity leave – Article 55I	*"(4) Reasonable contact from time to time between an employee and her employer which either party is entitled to make during a compulsory maternity leave period or ordinary maternity leave period (for example to discuss an employee's return to work) –* *(a) shall not constitute work; and* *(c) shall not bring that period to an end."* *"(2) For the purposes of this Article, any work carried out on any day shall constitute a day's work".*	– **Section (4)** is missing a sub-paragraph (b): it jumps from (a) to (c) – **Section (2);**the drafting at section (2) states that any work carried out will constitute a day's work. This is likely to be interpreted consistently with the rest of the EJL 2003 (i.e. Article 16), and accordingly an employee is entitled to be remunerated for a day's work under this article. This can be remedied by including wording that expressly confirms that any attendance by an employee during ordinary maternity leave is unpaid. **– Section (1)** There is no provision to allow an employer to refuse to allow an employee to return, We recommend	

Article of the Amendment	Current Wording	Recommended Wording	Comments
		putting in a control provision so that the right is not solely at the employee's option, such as – "(1) *an employee may, subject to the consent of the employer, such consent not to be unreasonably withheld, carry out unpaid work for her employer during her ordinary maternity leave period…*"	
Right to Return to Work – Article 55J	Article 55J is expressed in absolute terms, i.e.*" she is entitled to return to her job*". There is no mention here as to what happens if the job no longer exists.	We recommend drafting a provision that means that an employee whose fixed term contract has expired during maternity leave is not automatically entitled to return to work.	
Employer's Right to reclaim pay for compulsory maternity leave – Article 55D(5)	*"(5) Any remuneration to be paid by an employer to an employee under paragraph (2) shall be reduced by any amount that the employee receives by way of short term incapacity allowance under Article 15 of the Social Security (Jersey) Law 1974, or any maternity allowance under Article 22 of that Law, in respect of the compulsory maternity leave period."*	There is no provision within the Amendment to allow an employer to recoup any monies paid under Article 55D(5), i.e. contractual pay less the maternity allowance. We recommend including an article that allows an employer to make such a deduction. We also recommend that the period required should be expressly stated, to provide clarity for employers and employees.	
Adoption Leave – Article 55K(1)	*"(1) An employee is entitled to adoption leave in respect of a child provided the employee –* *(a) is the child's adopter; and* *(b) has either notified the approved adoption society that he*	Article 55K(1) should state *"An employee is entitled to unpaid adoption leave in respect of a child…"* We recommend including a provision that defines *"child",* so that it expressly excludes a foster child, step-child, or other	The Minister's intention was that this leave would be unpaid. The Minister also accepted the Forum's recommendation that adoption leave would not be available where there is an established relationship, i.e. in the case of a foster or step-

Article of the Amendment	Current Wording	Recommended Wording	Comments
	or she agrees that the child should be placed with him or her and has agreed the date of placement or, in the case of an overseas adoption, has received an official notification; and *(c) has given his or her employer notice of his or her intention to take adoption leave in respect of a child, specifying –* *(i) the date on which the child is expected to be placed with him or her for adoption or, in the case of an overseas adoption, the date on which the child is expected to enter Jersey, and* *(ii) the date on which the employee has chosen that his or her period of leave should begin."*	child that the employee has an established relationship with. We also recommend considering a provision to deal with the situation where an adoption breaks down.	child (p.12). There is no such provision within the Amendment.
Parental Leave – Article 55N(2)(a)(ii)	*"(2) The conditions referred to in paragraph (1) are that the employee –* *(a) is* *(ii) married to, the civil partner of, or the partner of, the child's mother or adopter, but not the child's father or adopter; and"*	There is no definition of "*partner*" within EJL 2003 or Amendment. We recommend including a definition of "*partner*" in Article 55N so that it is clear that there needs to be some form of long relationship to qualify for the right. Otherwise the provision is open to ambiguity.	The Forum and the Minister both accepted the interpretation that a partner is someone living in an enduring relationship with the mother, but who is not an immediate relative (p.11 of the Minister's Response).
Part 7 – Article 67 – Dismissal for Family Reasons			
Connected With – Article 67(1)	*This makes any dismissal unfair if it "is connected with" one of the FFRs.*	We recommend giving consideration to the way Article 67(1) has been drafted, and the reasons for including the lower test of "*connected with*." If	This is a very significant departure from the rest of the protections under Part 7 EJL 2003. The test of "*connected with*" creates a much lower

Article of the Amendment	Current Wording	Recommended Wording	Comments
		this was not intentional, then we suggest reverting to the usual test of "*the reason (or, if more than one, the principal reason...*" This would provide consistency.	threshold, and could give rise to difficulties for employers, who would have to show that there was no connection at all with one of the FFRs. This is a very difficult hurdle to overcome.
Redundancy – Article 67(2)	*"(2) An employee who is dismissed shall also be regarded for the purposes of this Part as unfairly dismissed if –* *(a) the reason (or, if more than one, the principal reason) is that the employee was redundant;* *(b) it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who had positions similar to that held by the employee and who have not been dismissed by the employer; and* *(c) it is shown that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was a reason connected with any of the reasons referred to in paragraph (1)(a), (b), (c), (d), (e) or (f)."*	We think consideration should be given to Article 67(2) at it will arguably force employers to prioritise pregnant employees.	
Schedule 1 – Calculation of Week's Salary	Schedule 1 sets out the method for calculating a week's salary for the purposes of the EJL 2003. For the purposes of the claims in relation to ante-natal care or compulsory maternity leave, the period required for a	This requires clarification and further amendments to schedule 1.	There is no mechanism for calculating an employee's weekly salary if they have worked for an employer for less than 12 weeks.

Article of the Amendment	Current Wording	Recommended Wording	Comments
	calculation is reduced to 12 weeks.		
Fixed Term Contracts/Agency Contracts/Zero Hours Contracts			
Fixed term contracts.	There has been little specific drafting for fixed term contracts	We recommend giving consideration to whether employers might, in limited circumstances, be able to break a fixed-term contract. – Technically an employee also has the right to return to the job in which she was employed prior to her maternity leave (Article 55J). There is no carve-out to say that this does not apply to a fixed-term contract that has expired during the period of the employee's ordinary maternity leave.	A person working under a fixed term contract is classed as an employee for the purposes of EJL 2003. If a person is on a fixed term contract and they cannot complete the contract due to pregnancy then employer will be forced to pay maternity leave, and will have to arrange further temporary cover. This is a heavy burden to impose on employers.
Agency Contracts	There is also no provision to deal with agency contracts and temporary employees provided under those contracts.	This is an area that warrants further consideration.	This contrasts starkly to the UK where a there are number of specific protections in place for agency contracts.
Zero-Hours Contracts	Workers under a zero-hours contract will be specifically excluded from claiming any of the FFR as they are not classed as employees under EJL 2003.	This is an area that warrants further consideration.	There may be a way to provide some protection under the DJL 2013.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A Report on the Proposed Family Friendly Rights
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Contents

Executive Summary

1 Introduction

1.1 Ogier have been asked to report on the proposed Employment (Amendment No. 8) (Jersey) Law 201-. The terms of reference are at appendix 1, and Ogier was asked to address five points. We have however combined 2) and 5) because there is a high degree of cross-over between the financial impact and the implications to businesses. One cannot really be answered or understood without the other.

1.2 We have also altered the order of the reports slightly. We will address the points in the following order:

1) To examine the Forum's recommendations and the reasons behind them and whether they are still relevant;

2) To compare the Amendment with the position in the UK;

3) To comment upon whether the Amendment is fit for purpose; and

4) To determine the impact and financial implications on businesses and employees, in particular the likely impact on small businesses.

1.3 The report was intended to be a desktop review and therefore there are parts of it that are necessarily broad in scope. If it is felt appropriate, then we can consider the matter in detail with the benefit of the full evidence before us.

1.4 The three main points are:

a) The vast majority of the Forum's recommendations are still valid. At paragraph 1.3 of Report 1 (page 9) is a list of those matters that we suggest reviewing;

b) The majority of the Amendment is fit for purpose. Appendix 5 (page 160) contains the clauses that we suggest reviewing or amending; and

c) We think that further consideration could be given to lightening the burden on small businesses (pages 51 to 53).

2 Appendices and Documents

2.1 We have included a number of appendices. The majority of these are working documents that we have produced for ourselves and to assist us in drafting the report. These have been provided for the benefit of the Panel. These are confidential documents and are not for wider dissemination or disclosure.

2.2 We have also provided a bundle of documents and sources that we have relied upon or read whilst preparing this report. These are provided for ease of reference.

3 Summary

3.1 The Forum reported in 2008, over six years ago. Even so the vast majority of the recommendations are still valid today. However a number of the recommendations may need to be considered. These are set out at paragraph 1.3 of Report 1.

3.2 We think particular consideration should be given to small businesses, flexible working/maternity in light of impending alterations in the UK, the interplay with DJL 2013, and fixed-term and agency contracts.

3.3 The overall framework of the Amendment is very similar to the position that existed in the UK prior to this year. A table of the key comparisons between the Amendment and the UK legislation is at appendix 2. A more detailed table of the legislation is at appendix 3. We also thought it would be helpful to consider the rights in various common law countries, and these are set out at appendix 4.

3.4 The UK has recently brought in a number of changes to FFR that are dealt with in the body Report 2. We recommend observing the impact of these changes to see whether they will be viable in Jersey.

3.5 The majority of the Amendment is fit for purpose. Attached at appendix 5 is a table of the provisions that we think need to be reviewed or altered.

3.6 There are two outstanding documents that will directly impact on whether the Amendment is fit for purpose. These are the ACOP dealing with the various FFR and the updated DJL 2013, and how this treats FFR as protected characteristics.

3.7 Overall further consideration needs to be given to the treatment of fixed term contracts. A firm decision also needs to be reached over zero-hours and agency workers. The Amendment does not deal with any of these situations sufficiently.

3.8 The direct financial impact of the Amendment is relatively clear, and it is primarily the cost of two weeks maternity leave. However there are wider financial costs, including the costs of recruitment, increased administrative and human resources costs. It is these that will create the biggest impact on businesses, as they have to adapt to the new system.

3.9 Small businesses will probably suffer a greater impact than larger businesses, as they are less likely to have the staffing or support resources to deal with the additional financial burden of the FFR. Anecdotally they are less likely to hire a temporary replacement and will try and manage without them, which is likely to increase the burden on other employees. Small businesses will also require greater support and assistance to implement the changes.

3.10 As for employees, the impact of the FFR is predominantly positive. There is little direct financial impact, and the right to request flexible working and return to the same job after taking family leave will provide a better working environment. There is however the possibility that the FFR will lead to certain employers refusing to hire female employees who they perceive to be of child-bearing age.

4 Conclusion

4.1 The vast majority of the work required to bring the FFR into force has been completed. There is still time to consider the outstanding points as the FFR are not due to be implemented until September 2015, and we suggest reviewing the Forum's recommendations and the Amendment.

4.2 It will be key to ensure that the proposed sex discrimination law is consistent with the FFR. The recent response to the sex discrimination legislation suggests that there is some uncertainty over the difference between the two, and also over how maternity/paternity is going to be a protected characteristic.

4.3 We think further consideration might be given to small businesses, and whether any measures can be taken to lighten the administrative and financial burden on them.

Ogier

27 June 2014

Abbreviations Key

ACOP - Approved Code of Practice

Amendment - Employment (Amendment No. 8) (Jersey Law 201-EJL -

CFA 2014 - Children and Families Act 2014

CHWJL - The Control of Housing and Work (Jersey) Law 2012

CHEO - Control of Housing and Work (Exemptions) (Jersey) Order 2013

DJL - The Discrimination (Jersey) Law 201

EJL - Employment (Jersey) Law 2003

EqA - Equality Act 2010

ERA - Employment Rights Act 1996

FFRs - Family Friendly Rights

FWR - Flexible Working Regulations 2014

JACS - Jersey Advisory and Conciliation Service

JET - Jersey Employment Tribunal

NCT - National Childbirth Trust

PALR - Paternity and Adoption Leave Regulations 2002

PWD - Pregnant Workers Directive (92/85/EEC)

MPLR - Maternity and Paternal Leave etc Regulations 1999

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Introduction

1 Introduction

1.1 We have been asked to report on the Amendment. The terms of reference are at appendix 1, and Ogier was asked to address five points.

1.2 The Forum originally reported on this matter in 2008. Since that time the Employment landscape in Jersey has altered due to the implementation of statutory redundancy, and the imminent DJL 2013. Businesses in Jersey have therefore had to adapt to these new provisions.

1.3 The majority of the Forum's recommendations were modelled on the system in place in the UK in 2008. These have also recently been altered, particularly the rules in relation to flexible working, and shared maternity/paternity leave. These alterations are quite substantial.

1.4 More recently there have been two developments in Jersey that might impact on the Amendment. First is Deputy Southern's proposition to increase ordinary maternity leave to 26 weeks for all employees, with no qualification period. His proposal is that this will be funded by the States of Jersey.

1.5 The other is consultation over and likely implementation of sex as a protected characteristic under the DJL 2013 from September 2015. This will impact on the FFR as there is a degree of cross-over between the two areas.

2 Rationale

2.1 We have been asked to conduct a desk-top review. We have been provided with:

(a) The Forum's recommendations;

(b) The Minister's Response;

(c) The Amendment and the supporting proposition;

(d) Deputy Southern's proposition; and

(e) A summary of responses to the Forum's questionnaire on sex discrimination, where the responses relate to FFR.

We have assumed that the reader of this report has read the above documents.

2.2 Although we have been asked to address five points, we have combined 2) and 5) because there is a high degree of cross-over between the financial impact and the implications to businesses. One cannot really be answered or understood without the other.

2.3 We have also altered the order of the reports slightly. We will address the points in the following order:

- Report 1) To examine the Forum's recommendations and the reasons behind them and whether they are still relevant;

7

- Report 2) To compare the Amendment with the position in the UK;
- Report 3) To comment upon whether the Amendment is fit for purpose; and
- Report 4) To determine the impact and financial implications on businesses and employees, in particular the likely impact on small businesses.

2.4 We have treated each point as a separate report. They should be capable of being read and understood predominantly on their own. There is therefore a small amount of repetition between the reports.

3 Appendices

3.1 We have created a number of documents, to assist us in drafting this report. We have included the majority of them as appendices.

3.2 These are confidential documents and they are not for general release. We have provided them to the Scrutiny Panel in order to show our conclusions, and to assist the Panel in understanding what steps are still required.

3.3 We have also produced a tracked version of the EJL 2003 incorporating the Amendment. This was prepared so that we could see how the Amendment would work in practice. We have not included this in the appendices as it is a large document, but we can provide a copy upon request.

4 Bibliography

4.1 We have also referred to a number of other documents, in particular the UK legislation where it relates to the FFR. We have included a list of these within the bibliography, and have prepared a bundle of those documents which has been kept separate from the report.

4.2 These documents run to four lever arch files. If the reader would like a copy please let us know, and we will provide one.

Report 1: To examine the forum's recommendations and the reasons behind them and whether they are still relevant

1 Introduction

1.1 The Forum originally reported in 2008 and the report has not been updated since. We have been asked to consider whether the recommendations of the Forum are still valid now, over six years after they first consulted and reported on FFR. The focus for the Forum's proposals was analogous provisions in the UK and the Isle of Man. However since the Forum originally reported the UK has implemented a number of changes that are due to take effect within the next year.

1.2 That being said, the majority of the Forum's recommendations and comments are still valid today. The underlying picture in terms of the impact on the economy in Jersey is relatively unaffected.

1.3 The Forum made a total of 41 recommendations. Of these, the following are no longer relevant or require further consideration:

(a) Small businesses;

(b) Number of ante-natal appointments;

(c) Shared parental leave (maternity/paternity/adoption);

(d) Dangerous workplaces and suspension without pay;

(e) Qualification Period and the notice period for taking maternity/parental leave;

(f) Service Accommodation;

(g) Flexible working and dependant leave; and

(h) The position of agency employees, fixed term employees and zero-hours workers.

1.4 Of these, particular focus should be given to:

(a) small business exemptions; and

(b) developments in the UK in relation to:

(i) right to request flexible working: and

(ii) shared parental leave, including maternity.

1.5 There were also a number of points where the Forum deferred any recommendations pending proper analysis of the impact on social security contributions or because advice from the Law Officers

department was required. It is not clear to date whether those analyses were undertaken, and if so what impact if any they will have on the Forum's recommendations.

1.6 Unless otherwise stated page numbers in Report 1 refer to the page numbers in the Forum's recommendation.

2 Legislation in Stages (p. 8)

2.1 One of the key points from the Forum's recommendation was the need to ensure that affected parties were not over-burdened with legislation. It was this recommendation that in turn gave rise to a staged implementation.

2.2 The Forum reported in 2008, prior to the implementation of either the redundancy laws or the sex discrimination laws. Employers should now be familiar with the redundancy legislation and any teething problems associated with this right ought to have settled down. However employers will need time to adapt to the DJL 2013, and the potential impact this will have on their practices and policies.

2.3 The legislative timetable envisages race discrimination coming into effect on 1 September 2014. Thereafter sex discrimination and the FFR will be brought into force on 1 September 2015. This provides employers time to get to grips with race discrimination, before moving on to consider sex discrimination and the FFR.

2.4 Our view is in accordance with the Forum, which is that it makes sense to implement sex discrimination and the FFR at the same time, to ensure sufficient protection for employees. However this reinforces the recommendation to legislate in stages, as employers are already facing a heavy burden in respect of the proposed discrimination law.

Recommendation: ensure that sex discrimination and FFR are implemented at the same time.

3 Part 1: Small business exemption (pp.9 - 11)

3.1 The Forum recommended that there be no small business exemption, on the grounds that 75% of businesses in Jersey employ six or fewer employees. Their concern was that by including a small business exemption a large number of employees would be left without adequate protection and no other jurisdiction offers such an exemption.

3.2 However this does raise the question as to whether they considered other jurisdictions with a similar proportion of small businesses to see how they were treated. Comparable jurisdictions could include Guernsey, the BVI and the Cayman Islands, where small companies might make-up a large proportion of businesses. In that respect it might not be appropriate to simply compare Jersey to the UK and how they manage small businesses.

3.3 We have also included a table at appendix 4, which sets out the rights in a number of common law jurisdictions, including Canada, New Zealand and the USA. Notably in the USA any businesses with less than 50 employees is exempt from having to comply with maternity legislation, including unpaid time off or the right to return to the same job. Rather small business owners can choose to be flexible over their approach.

3.4 Anecdotally larger businesses are more likely to provide FFR such as maternity leave, and so there may be less need to legislate to protect those workers. If this is correct, then the very employees that need protection would be excluded or partially excluded by a small business exemption. We

appreciate that this question ultimately boils down to a balance between protecting employees, yet still protecting the interests of small businesses. It may be that the need to ensure a minimum level of protection outweighs the potential impact on small businesses.

3.5 Our concern with this recommendation is that there is little analysis as to exactly how many employees this will actually impact. The fact that 75% of businesses have 6 or fewer employees does not necessarily mean that this equates to 75% of all employees.

3.6 When the current figures, provided by the Population Office, are considered:

(a) There are 7,040 businesses in Jersey;

(b) Of these 5,690 businesses employ between one to five employees, which is 81% of all businesses;

(c) Of those 3,400 are sole traders;

(d) The total number of people in work in Jersey is 56,290 of which 49,360 work in the private sector;

(e) Of these, 10,110 work for small businesses; and

(f) The ratio of male to female staff is approximately 55:45.

3.7 This means that the true impact needs to be assessed against 2,290 small businesses and 6,710 employees (i.e. less the sole traders). As a percentage this equates to 32.5% of all businesses and 11.9% of all employees including the public sector or 13.6% excluding the public sector. This is a very different picture from 75%.

3.8 One other concern is that this recommendation focuses on the immediate financial cost of the FFR. The proposal at stage 1 is that the States will fund part of the maternity pay, meaning that there may be little direct cost to the employer, save paying full contractual pay for two weeks. There are however wider implications that we explore in Report 4, such as operational difficulties, staffing levels, and, fundamentally the difficulty and associated cost of recruiting suitable temporary workers to provide maternity cover in Jersey. Our view is that these costs will fall more heavily on smaller employers (see Report 4) and it is unrealistic to expect employers to source skilled workers from the relatively limited pool of those seeking work (1,600 against approximately 900 – 1000 parents on maternity leave).

3.9 Finally, we recommend looking further at how small businesses are treated in the UK and other jurisdictions, such as the USA. For instance until 1 April 2007, businesses in the UK with less than five employees were exempt from the being held to have automatically dismissed an employee if it was not reasonably practicable to allow the employee to return to her old job. Small businesses in the UK can also recover 103% of statutory maternity pay from the state. In the USA businesses with less than 50 employees are exempt from the maternity leave provisions.

3.10 We recommend reconsidering this position, with a more detailed look at the impact on small businesses. We also recommend considering how other jurisdictions treat small businesses, and whether these models are replicable in Jersey.

Recommendation: reconsider including a small business exemption.

4 Part 2: Maternity Rights (pp.11-36)

Ante-natal care (pp. 11-16)

4.1 The majority of the Forum's recommendations in relation to ante-natal care remain valid today. The motivation behind this was the recognition that appropriate medical care is key to ensuring the health of the baby, and that employees should not feel compelled to work because of a fear of losing their pay for the time they need.

4.2 The Forum deferred a number of provisions to an ACOP, which is still to be developed. This will need to be quite comprehensive to ensure that sufficient clarity is provided to employers to allow them to understand what rights an employee has, and what limitations there are.

Maximum Number of Appointments (pp. 11 - 12)

4.3 The Forum specifically restricted this to clinical appointments and not optional classes such as NCT or antenatal classes. However there is no limit to the number of paid appointments an employee can take as paid leave, although an ACOP is considered likely that will probably recommend seven days, plus more at the discretion of the employer. This contrasts to the UK where an employee has a maximum number of ten days.

4.4 There are advantages to both arrangements. A fixed number of paid days gives the employer certainty. However by not stating the total days, there is an element of flexibility that allows for individual circumstances to be considered. Some employees may require less than ten days. Others may need more.

4.5 It seems that the Forum felt that there should be a set number of appointments, namely seven, with any additional appointments being discretionary (p 12). This did not extend to a requirement to legislate for this. However, given this indication, it may be appropriate to review the position in relation to the number of appointments and legislate for it specifically.

Duration of Appointment (pp. 12 -14)

4.6 It should be noted that at p 13 the Forum considered that respondents did not necessarily respond to the question in full, due to the way it was worded. This relates to the duration of an appointment, and whether employers should be able to specify a maximum period away from the office for such appointments. There is no provision in relation to this at all, and this may provide some uncertainty to employers.

4.7 There is justification for this, as employees will not be able to control hospital waiting times or the duration of appointments. However, this provision could also leave the employer in a difficult position. Certain projects may be time sensitive and small businesses may struggle to operate or operate effectively if an employee is out for a large duration of the day attending an appointment.

4.8 It may be that the ACOP adequately deals with this provision.

Recommendation: ACOP required to provide clarity. Consider setting a maximum number of appointments.

5 Maternity Leave (pp. 16 - pp. 36)

5.1 One development that may impact on these proposals is the fact that the UK system, on which so much of the framework of the Jersey legislation has been based, has recently been altered. The UK is bringing in the concept of shared parental leave, to include the ability of parents to apportion maternity leave between them.

5.2 This is a development to watch. At this stage, the implementation of any FFR is likely to be enough of a burden on employers, without the additional concerns and bureaucracy behind the proposed system in the UK (see Report 4). However those developments should be monitored ahead of implementing stage 2.

Recommendation: monitor new shared parental leave implementation in the UK.

Compulsory Maternity Leave (pp. 16 - 17)

5.3 This appears to have been a relatively uncontroversial recommendation. The period of two weeks is consistent with minimum practice and guidance. There is no justification to support the penal element recommended by the Forum, but this is consistent with other employment rights (eg right to be accompanied, right of collective consultation in redundancy) and the position in the UK.

5.4 There is no qualification period for this right, as it is predicated on health reasons. In our view this seems appropriate, although it does give rise to implications in respect of short or fixed term appointments.

Dangerous Workplaces and Alternative Duties (pp 17 – 19)

5.5 We are think that more consideration should be given to dangerous workplaces and the ability to suspend or relocate someone. There is a wider impact than merely science teachers, heavy industry and care workers. Air hostesses will need to be prevented from flying within their third trimester. Equally low paid employees working in cleaning and retail, such as shelf-stackers, will potentially be caught by this. There is therefore a wider policy consideration that needs to be looked at.

5.6 The law as drafted makes any dismissal "*connected*" to pregnancy automatically unfair. Therefore the logical impact of this is that any employer who cannot reassign the employee to perform safe duties will be left in a position where they have to suspend the employee on full pay. A dismissal, even after a full capability process would be unfair. This is the impact of the Amendment, and Veloso v Jersey Dairy 2205077/06. This does create a potential burden on employers, as they will need to arrange cover for the role and pay two wages. At present the States do not offer any assistance for employers in this regard, and employers may not have sufficient staffing permissions on their business licences to allow them to find hire a replacement.

5.7 This is a matter that points towards the need to consider specific legislation that deals with suspension with or without pay, a possible small business exemption, and consultation with the Population Office over their policies in relation to maternity cover.

Recommendation: consider position in relation to dangerous workplaces, and ensure consistent policy with Population Office.

Breastfeeding (pp 19 – 20)

5.8 The Forum suggested that an ACOP would deal with this, rather than specifically legislating for it. It would be a fundamental change to employment practices, and to relationship of employers and employees to include such a provision in statute.

5.9 One of the key factors behind this is likely to be partially ameliorated by the early implementation of the right to request flexible working arrangements. Breastfeeding mothers are likely to put in a request in this regard and employers will have to consider the situation and the statutory grounds.

5.10 The comment in relation to potential sex discrimination does need to be considered (p20). We are not sure whether this is actually correct. Consideration should be given to how the EqA 2010 deals with this situation in the UK. Notably an express difference is recognised between breastfeeding in public, which is protected, and at work, which is not.

5.11 There is a wider point, which is that the Forum did not appear to consider the interplay with discrimination. Breastfeeding (and other pregnancy related rights) are unique to women, and so a comparator with a male employer is not possible. Equally a male should not be able to claim discrimination due to any compliance with statutory FFR in favour of women. In the UK pregnant employees are covered during a protected period, which is defined within the EqA 2010.

5.12 We recommend that the sex discrimination amendments to the DJL 2013 and the EJL 2003 be drafted in a way that is consistent with and protects the rights of both employers and employees in relation to the FFR.

Recommendation: ensure legislation in respect of sex discrimination and FFR are consistent.

Paid Maternity Leave and Duration (pp20 - 23)

5.13 The Forum's recommendations need to be considered against the proposal by Deputy Southern to mandate for a 26 week maternity period, to be paid for by the States. The Forum was concerned about the financial impact on the Social Security fund, and stated that detailed financial advice was required prior to extending the additional period of maternity leave beyond the 18 weeks currently paid.

5.14 It is this period of 18 weeks therefore that forms the basis of the Forum's recommendations for stage 1. There are arguments for extending the additional maternity leave to 26 weeks, on the basis that this is the period that mothers are advised to breastfeed their children and the fact that longer periods are provided in other European Countries. It is worth noting that the PWD 1992 only mandates for a minimum period of continuous maternity leave of 14 weeks. However the Forum's priority was to ensure that minimum rights were established now (p22), so as to allow employers to get to grips with the administrative element, and more fundamentally to allow a proper analysis of the financial implications to be obtained.

5.15 The financial element to Deputy Southern's proposal appears to be fundamentally flawed as it does not appear to be based on any hard data. Deputy Southern appears to have taken the current figures and extrapolated from these to provide the cost now of extending the provision to 26 weeks. Whilst superficially this provides an annual increase of £0.7million, this needs to be scrutinised to ensure that it is accurate.

5.16 The greatest issue with this is that he presupposes a surplus in income from Social Security contributions going forwards. The reality is that as the population ages, and the work force declines, contributions will have to increase in any event.

5.17 Our view is that the recommendation from the Forum is to be preferred as it a) allows time for employers to adapt, and b) it will allow a detailed analysis of maternity rights to be developed once the actual financial implications have been assessed. This is justifiable, in the context of the legislation, which aims to minimise the financial impact on employers without delaying the FFR. Clearly the paramount factor has to be the availability of funding by the States, and this is a valid reason to have a staged implementation. Ultimately a 26 week period is likely to be brought in, but only once any necessary adjustments to social security contributions have been brought in. We think that this should be made clear in discussions, so as to circumvent Deputy Southern's proposal.

Recommendation: consider maintaining staged implementation to allow for impact to Social Security fund to be assessed. Undertake financial analysis.

Qualifying Period (pp 23 – 26)

5.18 The Forum's recommendation on this in respect of ordinary and additional maternity leave is confusing.

5.19 One issue that should be considered is the purpose of offering maternity leave. The Forum's recommendations appear to have focused almost exclusively on this from the employee's perspective, rather then the employer's. The primary factor behind paid maternity leave, from an employer's perspective, is to reward loyalty, and to ensure a long term, stable work force. It is for this reason that a qualification period is routinely applied. It is also for this reason that the ability to claw back maternity pay is included, as the employer should not be out of pocket for having to pay compulsory maternity leave pay for a new employee. This was recognised by the Forum (p 33).

5.20 The Forum recommended a qualifying period if employers are to be required to pay for any part of the maternity leave. A 26 week period was rejected as being too short, as the woman could have been pregnant before commencing employment. However the same principle applies in relation to unpaid leave with no qualification period. There is a wider question about the potential impact on employers of having to arrange maternity cover during the eight week ordinary leave period.

5.21 A 15 month period was also rejected as being too long. From what we have seen the Forum do not appear to have referred to what the UK or the Isle of Man do in this regard, where a period of 41 weeks is required to qualify for paid maternity leave, ie 26 weeks plus 15 weeks ahead of the expected date of delivery.

5.22 Deputy Southern's suggestion is that all employees should be entitled to 26 weeks maternity leave, regardless of length of service, which adopts the qualification position in the UK. There is concern that this might become a gateway to wider costs and implications for employers when applying his second stage of "*raising the level of pay and establishing how the appropriate payments are to be funded*."

5.23 One of Deputy Southern's complaints is that the Amendment is too complicated. Whilst there is a degree of complexity over this so far as the States are concerned, the rules are relatively easy for employers. The situation will be that:

(a) all employees are entitled to eight weeks maternity leave regardless of length of service;

(b) employees with 15 months service are entitled to a total of 18 weeks maternity leave (stage 1) or 26 weeks (stage 2);

(c) the employer only has to pay for the first two weeks of maternity leave, regardless of its length. Pay is 100% of the contractual salary, less the maternity allowance.

5.24 The Forum's recommendation tries to reach a balance between competing rights and obligations. We think it is unrealistic to expect Jersey to bring in rights comparable to the UK, where there has been protection for employees claiming maternity leave and maternity pay since the 1970s. The recommendations should be relatively easy for employers to implement and understand.

Recommendation: consider requiring a qualifying period for paid maternity leave, to be consistent with other employment rights, such as unfair dismissal.

Notification (pp. 26 - 27)

5.25 We have no comments, although the 15 week notification period does presuppose a minimum qualification period of 15 weeks. This point is made in relation to parental leave, but somewhat inconsistently it is not raised as relevant to maternity leave.

5.26 The Forum stated that notice **must** be given to take ordinary maternity leave. There are practical implications behind this as there are no consequences if an employee fails to provide sufficient notice (see Report 3).

Recommendation: consider ensuring consistency of approach between maternity, adoption and parental leave over the need for notice. Consider a sanction for late notice.

Sickness (pp. 27 - 28)

5.27 The recommendations in relation to sick leave are still valid. The only factor not considered is what impact this will have on employers who provide paid sick leave. In reality they probably already have processes in place to deal with this.

5.28 We are aware that there is a potential issue over whether employers who pay more for sick pay than maternity pay might face a claim for sex discrimination. This was raised in the recent Forum questionnaire, and it received a mixed response. Our view is that sickness and maternity are not and should not be treated as the same thing. This requires consideration of the DJL 2013, and whether there will be a specific exemption.

Recommendation: ensure DJL 2013 and FFR are consistent over how to treat sick pay.

Terms and Conditions (pp.28 - 30)

5.29 The recommendations in relation to terms and conditions are still valid, save that more specific consideration should be given to benefits such as accommodation and vehicles.

5.30 The provision of accommodation is prevalent in certain Jersey sectors, in particular hospitality and agriculture. Accommodation is also treated differently for tax and pay purposes, which will also need to be considered. There is the possibility that any policy that attempts to restrict the use of such accommodation would fall foul of the sex discrimination law, and the Forum recommended obtaining specific advice on this point.

5.31 Our concern is that employers may not recognise that this is a potential problem, unless they are warned about it. There may also be legitimate reasons for not wishing an employee to live in service accommodation with a baby (hotel or guest room, farm – health and safety, and a family employing a live-in nanny). Unless the legislation specifically exempts service accommodation, then there is no ability for employers to control this.

5.32 One possibility we strongly suggest the panel to consider is an exemption, similar to that in the CHEO 2013, for domestic businesses or accommodation where it is provided in someone's home.

Recommendation: consider offering an exemption for service accommodation, similar to that within CHEO 2013. Consider detailed guidance on terms and conditions, including vehicles, accommodation and pensions contributions. Obtain advice on sex discrimination and provision of benefits, in particular accommodation.

Right to Return to Work Early (pp.30 - 31)

5.33 Whilst any maternity period is below 26 weeks then there is no potential impact for employers in relation to the right to return to work early (p 30). This is because the maternity cover will normally be limited to the duration of maternity leave, and the temporary employee will not therefore qualify for protection for unfair dismissal.

5.34 However once maternity extends up to or beyond 26 weeks, there are practical implications as employers will be at risk of temporary employees qualifying for statutory protection. The employer will need sufficient notice to ensure that they bring the maternity cover to an end without incurring additional damages.

5.35 The remainder of the Forum's position in this regard appears to be correct as employers can make provision in their contracts for the temporary contract to end if the pregnant employee provides four weeks notice to return early.

Recommendation: at stage 2 consider whether the right should be varied to prevent maternity cover from accruing statutory rights. Consider specific legislation to deal with maternity cover.

Right to Return to the Same/Comparable Job (pp. 31 - 33)

5.36 We have no substantive comments on the Forum's recommendations in relation to these sections. There is a query about whether employers should be given slightly more freedom in relation to which job the employee returns to.

5.37 The Forum's position is similar to that in the UK, where employees have the right to return to the same job within 26 weeks (ordinary maternity leave) but a right to return to a comparable job if they return after additional maternity leave. If they return later than that, say after 54 months, they are no longer protected.

5.38 The Forum commented that as the duration of maternity leave was short enough to prevent any particular problems from arising, there was no need to allow employers the freedom to move the employee to a new job. If maternity leave is extended beyond 26 weeks, then such a provision may be required.

Refunding Compulsory Maternity Pay (pp 33 – 34)

5.39 We agree with the Forum's recommendations in this regard and think that this is an essential requirement.

Keeping in Touch Days/Contact (pp. 34 - 35)

5.40 We have no comments in relation to the Forum's recommendations in this respect.

6 Part 3: Paternity (Parental) Leave (pp. 36 - 42)

6.1 We have very few comments on the Forum's recommendations in relation to paternity leave, save that we repeat the point above about developments in the UK that should be monitored.

6.2 It appears that this was a relatively uncontroversial policy and was well supported. The practical application of taking weeks in blocks, within the first eight weeks mirrors the ordinary maternity leave period. Provisions for funding paternity will need to be considered at stage 2.

6.3 The one inconsistency in the Forum's recommendations is that they infer a qualification period of 15 weeks, by virtue of the notice provisions (p 40). This contrasts with maternity, where although the same notice provisions exist, the Forum do not consider this to be the minimum qualification period. This inconsistency should be clarified if possible as this may give rise to problems of interpretation (see Report 3).

Recommendation: ensure consistency over the interpretation of the notice provisions in relation to maternity, adoption and parental leave. Consider a qualification period.

7 Part 4: Adoption (pp.42 - pp.48)

Right and Age (pp. 43 - 44)

7.1 The only comment we have on the Forum's recommendation is that the restriction in relation to established relationships/foster children (p 43) is in our view justified, on the basis that the purpose of adoption leave is to allow parents to bond with new children. This is therefore a sensible recommendation.

7.2 Similarly the age of the adopted child should not impact on the right. The Forum recognised that the reality is that most employees would not necessarily take the full leave if it is unpaid, especially with older children.

Qualifying period (Pg. 44 - 45)

7.3 The Forum's recommendation is consistent with maternity and paternity rights. However there is the recognition that this might be difficult if an employee claims leave shortly after commencing work. The fact that so few adoptions occur annually should probably not have been a relevant consideration for this point. The impact is still the same, as there are practical difficulties, and it may make it very difficult for employers to find a replacement.

7.4 The Forum's report appears to have given little consideration has been given to the provisions in the UK or the Isle of Man and whether they provide a qualifying period.

7.5 The difficulty with this is that adoptions are apparently made at short notice and a couple may have been trying to adopt for a long time. This again stems back to whether leave such as this is considered from the employer's perspective, as a reward for long service. An employer is much more likely to be sympathetic to an employee in this situation if they understand and are aware that the employee is attempting to adopt. We recommend exploring a balance between no qualifying period and allowing some protection to employers to ensure continuity.

Recommendation: consider a qualification period for adoption leave.

Shared Adoption Leave (pp.45 - 47)

7.6 Please note the above comments on shared parental leave. As noted by the Forum there are practical difficulties of administering such a scheme, given that most adopting couples will work for different employers.

7.7 The proposals Forum's proposals provide a balance as parents can choose which partner is to take the longer leave. Employers can ask for self-certification and proof as to which parent is taking the longer leave.

Notice (pp.47 - 48)

7.8 We have no comments to make, save that the ACOP will need to deal with practical problems, including the nature of discussions with the employer, whether unpaid days off to attend necessary courses might be provided to the employee etc.

Recommendation: ACOP to deal with notice, support from employers, and self-certification by employees.

Surrogacy and IVF

7.9 The Forum did not report on any rights for parents using a surrogate, or whether time off for IVF treatment should be provided.

8 Part 5: Flexible Working (pp.48 - 56)

8.1 The Forum's recommendations should be reviewed in light of two key developments in the UK. These are:

(a) the removal of the statutory criteria for considering a right to request flexible working; and

(b) the extension of the right to request flexible working to everyone, and not just carers.

8.2 Save for these points, the only other comment we have is that the qualification period should probably be consistent with other rights under EJL 2003 (ie six months for unfair dismissal, or two years for redundancy). Our view is that the justification for flexible working still exists, and the framework provides a mechanism for employers and employees so that they know their rights with a high degree of certainty.

Removal of Statutory Criteria (pp. 49 - 52)

8.3 The draft criteria within the EJL 2003 are based almost exactly on the UK criteria, save that they have been condensed. As part of the drive to reduce bureaucracy in the UK, these have now been

repealed and will be replaced by an ACOP, and the reasons will be left for the employer to determine.

8.4 Our view is that such an approach is more appropriate for the UK, as most employers should be used to dealing with such requests and applying the relevant tests to their businesses. Employers in Jersey will probably benefit, at least at this early stage of development, from having specific guidelines to consider and apply.

8.5 To that extent we still think that the Forum's recommendations are still relevant.

Extension of Right (pp.52 - .55)

8.6 The Forum specifically considered whether to extend the right to request flexible working to all employees, but concluded that this was out of their remit as their focus was expressly to look at FFR, and not wider social policies. The Forum also noted that the system then in place in the UK was limited to carers and therefore recommended that the right to request flexible working in Jersey should only apply to carers. This is no longer the situation in the UK, where, as of 30 June 2014, all employees can request flexible working.

8.7 Notably the response from most employers was that as the decision whether to accede to a request was based on the needs of the business, the circumstances of the individual should not be relevant. Most respondents supported extending the right to all employees.

8.8 This may well be an area that requires consideration and updating in light of the extension of rights in the UK.

Recommendation: review change to flexible working in the UK and consider extending right to all employees.

9 Parts 6 & 7: Parental Leave and Dependant Leave (pp.56 - 64)

9.1 The Forum's main concern here was that this would too much of burden on employers. That view is probably more relevant now than in 2008, given the advent of redundancy and discrimination laws.

9.2 There are also administrative issues to consider, for instance whether there will be a central database or register recording the amount of leave a parent has taken, especially when they change employers.

9.3 As a result of the incomplete responses, it may be that further consultation will be necessary prior to implementing either of these provisions.

10 Part 8: Alternative Leave (pp.64 - 69)

10.1 Further research was suggested. The Forum's recommendation is that flexible rights would benefit the family by allowing parents to share responsibility, but that they would like to undertake further research ahead of stage 2. This may be appropriate given the incomplete responses.

Recommendation: consider Parts 6, 7, & 8 at stage 2. Undertake further research on practical impact.

11 Temporary Agency Employees (pp. 69 - 72)

11.1 No specific recommendations were made to deal with temporary or fixed-term employees.

11.2 The Forum considered temporary agency employees. Our opinion is that the Forum's view on this area was too complicated, fundamentally flawed and would give rise to serious practical problems. Temporary agency employees will probably make up the bulk of the available workforce for maternity cover. Care needs to be taken to ensure that there is sufficient staff available to employers to cover maternity leave.

11.3 Firstly, agency workers on zero-hours contracts will not be protected by the statutory rights as they are not employees under EJL 2003. FFR, as with other rights under the EJL 2003, only apply to employees. Recent JET decisions confirm that a true zero-hours contract does not create an employment relationship (eg Bergin v States of Jersey). This is because there is no contract of service.

11.4 There might be some agency workers who are actually employed by the agency. If that is so then the burden of paying maternity leave should fall on the agency as employer.

11.5 This is because, secondly, the proposal to average pay across potential employers the agency worker has worked for (even if their contracted work period has ended) a) gives rise to potential injustice for the employer who may have only contracted to employ them for a week, or day, b) could give rise to overpayment for the employee, and fundamentally c) would be practically impossible to calculate. For instance, which employer would be able to deduct the maternity allowance? Or how is that to be apportioned? Why should someone have to pay maternity pay to an agency worker who they have only used for a short period?

11.6 Consideration does need to be given to temporary and agency workers. The proposals from the Forum however give rise to a number of ancillary issues.

11.7 The current situation is that those workers who are employees will qualify for statutory protection. This should lie with their employer, namely the agency.

Recommendation: consider fixed term contracts, temporary contracts and agency workers and compare to UK where specific legislation has been introduced.

12 Consultation on Sex Discrimination

12.1 This section is technically out of scope. We have however been provided with the responses to the sex discrimination consultation data, where this relates to the FFR. Our view having read the responses is that there is an element of confusion over discrimination and FFR. Some respondents assumed that they were the same thing, whereas our view is that they are distinct and should be treated as such. We suggest providing specific legislation that establishes exact parameters of discrimination in relation to FFR.

12.2 Overall the responses can be distilled into three main categories:

(a) Employees should receive every right, with no balance;

(b) A reasoned response recognising the balance required; and

(c) The state should not interfere with contracts of employment, and employees should have rights.

12.3 Some important general principles arose from these responses. These are:

(a) Fixed-term contracts: specific consideration needs to be given to these contracts, to ensure that employees on short term contracts do not abuse the situation. This is consistent with our wider advice, which is that specific consideration needs to be given to fixed-term contracts;

(b) Knowledge: one concern was over employees not informing future employers if they were pregnant. One solution is to create a duty to inform employers or future employers, but this could lead to discrimination at the recruitment stage. The other solution is to make knowledge a prerequisite to establishing that pregnancy is protected. An employer can only discriminate if they know that the person is pregnant (or caught by another protected FFR). This is the approach taken in the UK;

(c) Health and Safety: there was a running theme, namely that provision should be made to ensure that there is no discrimination in situations where employers genuinely rely on health and safety grounds. This needs to be considered with paragraphs 5.5 - 5.7 above;

(d) Breastfeeding: there was a strong feeling that this should not be the subject of primary legislation, in part due to the differing types of workplace. It is more appropriate to deal with this under an ACOP, which matches the Forum's recommendation (paragraph 5.8 above);

(e) Sickness and maternity: these are different concepts and should not be equated with one another. We agree with the response of one of the respondents to the sex discrimination consultation, which is that people who comply with the statutory minimum in relation to maternity should not face a claim of discrimination.

Recommendation: consider interplay between sex discrimination and FFR.

13 Conclusion

13.1 The majority of the Forum's recommendations are still valid. There have been a number of developments since 2008 that merit consideration and further scrutiny. The Forum also recommended obtaining specific legal advice and undertaking additional research on the impact of some of their recommendations. These are outstanding and should be undertaken.

13.2 The impact on small businesses is addressed in Report 4. However some consideration should be given to what steps can be taken to simplify the process and reduce the burden on small employers.

Report 2: To compare the proposals contained in the Employment (Amendment No. 8) (Jersey) Law 201- with the UK

1 Introduction

1.1 The purpose of the Amendment is to bring into effect statutory rights to flexible working, maternity, parental and adoption leave which are not currently legislated for in Jersey. The existing UK legislation was used as a model for much of the Amendment.

1.2 A significant overhaul is being implemented to the UK legislation and some of the effects will come into force as soon as 30 June 2014. The comparison undertaken below takes into account the proposed Jersey amendments, the current UK provisions and pending amendments to the UK law.

1.3 The benefit of bringing into force the legislation at this stage is that this can be done through amending one primary source of legislation, albeit in stages. The UK's legislation has been brought in piecemeal over a number of different laws, regulations, directives and orders, making it fragmented and often difficult to follow. A number of amendments and additional regulations were required in order to achieve the current form in the UK.

1.4 A table showing the key comparisons with the UK legislation is at appendix 2. A detailed table of the specific legislative provisions is at appendix 3. It is helpful to compare the proposals within the Amendment with similar provisions in other common law countries, such as Australia, Canada, the USA and New Zealand and this comparison is at appendix 4.

1.5 Overall the proposals in Jersey are similar to those in the UK. The primary difference is the period of paid (including statutory maternity pay) maternity/adoption leave, which is 39 weeks paid and 13 weeks unpaid in the UK. This compares to up to a total 18 weeks in Jersey. Although the UK offers a greater period of paid maternity leave, the rate of statutory maternity pay is only £138.13 compared to £192.81 in Jersey. Jersey offers identical time for paternity leave, but has taken a more open approach by extending this right to same sex partners, which is not currently available in the UK.

1.6 The important point to emphasise is that the Amendment represents stage 1 of the process, and that greater rights and higher pay are likely to be provided under at stage 2. However prior to this, a detailed analysis of the impact on social security contributions will be required.

2 Part 3A Flexible Working (Arts 15A - 15F)

Entitlement to request change in terms and conditions of employment

2.1 The proposed introduction of Part 3A of the Amendment reflects Part 8A of the UK's ERA 1996. Art 15A introduces the entitlement to request a change in the terms and conditions of employment. The corresponding provision in the UK legislation can be found at s. 80F.

2.2 The Amendment states that any request for a change to the employee's terms and conditions of employment must be *"to enable the employee to provide care for another person"*. The current UK legislation contains this provision, requiring the reason for the request to be to either care for a child who has not yet reached the prescribed age or falls within a prescribed description and in which of whom the employee satisfies prescribed conditions as to the relationship, or a person aged 18 or over who falls within a prescribed description of whom the employee satisfies prescribed conditions as to the relationship.

2.3 The prescribed conditions referred to above will be repealed from 30 June 2014 and replaced by the FWR 2014. These simply stipulate that "*An employee who has been continuously employed for a period of at least 26 weeks is entitled to make a flexible working application*," thus entitling any employee who fits the criteria to make a request for flexible working. This will be wider than the right in Jersey. The Forum specifically considered this point (pp. 52-55) but felt that it was out of scope.

2.4 Art 15A does not intend to be as far-reaching as the UK legislation. This may be because the regime in Jersey will be nascent, compared to the established position in the UK. Employers in Jersey will need time to adapt their policies and processes to deal with requests for flexible working.

2.5 The current UK legislation also requires an employee in his application for flexible working to explain what effect, if any, the employee thinks making the change applied for would have on his employer and how any such effect might be dealt with. The corresponding Jersey provision places no such burden on the employee, which results in an absence of a safety mechanism. Employees in the UK also have to self-certify that they qualify for the right.

2.6 Further consideration may be given as to whether statutory provision is required in respect of asking the employee to explain the effect and provide solutions to their request for flexible working, rather than leaving this in an ACOP. This would help to reduce some of the administrative burden on employers, as the employee would have to come up with a workable solution. Guidance can be given to employees in an ACOP.

2.7 The significant difference between the Amendment and the corresponding UK legislation is the required period of continuous employment before an application must be considered by an employer. The Amendment requires continuous employment for a period of 15 months, whereas the UK legislation stipulates a period of less than half of that, just 26 weeks.

2.8 The period within the Amendment is inconsistent with other rights, ie 26 weeks for unfair dismissal or two years for redundancy. The latter sits more consistently with one of the intentions with flexible working, namely that employees should provide a certain amount of service to qualify. Our view is that a greater period is probably appropriate, as it provides a good balance between the competing rights of the employer and the employee.

Comment: the position is broadly similar, although there is a shorter qualification period in the UK. The position in relation to the obligations on an employee to propose a solution could be reviewed. Consider a consistent qualifying period, ie two years.

Timing of Meetings

2.9 Under the Amendment and the ERA 1996 as currently drafted, any meeting to discuss the request must be held within a reasonable time. However the impending amendment in the UK will remove the 28 day limit and state that any meeting shall be held within a "*reasonable period*."

2.10 This provides a degree of flexibility to employers, which is consistent with the current UK Government agenda to reduce red tape. It is also probably more workable in the UK, as employers should, in the main, be used to dealing with applications and so can process them quicker. The 28 day limit in Jersey is probably appropriate during the early stages of dealing with requests for flexible working.

2.11 The rest of the mechanism proposed by the Amendment is very similar to that in the UK, and does not require detailed analysis or comment, with the exception of Art 15B(5) which sets out the statutory grounds upon which an employer can refuse an application for flexible working. These are very similar to the existing grounds in the UK, although the opportunity has been taken to contract them slightly and to clarify the drafting.

2.12 However as of 30 June 2014, the statutory grounds in the UK will be repealed with a right to refuse the application on business grounds. This is to be supplemented by an ACOP from ACAS, which in turn refers to grounds the employer can consider. In reality these are the same statutory grounds, and we anticipate that the new provision will do little to alter the status quo. Theoretically it is less bureaucratic, but in practice we think it is unlikely to be so.

Comment: The 28 day time limit seems appropriate. The statutory grounds mirror the position that used to exist in the UK, and should provide sufficient clarity to employers during the early years of flexible working.

Applications, notices and appeals under Part 3A

2.13 The two pieces of legislation differ slightly in respect of the detail provided regarding the date on which an application is taken as having been made. The UK legislation makes a distinction between the means by which the application was delivered; either by post, electronically or personally. The Jersey legislation does not draw the same distinction, stating that an application is taken as having been made on the day the application is received by the employer.

2.14 There is also going to be a distinction in the future over the right to be accompanied. At present the right in the UK and under the Amendment in Jersey only arises at the appeal stage of an application for flexible working. The new provisions in the UK will allow employees to be accompanied at the initial hearing as well as at the appeal hearing.

Article 15E - Complaints to Tribunal

2.15 There is a similar level of protection afforded to employees in Jersey and the UK to ensure that their request for flexible working is properly considered. These provisions are at Art 15E(1) of the Amendment and s80H(1) ERA 1996.

2.16 The CFA 2014 (yet to come into force) has amended s. 80H of the ERA 1996 to insert an additional ground for complaint to an employment tribunal, that the employer's notification under s80G(1D) was given in circumstances that did not satisfy one of the requirements in s80G(1D)(a) and (b). This gives the employee grounds to make a complaint where the employer has failed to notify the employee correctly of the meeting to discuss the employee's application for flexible working, which has resulted in the employee failing to attend.

2.17 There are differences in the time limits in Jersey and the UK for bringing claims. The provisions under Part 3A of the Amendment are consistent with other time limits under EJL 2003, namely 56 days. In the UK they allow a period of three months.

Article 15F - Remedies

2.18 It is important that rights under the Amendment are protected by suitable remedies. These are provided by Art 15F, which allows the JET to order the employer:

(a) To reconsider the application. Notably the JET cannot dictate to the employer the terms of the contract. Any such power would, in our view amount to an arbitrary and excessive incursion into the freedom of parties to contract in Jersey; or

(b) To pay up to 4 weeks' pay by way of compensation.

2.19 The maximum amount of compensation that can be awarded by the UK tribunal for a breach of s80H ERA 1996 is eight weeks' pay.

Comment: a similar level of protection is afforded to employees in Jersey compared to those in the UK. There is a right to bring a claim before the tribunal, and an award can be made if there is a breach.

3 Article 31 amended

3.1 We have commented on this in Report 3. It is important to include FFR within the scope of the right for an employee not to face a detriment. This is consistent with the position in the UK.

3.2 However Art 31 of the Amendment is further reaching than its' UK counterpart in that it relates to "*any right conferred under Part 3A or 5A and in particular any right connected with*" flexible working/pregnancy or adoption. The UK provision limits specific circumstances for which an employee may not be subjected to detriment, as follows:

(a) made (or proposed to make) an application requesting flexible working under s80F;

(b) exercised (or proposed to exercise) a right conferred on him under s80G in relation to the refusal of an application or the right to appeal;

(c) brought proceedings against the employer under s80H; or

(d) alleged the existence of any circumstance which would constitute a ground for bringing such proceedings.

3.3 There is a danger that the wording of Art 31 of the Amendment could be too wide ranging and open the floodgates to spurious claims. We recommend considering similar restrictions to those in place in the UK.

Comment: consider restricting the grounds upon which an employee can claim to have suffered a detriment.

4 Part 5A - Maternity (Arts 55A - 55J)

Right to take time off for ante-natal care

4.1 Art 55B of the Amendment provides female employees with the right to have paid time off to attend ante-natal classes. This is similar to the right in the UK, although in Jersey there is no maximum number of days that can be taken, whereas in the UK up to ten paid days can be taken.

4.2 The provision in the UK has the benefit of certainty. Employers and employees can be flexible if an emergency arises after the ten days have been used, but both parties know where they stand. In contrast the provision in Jersey could give rise to problems due to a lack of clarity. The Forum were of the opinion (pp. 11-13) that this flexible system was to be preferred, and that an ACOP would suggest seven days plus additional days in an emergency. Protection for the employer exists as they can request proof from a medical professional that the appointment was necessary. This should limit the number of days taken as a result.

4.3 The other primary difference is that in Jersey the Amendment deliberately prescribes at 55B(5) that "*ante-natal care does not include ante-natal classes to prepare the mother for motherhood*". There is no corresponding provision within the UK legislation, and the position is therefore unclear (The Department for Business Innovation and Skills provided guidance in April 2007 which stated that such antenatal care could extend to relaxation and parent craft classes, cf Bateman v Flexible Lamps Limited where an employment tribunal held that the classes were educational and not medicinal and therefore did not fall within the statutory right).

4.4 There is an advantage in legislating for ante-natal classes in the way that has been proposed in Jersey, as it removes any ambiguity.

Comment: the position in Jersey is in our view better then the UK, as there is clarity over NCT classes. The number of ante-natal classes appointments has not however been fixed.

Right to remuneration during time off to receive ante-natal care.

4.5 The right to attend ante-natal care is the right to be paid whilst attending appointments. For the purposes of this right, Art 55C(3) sets out the basis of the calculation of this. However there is a flaw as the Article does not take into account circumstances in which the employee has been employed for less than 12 weeks. Nor is this remedied in Schedule 1 of the EJL 2003. The UK legislation provides for a calculation in these circumstances.

Comment: schedule 1 of EJL 2003 needs to be amended as stated above.

Agency Workers and ante-natal care

4.6 In addition to the rights identified above, the UK legislation makes provision for agency workers to take time off for ante-natal care and for agency workers to receive remuneration for the same. There is no corresponding legislation in Jersey.

Comment: This points to the need to give specific consideration to agency workers.

Paternal Ante-Natal Rights (S. 57ZE ERA 1996)

4.7 Whilst this section is not yet in force, it is due come into force in the UK on 1 October 2014. This section will permit an employee who has a qualifying relationship with a pregnant woman or her expected child to take time off work so that he (or she) may accompany the woman when she attends the appointment for the purpose of receiving ante-natal care.

4.8 The entitlement to time of will be limited to just two occasions per pregnancy and a maximum of six and a half hours time may be taken on each occasion. Attendance at the appointment by the pregnant woman must also be on the advice of a registered medical practitioner, registered nurse or registered midwife.

4.9 Under s. 57ZF, an employee will be able to present a complaint to an employment tribunal if his or her employer has unreasonably refused him or her to take time off.

4.10 The same rights will be extended to agency workers under s. 57ZG and s. 57ZH.

Compulsory maternity leave

4.11 The Amendment provides for a compulsory period of maternity leave under Art 55D(1), which corresponds directly with s72(1) ERA 1996. A similar compulsory period is applied, namely two weeks.

4.12 In the UK factory workers must take an additional two weeks (making the total four weeks). The Forum noted (p. 17) that there was limited heavy industry in Jersey to justify a similar provision. It is a criminal offence under the UK law to permit an employee to work during their period of compulsory maternity leave. The Forum recommended a similar penalty in Jersey (pp. 17-18) but this has not been provided for within the Amendment.

4.13 The primary difference is over the rate of pay. All other benefits continue in full in both jurisdictions. However in Jersey, an employee is entitled to 100% of pay for the compulsory maternity leave period. In contrast employees in the UK are only entitled to 90% of their weekly salary. The provisions in Jersey for this small period are therefore more generous than in the UK.

4.14 There is no qualification period for compulsory maternity leave.

Comment: the rights in Jersey and the UK are very similar, although the pay under the Amendment is slightly higher in Jersey.

Entitlement to ordinary maternity leave

4.15 The proposal under Art 55E of the Amendment is that there will be two periods of ordinary maternity leave in Jersey. All employees will qualify for a period of eight weeks maternity leave (inclusive of the compulsory period). Those employees with 15 months service before the estimated date of delivery qualify for an additional ten weeks maternity leave. This is in effect a 12 month qualification period, as this allows time for the 15 week notice to be provided.

4.16 Pay for compulsory maternity leave is as described above, namely 100% of salary for two weeks. Thereafter maternity leave is unpaid, but eligible employees will receive the statutory maternity allowance of up to £191.38 a week. Therefore the minimum an employee will receive in maternity pay is £1,531.04 or £3,444.84, plus any contractual pay for the first two weeks.

4.17 The UK legislation makes no distinction as to the length of time an employee has been employed and her right to a period of ordinary maternity leave. If an employee has been employed for less than 26 weeks, then she is not entitled to maternity pay from the employer at all. However she is entitled to 12 months maternity leave whether she has worked for 1 day, 26 weeks or more.

4.18 In the UK all qualifying employees, those who have worked for their current employer for 26 weeks or more and earning above a certain level, are entitled to 52 weeks maternity leave, which is paid as follows:

(a) From 0 - 6 weeks at the higher of 90% of salary;

(b) From 7 – 39 weeks statutory maternity pay, currently £138.13; and

(c) From 40 to 52 unpaid.

Therefore employees in the UK receive a minimum of £5,387.07 (likely to be more as this is 39 weeks at statutory minimum) in maternity pay. This sum is subject to tax and national insurance. In contrast the maternity allowance in Jersey is an exempt benefit and is not subject to taxation.

4.19 Please note that in the UK those who have not been continuously employed for 26 weeks or are on a low income may be entitled to Maternity Allowance paid directly by the state, at the current rate of £138.13 for a period of 39 weeks.

4.20 The position in Jersey could therefore be slightly more generous, as all employees will obtain contractual pay for two weeks, and if they qualify, the maternity allowance. In the UK, only employees with longer service will qualify for pay from their employer. This promotes stability and loyalty in the workforce, which is in our view a preferable position to take, as it provides employers with a base level of protection.

4.21 The above figures show that that in financial terms the statutory provision in Jersey is more generous than in the UK. A qualifying employee in Jersey receives about 64% of the UK statutory minimum in a period that is only 46% of the leave period in the UK before tax. The employee in Jersey will then return to work at full pay if they choose to. Whilst this is offset against the benefit of a longer maternity leave with their child, in financial terms, employees in Jersey should be better off. This is subject to the caveat of course that employees in the UK benefit from 90% of their salary for six weeks, which could make them better off overall.

4.22 In Jersey employers will only be liable for full contractual pay for two weeks, less the maternity allowance. Thereafter they will not have to make any payments.

4.23 In the UK the employer is responsible for paying the maternity pay to qualifying employees for the duration of the maternity leave, which is an additional burden. They do however obtain a partial reimbursement from the government in respect of statutory maternity pay. Most employers can recover 92% of statutory maternity pay, but small employers, whose national insurance contributions totalled less than £45,000 in the last complete tax year, are entitled to recover the 92% plus an additional amount as compensation that takes the recoverable amount to 103%.

4.24 The two systems are therefore very similar, albeit the UK is more generous in the period of leave that is provided to employees. Once stage 2 is implemented, Jersey will be closer to the UK in providing a 26 week period. This will also provide qualifying employees a minimum maternity allowance of £4,975.88.

4.25 The lack of a qualification period in relation to maternity pay in Jersey is the only other real distinction between the systems. In both jurisdictions there is no qualification period required in order to take ordinary maternity leave. However the employee is required to provide the employer with notice.

Comment: the period of maternity leave in Jersey is low, when compared to the UK. However the financial provision is slightly more generous. Once stage 2 has been implemented, the position in Jersey will be closer to the UK.

Notice

4.26 The employee is meant to provide 15 weeks notice of the intention to take maternity leave (Art 55E). This is the same position as in the UK. However the statutes in both jurisdictions also provide for notice to be given after this date if it was not reasonably practicable to provide it earlier.

4.27 This means that any employee can claim maternity leave, regardless of length of service. However in the UK, an employer can defer the date an employee takes her ordinary maternity leave if notice is provided late. This would only be relevant if she chose to take her maternity leave earlier than the date of the birth, as employers cannot defer maternity leave beyond this date.

4.28 There is no similar provision in Jersey, and therefore there is no real incentive on employees to provide their employers with at least 15 weeks notice.

Comment: consider including a sanction in the Amendment if an employee fails to give sufficient notice.

Requirement to notify intention to return during ordinary maternity leave

4.29 The corresponding provision of the UK law can be found at regulation 11 of the MPLR 1999. The provisions are largely the same, save that Art 55H requires just four weeks notice of a return to work, whereas the UK requires eight weeks notice to be provided. This reflects the difference in ordinary maternity leave periods prescribed under the respective laws.

4.30 Employers can defer the return date if they do not receive sufficient notice from the employee.

Work during ordinary maternity leave period

4.31 Art 55I of the Amendment corresponds directly with regulation 12A of the MPLR 1999, save for that the UK legislation stipulates that an employee may carry out up to ten days' work for her employer during her statutory maternity leave period. In contrast there is no limit on the amount of work that may be undertaken by an employee in Jersey.

4.32 The decision to omit a maximum number of days from Art 55I may be due to the ordinary maternity leave period being shorter in Jersey and therefore there is less likely to be a requirement for an employee to attend work.

Right to return after maternity leave

4.33 Art 55J of the Amendment provides that an employee who returns to work immediately after a period of compulsory maternity leave or ordinary maternity leave is entitled to return to the job in which she was employed immediately before her absence.

4.34 The UK provision, found at reg 18 of the MPLR 1999 differentiates between those employees who return to work after a period of ordinary maternity leave, or a period of parental leave of four weeks or less and those who return to work after a period of additional maternity leave or period of parental leave of more than four weeks. The first category would be entitled to return to the job in which they were employed prior to their absence. The second category is entitled to return to the job in which they were employed prior to their absence, unless it is not reasonably practicable for the employer to permit them to do so, in which case they shall return to another job which is both suitable for them to do and appropriate in the circumstances.

4.35 In view of the shorter prescribed ordinary maternity period under Art 55E, it is unlikely that such a requirement to find an alternative suitable job would be necessary upon an employee's return to work under Art 55J. This mirrors the recommendation of the Forum (pp. 30-31).

Comment: the provision in Jersey may need to change if ordinary maternity leave is extended beyond 26 weeks.

5 Part 5A: Adoption Leave (Arts 55K - 55M)

5.1 Subsections (1) & (2) of Art 55K provide the grounds on which an employee will be entitled to adoption leave. These provisions can be compared with reg 15 & 17 of the MPLR 1999. The UK legislation is conditional on the employee having been continuously employed for a period of not less than 26 weeks ending with the week in which he was notified of having been matched with the child.

5.2 The position in Jersey matches the maternity leave provisions, namely eight weeks with no qualification period and an additional ten weeks with 15 months of employment with the same employer.

5.3 The duration of the adoption leave differs between the two pieces of legislation. Art 55K permits a total period of up to 18 weeks adoption leave, whereas in the UK qualifying employees are entitled to 12 months adoption leave.

5.4 One primary difference is that the UK legislates at reg 22 of the PALR 2002 for instances in which the adoption placement is unsuccessful. Art 55K does not give consideration to such circumstances. Where adoption leave has already commenced and either the employee is notified that the child will not be placed, or the child has been placed and either dies or is returned to the adoption agency, the adoption leave will end eight weeks after the event has occurred.

5.5 As discussed below, the UK provides for statutory paternity pay in respect of adoption leave. This currently stands at 90% of pay or the statutory maternity pay of £131.18 (whichever is lower). By the amendments to brought into force by the CFA 2014 as of 5 April 2015, adoption pay will be brought in line with maternity pay to entitle the adopter to a six week period of pay at 90% of the usual weekly earnings and statutory maternity pay thereafter.

5.6 The CFA 2014 will also permit an adopter time off to attend appointments to meet the child they intend to adopt, with a maximum time of six and a half hours per appointment being permitted. This provision will come into force from 1 October 2014.

Comment: There is no qualification period for adoption leave in Jersey, compared with the UK, where at least 26 week's employment is required.

6 Part 5A: Parental Leave (Arts 55N - 55Q)

6.1 Art 55N of the Amendment proposes to introduce an entitlement to parental leave upon birth or adoption. The significant difference between the UK is that Art 55N proposes a parental leave regardless of the sex of the partner, whereas the UK only offers a paternity leave for the father. The position in Jersey will therefore be a more open and modern policy.

6.2 In addition, the UK law deals with adoption leave separately to the right to paternity leave following a birth. One adopting parent can take adoption leave. The other can take paternity leave.

6.3 Both Art 55N and the PALR 2002 provide that an employee may take two weeks' parental or adoption leave. There is a 26 week qualification period in the UK. There is no express qualification period in Jersey, but 15 weeks notice must be given in order to exercise the right, which provides a minimum period of employment.

6.4 Entitlement to parental leave under Art 55N is conditional only upon the employee having a specified relationship with the child and/or mother and expecting to have parental responsibility for the child. There is no pay for maternity leave in Jersey.

6.5 The UK also legislates for ordinary statutory paternity pay for a period of two weeks at the lower of 90% of the weekly salary or £131.18.

6.6 While consideration was given as to whether parental leave should be paid in Jersey, it was the recommendation of the forum that the entitlement to parental leave should be unpaid during stage 1.

Comment: These provisions are broadly similar, although paternity leave is paid in the UK.

7 Shared Parental Leave

7.1 The UK's CFA 2014 will bring into force an entitlement for parental leave to be shared by the two parents. As of 5 April 2015, eligible employees will be entitled to a maximum of 52 weeks' leave of which 39 weeks' statutory pay will be available for qualifying employees. This can be on the birth or adoption of a child. This leave can be shared between the parents and it is up to them to decide which parent will take the leave and when.

7.2 This scheme is in its infancy, and it is likely to require a large burden on employers to administer the leave. Employees will self-certify that they qualify and that their partner is not taking leave at the same time. This is obviously vulnerable to abuse.

7.3 In addition, there is already the concept of parental leave in the UK, which allows parents to take unpaid leave to care for a sick child. This is currently limited to the first five years of a child's life/adoption, and a maximum of four weeks a year per child per parent, up to a maximum of 18 weeks.

Comment: these were both provisions the Forum considered and suggested reviewing at a later date. These will provide a significant advantage to parents in the UK. We recommend reviewing these alterations and considering them at stage 2.

8 Complaints to the tribunal for a breach of Part 5A EJL 2003 (Arts 55S and 55T)

8.1 As with the right to request flexible working, there is provision within the Amendment to refer a complaint to the JET pursuant to Art 55S. There is a similar right in the UK. A complaint in Jersey must be made within eight weeks. The UK allows a period of three months in which a complaint may be raised.

8.2 Art 55T enables the JET to award an amount of compensation, in respect of each contravention, not exceeding four weeks' pay.

8.3 The corresponding UK legislation in respect of breach of provisions relating to ante-natal care makes provision of a award equal to the remuneration to which the employee would have been entitled if her employer had not refused to pay her in respect of time off for ante-natal care. The same provision also extends to agency workers.

8.4 The CFA 2014 will amend the current UK legislation to permit a tribunal to make an award that is twice the amount that the employee would have been entitled to if her employer had not refused to pay her in respect of time off to receive ante-natal care.

Comment: the rights are broadly similar.

9 Part 7 Unfair Dismissal (Art 67)

Automatically Unfair Dismissal

9.1 There is a provision in the Amendment at Art 67(1) to make any dismissal connected to one of the FFR automatically unfair. There is no qualification period to be able to bring such a claim, unlike the six month qualification period required to bring a claim for ordinary unfair dismissal.

9.2 This mirrors the provision in the UK almost identically, save in one key respect. In the UK the test for the tribunal is whether the "*reason or principal reason for the dismissal*" related to one of the prescribed grounds (s99 ERA 1996). The way this is treated is that the burden is on the employee to provide evidence that there is an arguable case that the reason for the dismissal was one of the rights in the UK. If they do this, the burden then switches to the employer to show that the reason was actually for another reason.

9.3 In Jersey the proposed wording is simply "*connected with*" the FFR. An employee will simply have to show an arguable case that the dismissal was connected with the FFR. It does not have to have been the reason for the dismissal. This is a very broad and open test. It then places a very high burden on the employer to show that there was no connection at all with one of the FFR. Even a minor connection will suffice to establish the claim.

9.4 Consideration should be given to altering the drafting of Art 67(1) so that the wording is consistent with the rest of the EJL 2003. Our view is that the test should be framed around the reason for the dismissal.

Comment: We think the drafting of this article needs to be reviewed.

Redundancy

9.5 In the UK, the MPLR 1999 makes specific provision for an employee who is on maternity leave to be offered a suitable existing vacancy where one is available. This gives a pregnant employee priority in a redundancy exercise. The Jersey provisions deliberately do not make any specific provision for the same protection.

9.6 The same provision in the UK is also made in respect of employees on adoption leave, under the PALR 2002.

9.7 We have raised our concerns with Art 67(2) within Report 3.

Comment: we think the drafting of this article needs to be reviewed.

10 Discrimination

10.1 We have not seen the proposed amendments to the DJL 2013 to deal with sex discrimination or pregnancy related discrimination.

10.2 In the UK, these are treated as two quite separate forms of discrimination, and specific provision is made for these characteristics in the EqA 2010. Pregnancy related discrimination only applies during a protected period, namely from the date of notice to the employer that the employee is pregnant, to the end of the maternity leave.

10.3 There is also a distinction between discrimination in the workplace and discrimination generally. For instance a woman has the right not to be discriminated against for breastfeeding in public. The same does not apply in the workplace.

Comment: this area will require careful drafting.

11 Agency Workers

11.1 Specific legislation has been produced to deal with and protect agency workers in the UK. No such legislation has been proposed in Jersey. The Forum's view on agency workers (p 70) was that they would automatically be covered by the provisions of EJL 2003. This may require further consideration and reflection.

12 Conclusion

12.1 Although we have only been asked to compare the UK provisions to the Amendment, we thought it would be helpful to consider the position in other common law jurisdictions, because they normally have a similar legal system and a common interpretation of legal principles to Jersey. We have attached at appendix 4 a table comparing the basic FFR in Australia, New Zealand, Canada, the USA, and the UK. It is worth noting that Jersey's provisions are comparable to those in Canada and New Zealand and significantly more generous than the USA.

12.2 We have also included at appendix 3 a table setting out the specific wording of the current and future provisions in the UK, compared to those contained within the Amendment.

12.3 At appendix 2 is a table setting out the key similarities and differences between the rights offered in Jersey and in the UK.

Report 3: To ensure the Employment (Amendment No. 8) (Jersey) Law 201- is fit for purpose

1 Introduction

1.1 We have approached this question on the basis that we have been asked to consider whether the proposed drafting a) matches the Minister's intentions when adopting the Forum's recommendations, and b) to consider the wording of the drafting and whether this does or might give rise to any problems with interpretation.

1.2 We have addressed the amendments in the order in which they will appear in the EJL 2003. If we have not commented on a provision or amendment, then the assumption is that the drafting is fit for purpose.

1.3 The majority of the drafting is fit for purpose. At appendix 5 is a table showing the provisions we think need to be altered or reviewed, with suggested wording where possible.

1.4 Some thought should be given to the qualification periods that have been proposed under the Amendment, and whether these can be aligned to existing periods within the EJL 2003, for instance 26 weeks to claim for unfair dismissal or two years to claim for redundancy.

1.5 There are two outstanding documents that mean that any analysis of the Amendment cannot wholly assess whether the draft law will actually fulfil its purpose. These are the ACOP, which is key to understanding and applying a number of the amendments, and the proposed interplay with the DJL 2013. Once these have been finalised the true workings of the Amendment can be identified.

2 Flexible Working (Part 3A)

Dealing with an application - Art.15B(1)

2.1 The way in which Art 15B(1)(b) has been drafted is open to ambiguity. This provision states that an employer to whom an application under Art 15A is made:

> "*may agree the change in the terms or conditions applied for under Article 15A or agree different terms and conditions of the employee's employment to those applied for; and*"

This gives the impression that an employer can only do one of two things: a) agree to the employee's proposal, or b) agree to a different variation.

2.2 There is no express provision within this article to allow an employer to refuse an application under Art 15A. We appreciate that Art 15B(5) provides for the grounds for an employer to refuse an application, and that the inclusion of this means that, under ordinary canons of construction, this should be interpreted to show that an employer can refuse an application.

35

2.3 However we think that this is an unnecessary ambiguity, and that the construction of this clause will be easier for both employers and employees to understand if the wording were as follows:

> *"may agree the change in the terms or conditions applied for under Article 15A, agree different terms and conditions of the employee's employment to those applied for, or refuse the application so long as one of the grounds under 15B(5) below is satisfied; and"*

Grounds - Art 15B(5)

2.4 The statutory grounds have been included, and these are virtually identical to those in the UK. However these will be repealed on 30 June 2014 in the UK, and employers will instead be allowed to decide applications on the basis of the needs of the business in general. This new statutory scheme is nascent, and so will need to be monitored to see if it is successful.

2.5 The grounds themselves are relatively clear, save that in Art 15B(5)(a) it is not clear whether the wording should read "*would create the burden of additional costs*" as opposed to "*a burden of additional costs*."

2.6 It is understood that an ACOP will be issued which will assist employers with how to apply the grounds and emphasise that the decision is one for the employer.

Variation Art 15A

2.7 There is no statutory right to allow an employer to vary any contractual changes agreed to under a request made under Art 15A. Any variation would become part of the new terms and conditions of an employee's contract, and so any variation could be dealt with using customary law principles such as discussion and consent.

2.8 Employers should be provided some comfort that they can review any variations made under Art 15A, should the needs of the business change, or should the employee's circumstances change.

2.9 However a statutory right to vary an Art 15A variation could be viewed as an additional burden on parties. This could probably be dealt with under the ACOP issued by JACS, which can make specific reference to the possibility of variation, and that employers may want to put in place a review/regular reviews to ensure that the Art 15A variation continues to be suitable for both parties.

3 Detriment (Part 4 - Art 31(3) & (4))

3.1 We do not have any comments about this provision, save that in our view this is a necessary inclusion as it will protect employees who assert or attempt to assert a right from any actions by the employer short of a dismissal. Without this provision the FFR would have limited effect.

3.2 The inclusion of Art 31(4) is a useful clarification that the right under Art 31 is intended to apply to any conduct or action short of a dismissal. However we note that detriment is not defined in the EJL 2003, and this has not been discussed in the few JET cases that have dealt with a claim under this Article.

3.3 This is a point that could probably do with clarification in the future. The UK defines the circumstances in which a detriment arises, which provides a better mechanism for both parties to know their rights and obligations. We suggest reviewing this article.

4 Maternity, Adoption and Parental Rights (Part 5A)

Ante-natal Care - Art 55B & Art 55C

4.1 We do not have any comments on this section. The Minister accepted that there would not be a maximum number of days for this. A detailed ACOP will be required to assist employers to develop a policy.

Compulsory Maternity Leave - Art 55D

4.2 The majority of this drafting is fit for purpose. The inclusion of weekly pay by reference to Schedule 1 of EJL 2003 is an effective way of preventing employers from attempting to provide for a lower contractual pay during maternity leave.

Holiday - Art 55D (2)(b)

4.3 There is no provision within the proposed legislation to prevent an employer from insisting that an employee takes paid holiday in place of their maternity allowance. This applies equally to the ordinary and additional periods of maternity leave.

4.4 The intention is that employees continue to accrue holiday during maternity leave, and that maternity leave should be treated as separate from their holiday allowance. This is covered by Art 55D(2)(b). However we anticipate that unless it is made clear that maternity leave is not the same, and that there is a separate entitlement, some employers may ask employees to use holiday in place of maternity leave, although this could be actuated by ignorance of the position instead of being a deliberate request.

4.5 **We recommend considering wording to make this point clear.**

Benefits - Art 55D(2)(c)

4.6 In addition there is a potential conflict with the Forum's recommendation (pp.29 - 30) that all benefits continue to accrue during period of maternity leave, including employer contributions, and the current drafting. Art 55D(2)(c) states that any terms and conditions that continue during maternity are still subject to any obligations in relation to those terms and conditions.

4.7 Where an employer's pension scheme is non-contributory, ie the employee does not make contributions, then there is no problem in applying this article. However where there is a contributory pension scheme, and employer contributions are dependent on the employee making a payment, this clause could give rise to problems.

4.8 A literal interpretation means that unless an employee makes pension contributions, she will be not be entitled to receive the employer contributions. Her obligation must be met to crystallise the employer's duty to pay. In reality an employee on unpaid leave may not be able to afford her minimum contribution.

4.9 There may also be a problem, in that the rules of the pension scheme may prohibit employer contributions in the absence of any employee contribution. It may also be expensive to vary the rules, and in certain circumstances this may not be possible for particularly if the scheme is provided by a large provider. This burden will be particularly difficult for any small employers to meet (although statistics may show that very few of them provide any pension contributions).

4.10 There is no obvious solution, and this point could benefit from greater scrutiny to ensure that it meets the stated aim of the Minister. This applies equally to similar provisions for ordinary maternity leave (Art 55G(1)(b)) and adoption leave (by virtue of Art 55M).

4.11 The position of service accommodation also needs to be considered. A possible solution is to provide an exemption for accommodation in a private home, similar to the one in the CHWEO 2013.

Reduction for Social Security Maternity Allowance - Art. 55D(5)

4.12 The Forum recommended (pp.17 - 18) and the Minister accepted (p.6) that an employer would be able to reduce the contractual amount of any payment for compulsory maternity leave by the amount of the maternity allowance, whether the employee qualified for the allowance or not.

4.13 The drafting of Art 55D(5) does not achieve this stated aim. That is because the wording is quite clear in its terms that any reduction by the employer is "*by any amount that the employee receives*." As drafted, an employer will only be able to reduce the pay if an employee qualifies for and receives the maternity allowance. This is contrary to the intention of the Minister, and could give rise to higher costs for the employer, particularly as there is no qualification period for compulsory maternity leave.

4.14 **We recommend altering this so that it is clear that the employer can reduce the pay by the amount of the maternity allowance in any event, and by any sick pay the employee actually receives. We suggest the following:**

> ***"Any remuneration to be paid by an employer to the employee under paragraph (2) shall be reduced by:***
>
> > ***(a) the amount of the maternity allowance under Article 22 of the Social Security (Jersey) Law 1974, whether the employee qualifies for the allowance or not; or***
> >
> > ***(b) any amount that the employee receives by way of short term incapacity allowance under Article 15 of that Law."***

5 Ordinary Maternity Leave (Part 5A- Art. 55E)

5.1 There is an inherent contradiction in the way the law is framed, which is the timing of when the notice of the right to take maternity leave, adoption leave or parental leave is given to employers. This inconsistency is apparent in the Forum's recommendations (pp 24, 26 and 40).

5.2 Art 55E(1)(a) is the first of the proposed articles to deal with this issue, and so we will focus on this article. However our comments apply equally to Art 55K(2) and Art 55P(2)(c).

5.3 An employee is meant to provide 15 weeks notice to an employer that they are pregnant and intend to take maternity leave. This in effect provides a 15 week qualification period for the right to have ordinary maternity leave. However the drafting of Art 55(1)(a) provides an exception, which is *"if that is not reasonably practicable, as soon as is reasonably practicable."* This was not part of the Forum's recommendations (see p26), which states that notice must be given 15 weeks before the estimated week of delivery.

5.4 This means that a new employee can give notice of their intention to take ordinary maternity leave after the 15 week time frame for existing employees. This is consistent with the stated aim that there should be no qualification period for the first 6 weeks of ordinary maternity leave.

5.5 However, virtually identical wording is used in Art 55P(2)(c), where the Forum's recommendations were that this wording would in effect provide a 15 week qualification period for parental leave.

5.6 It is this inconsistency, as well as the diametrically opposed aims, that will give rise to conceptual problems with the application and interpretation of the legislation as drafted. If anyone wanted to argue this point at the JET they would rely on the Forum's recommendations, and these would cause confusion.

5.7 There are also practical considerations, as there is no guidance as to how the reasonably practicable provision will be applied in practice. We anticipate that the JET will apply current principles to this, as similar wording is used in relation to the time limit for bringing a claim. The JET will probably look at the date of knowledge, and how long afterwards the employee informed their employer. However such a provision is otiose if in fact there is no qualification period.

5.8 We think it would be better to ensure that there is consistency in the way these terms are meant to work. This may mean being clear that the qualification period is 15 weeks, and notice is required to become "*entitled*" for FFR leave, or that notice is not required but will normally be expected to be given at least 15 weeks before the expected week of childbirth but that later notice in limited circumstances does not affect an employee's entitlement to leave.

5.9 However, the natural interpretation of Art 55E(2)(a) is more closely aligned to there being a requirement to give the notice in sufficient time, as it states that an employee who is "*entitled to maternity leave*" is entitled to six weeks off. This presupposes that not every employee is entitled to actually take ordinary maternity leave. Therefore this suggests that sufficient notice is required to qualify.

5.10 This is an area that requires more thought, and a consistent approach in respect of the different FFRs being brought into force.

Termination - Arts. 55F(5), 55L(7) & 55Q(3)

5.11 This applies to all forms of leave under the FFR. We think that Arts 55F(5), 55L(7) and 55Q(3) would be improved by the inclusion of the words "for whatever reason," eg:

> "*Where the employee's employment terminates for whatever reason after the commencement of the ordinary maternity leave…*"

Work during maternity leave - Art 55I

5.12 The intention behind Art 55I is to allow an employee to return to work during maternity leave, at her own request, in order to allow her stay in touch or complete any necessary training. The Minister's intention was that these days would be unpaid (Minister pp.9 - 10) and also to ensure that the employer could not compel an employee to work. This last point is achieved through Art 55I(6).

5.13 However there is one drafting error and two further problems with Art 55I as drafted:

(a) section (4) is missing a sub-paragraph (b): it jumps from (a) to (c);

(b) the drafting at section (2) states that any work carried out will constitute a day's work. This is likely to be interpreted consistently with the rest of the EJL 2003 (ie Art 16), and accordingly an employee is entitled to be remunerated for a day's work under Art 55I. This can be remedied by including wording that expressly confirms that any attendance by an

employee during ordinary maternity leave is unpaid. This can be in section (2), or as set out in 44(c) below; and

(c) There is no provision to allow an employer to refuse to allow an employee to return, for instance if health and safety grounds mean that it is not appropriate for the employee to attend a training session. We recommend putting in a control provision so that the right is not solely at the employee's option, such as:

> *"(1)…an employee may, subject to the reasonable consent of her employer, carry out unpaid work for her employer during her ordinary maternity leave period…"*

Right to Return to Work - Art. 55J

5.14 The only comment in relation to Art 55J is that there is a potential issue in relation to fixed-term contracts that expire during the period of maternity leave. Art 55J is expressed in absolute terms, ie she is entitled to return to her job. There is no mention here as to what happens if the job no longer exists.

5.15 **We recommend drafting a provision that means that an employee whose fixed term contract has expired during maternity leave is not automatically entitled to return to the same job.**

5.16 There is sufficient protection for pregnant employees as the expiry of a fixed term contract constitutes a dismissal for the purposes of Arts 61 and 67, so if the circumstances justify it an employee may bring a claim, for instance where the employee's contract was routinely renewed prior to her pregnancy. However, if the contract has genuinely expired, then the employer should be protected from a mandatory obligation to provide the employee with a job.

Employer's Right to reclaim pay for compulsory maternity leave - Art. 55D(5)

5.17 The Forum recommended (pp.33 - 34) that an employer should have the right to reclaim the balance of any pay made under Art 55D(5), if an employee does not return to work after their maternity leave, or fails to work for a sufficient period after their maternity leave. This was accepted by the Minister (p.10 of his response).

5.18 There is no provision within the Amendment to allow an employer to recoup any monies paid under Art 55D(5), ie contractual pay less the maternity allowance.

5.19 **We recommend including an article that allows an employer to make such a deduction. We also recommend that the period required should be expressly stated, to provide clarity for employers and employees. The Forum should be asked to consider what a reasonable period would be.**

6 Adoption Leave (Part 5A - Chapter 4)

6.1 The Minister's intention was that this leave would be unpaid (p12). Art 55K(1) should therefore state "*An employee is untitled to unpaid adoption leave in respect of a child…*" The current drafting is unclear as to whether the adoption leave is paid or not. The suggested wording would be consistent with Art 55N – Parental Leave.

6.2 The Minister also accepted the Forum's recommendation that adoption leave would not be available where there is an established relationship, ie in the case of a foster or step-child (p12). There is no

such provision within Amendment No8. Art 55K(1)(b) could be interpreted to include a foster-child or step-child.

6.3 Therefore we recommend including a provision that defines "*child*", so that it expressly excludes a foster child, step-child, or other child that the employee has an established relationship with.

6.4 There is no provision to deal with the unfortunate situation when an adoption fails, or if there is an issue with the child. We recommend considering the position in the UK, which fixes an end date of eight weeks after the adoption fails (or the anticipated end of adoption leave if earlier). A similar position, albeit with a shorter period, could be considered in Jersey.

7 Parental Leave (Part 5A - Chapter 5)

7.1 The right to claim parental leave extends to the "*partner of the child's mother*," Art 55N(2)(a)(ii). There is no definition of "*partner*" within EJL 2003 or the Amendment. The Forum and the Minister both accepted the interpretation that a partner is someone living in an enduring relationship with the mother, but who is not an immediate relative (p11 of the Minister's Response).

7.2 **We recommend including the definition of partner in Art 55N so that it is clear that there needs to be some form of long relationship to qualify for the right. Otherwise the provision is open to ambiguity.**

7.3 The only other point is that there is no right to return to the same job after paternity leave. Although the employee is likely to have an effective remedy under Art 31 (detriment) or Art 67 (dismissal).

8 Dismissal for Family Reasons (Part 7 - Art. 67)

8.1 It is in our view quite proper to legislate to prevent an employee from being dismissed for exercising one of the FFRs. Without such a provision the rights would be relatively ineffectual.

Connected with - Art 67 (1)

8.2 However careful consideration should be given to the chosen wording in Art 67(1). This makes any dismissal unfair if it "*is connected with*" one of the FFRs.

8.3 This is a radical departure from the rest of the protections under Part 7 EJL 2003, which require the JET to consider whether the reason or principal reason is within one of the allowed exceptions, ie capability. Similarly the UK legislation uses the test of reason or principle reason.

8.4 The JET is familiar with this concept. This is also the wording that has been chosen under the proposed Art 67(2). So long as the employer can show what the actual reason was then they can avoid a claim that the dismissal was automatically unfair. This is an important safeguard to ensure that employers can still discipline and manage their workforce without undue interference from the state.

8.5 The test of "*connected with*" creates a much lower threshold, and could give rise to difficulties for employers, who would have to show that there was no connection at all with one of the FFRs. This is a very difficult hurdle to overcome.

8.6 **We recommend giving consideration to the way Art 67(1) has been drafted, and the reasons for including the lower test of "*connected with*." If this was not intentional, then we suggest**

reverting to the usual test of "*the reason (or, if more than one, the principal reason...*" This would provide consistency. If it was intentional then it would be helpful to understand the rationale behind the drafting. Employers would also require very careful guidance over how this term works in practice.

Redundancy - Art 67 (2)

8.7 The Minister accepted the Forum's recommendations (p.10 Forum) in respect of redundancy; the position in the UK whereby a pregnant or adopting employee will be offered the right of an alternative job over and above other employees will not be applied in Jersey (p10 of the Minister's response).

8.8 However the impact of Art 67(2) is to potentially include such a provision via the backdoor. This is because reference is made to a redundancy situation where one or more employees are retained, and an employee covered by one of the FFRs is dismissed. If the redundancy was for a reason connected to one of the FFRs it is automatically unfair. This specifically raises the point for an employer, and implies that they cannot make someone covered by one of the FFRs redundant.

8.9 We think an employer faced with a situation under Art 67(2)(b) may justifiably be concerned that the pregnant employee will bring a claim that the reason was connected with one of the FFRs under (2)(c). As a result they may be more likely to favour the pregnant employee and select them even if the other employee was better at their job.

8.10 This gives rise to another problem for employers. In the UK, an employer who favours a pregnant or adopting parent has statutory protection. Therefore a UK employee who is made redundant cannot claim that the redundancy was unfair simply because a pregnant employee was chosen over them. There is no such protection in Jersey, and simply selecting the pregnant employee would make the redundancy of the other employee unfair. An employer would be left in an almost impossible quandary over how to proceed.

8.11 Our opinion is that this is an unreasonable fetter on the freedom of employers to manage their business, and to select the most appropriate staff for their workforce.

8.12 The fact is that redundancy is classed as a dismissal under EJL 2003, and so it would be caught by Art 67(1) if the evidence showed that the redundancy decision was made because the employee was pregnant (or for reasons of one of the other FFRs).

8.13 We also think that adequate protection should be provided by the DJL 2013, which should make any direct discrimination on one of the protected grounds, including the FFRs, during redundancy unlawful. Equally, any selection criteria will need to be carefully considered to ensure that they do not indirectly discriminate against pregnant employees, or employees who have taken maternity leave.

8.14 **Consideration should be given to removing Art 67(2) as it arguably will force employers to prioritise pregnant employees during a redundancy process.**

9 Schedule 1 – Calculation of Week's salary

9.1 Schedule 1 sets out the method for calculating a week's salary for the purposes of the EJL 2003. For the purposes of the claims in relation to ante-natal care or compulsory maternity leave, the period required for a calculation is reduced to 12 weeks.

9.2 However there is no mechanism for calculating an employee's weekly salary if they have worked for an employer for less than 12 weeks. This requires clarification and further amendments to schedule 1 of EJL 2003.

10 Fixed Term Contracts/Agency Contracts/Zero Hours Contracts

10.1 Overall there appears to have been little consideration about the impact of the FFR on fixed term contracts. A person working under a fixed term contract is classed as an employee for the purposes of EJL 2003. If a person is on a fixed term contract and they cannot complete the contract due to pregnancy then an employer will be forced to pay maternity leave, and will have to arrange further temporary cover. This is a heavy burden to impose on employers.

10.2 **We recommend giving consideration to whether employers might, in limited circumstances, be able to break a fixed-term contract. Under the current law, an employee can start a fixed term contract for say 10 weeks when they are only 5 weeks away from the expected week of delivery. An employer cannot discriminate against the woman by refusing to offer the job, as this is likely to be prohibited by the discrimination legislation. She would then be entitled to two weeks paid leave, and the ability to unpaid leave for the remainder of the contract. The employer currently has no recourse to obtain a refund. This also creates logistical problems for employers as they would have to source a new employee (see discussion on impact to employers).**

10.3 Technically the employee also has the right to return to the job in which she was employed prior to her maternity leave (Art 55J). There is no carve-out to say that this does not apply to a fixed-term contract that has expired during the period of the employee's ordinary maternity leave.

10.4 There is also no provision to deal with agency contracts and temporary employees provided under those contracts. This contrasts starkly to the UK where a there are number of specific protections in place for agency contracts.

10.5 Workers under a zero-hours contract will be specifically excluded from claiming any of the FFRs as they are not classed as employees under EJL 2003. There may be a way to provide some protection under the DJL 2013.

10.6 These are areas that warrant further consideration and possibly greater clarification.

11 Conclusion

11.1 The majority of the Amendment is fit for purpose.

11.2 There are a few articles that require minor amendments. There are also a few areas that need more fundamental changes. A table is included at appendix 5 detailing the articles that need alteration. In particular we recommend reviewing:

(a) Art 55D(2): Accrual of benefits, including pension contributions and accommodation;

(b) Notice requirements and how to deal with reasonably practicable exclusion (Arts 55E, 55K and 55P);

(c) No right for an employer to reclaim pay for compulsory maternity leave if employee leaves without returning to work;

(d) Art 67(1): consider why "*connected with*" was chosen, and consider reviewing; and

(e) Art 67(2): redundancy and FFRs. Consider varying or removing.

11.3 Consideration should be given to fixed-term, zero-hours and agency contracts, as there is currently inadequate legislation in respect of these quite complicated areas.

Report 4: To determine what impact, if any, the Employment (Amendment No. 8) (Jersey) Law 201- will have on businesses, in particular small businesses and employees, and whether there are any financial implications for employers and employees arising from the Employment (Amendment No. 8) (Jersey) Law 201-

1 Introduction

1.1 There is a high degree of cross-over between the two questions above. As a result we have addressed them together, so as to avoid any unnecessary repetition.

1.2 The major impact the Amendment is likely to be due to maternity and adoption leave, and the right to return to work. Flexible working and parental leave should be relatively cost neutral. Our focus therefore has been on where we see the likely impact to occur.

1.3 The key questions to consider are:

(a) what impact will the Amendment have on businesses, and what will the financial implications be?;

(b) what will this impact be on small businesses?; and

(c) what will this impact be on employees, and what are the financial implications for them?

1.4 In summary our opinion is:

(a) The direct financial cost to employers should be relatively limited;

(b) However the administrative and resourcing costs could be quite high;

45

(c) This is likely to have a greater effect on small businesses, who are unlikely to have the staffing or professional resources to manage the maternity/adoption leave period; and

(d) Employees are in a better position due to the FFR. There is little direct financial impact as a result of the FFR. However there is the potential for employers to discriminate against young women when it comes to employing staff.

1.5 The question ahead of implementation is does the benefit of providing sufficient protection for employees outweigh the likely impact these provisions will have on businesses. In other words, should the right be recognised as so fundamental that notwithstanding the likely impact on businesses, they should be brought into force.

1.6 There is a wider social policy in having FFR, beyond the specific impact on businesses and employees. Such rights are almost universally recognised, at least within developed economies, and therefore Jersey's reputation as a place to do business is potentially hampered by the lack of FFR. There is therefore not only the potential benefit to employee welfare, but the reputation of Jersey as a place to work, to be considered.

2 Jersey

2.1 Whilst it is helpful to look at other jurisdictions, and how they have implemented similar rights, Jersey has a relatively unique employment and regulatory environment. Due to the restrictions on employees, and a limited recruitment pool, it is not necessarily as easy to find suitable replacements or temporary staff as it would be say in the UK.

2.2 The statistics below show that there are only 1,600 people actively seeking work in Jersey against approximately 1,000 new mothers.

3 Small Businesses

3.1 Anecdotal evidence, including the response to the Forum, suggests that the majority of large employers offer their employees some form of contractual maternity/paternity leave. Equally the anecdotal evidence indicates that smaller employers are less likely to offer any paid maternity leave.

3.2 The Forum's recommendation was therefore that there should be no small business exemption (p11). One of the underpinning factors to this was the statistic that three quarters of all businesses in Jersey have less than six employees. The figures below indicate that this is now closer to 80% of all businesses in Jersey.

3.3 However, in order to understand the true impact of the Amendment, it is necessary to consider how many employees this actually equates to. It is not as simple as saying that three quarters of all employees would be outside the protection afforded by some of the FFRs if there were a small business exemption.

3.4 Looking at the current statistics from the Statistics Unit:

(a) There are 7,040 businesses in Jersey;

(b) Of these 5,690 businesses employ between one to five employees;

(c) Of those 3,400 are sole traders;

(d) The total number of people in work in Jersey is 56,290 including the public sector and 49,360 in just the private sector;

(e) Of these, 10,110 work for small businesses; and

(f) The ratio of male to female staff is approximately 55:45.

3.5 This means that the true impact needs to be assessed against 2,290 small businesses and 6,710 employees (ie less the sole traders).

3.6 As a percentage this equates to 32.5% of all businesses and 11.9% of all employees including the public sector or 13.6% excluding the public sector.

3.7 Further statistical analysis could be undertaken to consider how many of these 6,710 employees are women (ie 45%, so an estimated 3,020), how many are of child-bearing age, and also how many of these employees earn at or close to minimum wage. We also note that approximately 1,000 of the 5,690 businesses are building companies, which we assume are less likely to have female employees.

4 Impact on Businesses

Financial Implications

4.1 The immediate financial impact can be distilled into four specific categories:

(a) full contractual pay for two weeks;

(b) the salary of any maternity cover;

(c) maintenance of benefits for the remainder of the maternity leave; and

(d) the costs of ensuring that policies and procedures are up to date, and training management in how to deal with the FFRs.

4.2 We have raised the issue with the drafting of the Amendment in Report 3. As the Amendment currently stands, employers can only offset the maternity allowance if an employee receives the allowance. This should be remedied to ensure that the full allowance can be offset against any contractual pay during compulsory maternity leave.

4.3 The full maternity allowance is currently £191.38, which equates to £5.47 an hour on the basis of a 35 hour working week. The minimum wage is currently £6.63 an hour, so £232.05. Therefore those employers who pay minimum wage will have to pay a minimum of £81.34 during compulsory maternity leave. Employers who pay more than the minimum wage will have a higher contractual burden. This is an inevitable financial cost of the Amendment.

4.4 One matter that needs further clarification is the number of affected employees who work close to or at minimum wage. This will then allow an understanding as whether the burden on the majority of employers is virtually cost neutral, or whether there is in fact a significant cost to employers.

4.5 There is also the financial cost incurred in paying for a replacement or temporary replacement. This will equate to the additional salary of the maternity cover for a minimum of the first two weeks, and possibly any benefits that are offered (although this last point seems unlikely). Some employers may

also choose to hire the temporary cover to start earlier, so that the pregnant employee can ensure that their work is transferred appropriately, which will mean that they have to pay two salaries during this period.

4.6 There is also a potential financial burden on employers who are unable to offer alternative employment when an employee's job involves a risk to their health and safety. Given the position in relation the FFR, an employer is unlikely to be able to dismiss an employee in these circumstances and will have to consider suspending their pregnant employee with pay. They will lose this labour, and may well have to pay to obtain cover during this period.

4.7 It is possible that the pay for the duration of any temporary cover will be more expensive than the existing employee's salary. Further information from recruitment and temporary agencies is required to understand if that is likely to be the case.

4.8 The other financial cost to businesses is maintaining an employee's benefits throughout the maternity leave. This could include the cost of health insurance, telephones, a car allowance, and more pertinently employer pension contributions. If such benefits are provided these will be a financial cost to employers for between 8 and 18 weeks. Employers also need to ensure that employees' pension rights are not affected by the maternity leave, which may involve a cost to ensure that any necessary enhancements are made.

4.9 Finally there is likely to be a cost to employers to ensure that their policies and procedures deal with the FFR and that management are trained in how to deal with any applications, rights or complaints that may arise. These costs could include legal or human resourcing costs, as well as the time and administrative work taken to develop the policies and to train staff.

4.10 As most of the maternity leave is unpaid, there is limited immediate financial impact on businesses in Jersey. However any extension of rights could alter this position significantly.

Other Implications

4.11 The wider impact of the FFR will have an administrative and financial cost for employers. Furthermore, as with other employment rights, there is an administrative burden on all employers when dealing with the rights in practice, and also when faced with a claim before the Employment Tribunal. This additional cost is difficult to quantify, but the obvious financial penalties of failing to implement the rights mean that employers will have to adapt to the new regime.

4.12 There are two potential rights that will impact on businesses:

(a) paid time off for ante-natal care; and

(b) maternity leave.

Ante-natal care

4.13 Paid ante-natal care will be a cost to employers, in terms of salary. However the wider impact is on the loss of services during the appointments, and the potential for dissatisfaction amongst those employees not given time off for ante-natal care.

4.14 There is also the wider human resources and management cost to ensure that the business is able to continue effectively during any medical appointments and that the employee's work is covered

whilst they are off. This will require adept management, as ante-natal appointments cannot necessarily be predicted, nor can a finite time limit be put on the length of each appointment.

Maternity Leave

4.15 The wider implications of maternity leave are also likely to increase the financial burden on employers. This is because the real impact on businesses is likely to be over the continuity of staff and sourcing a temporary replacement.

4.16 Employers will be left with two obvious options during maternity leave. They can either recruit a temporary replacement, or they can chose not to recruit a replacement and share the workload around the remainder of their staff.

4.17 This latter option is not without difficulties, as employers are under an obligation to ensure a safe working environment and to undertake suitable risk assessments. If there is too much work due to the lack of a maternity cover, this could expose employers to a claim for stress at work. It could also lead to employees resigning and claiming constructive unfair dismissal.

4.18 The latest unemployment statistics show that there are currently about 1,600 actively looking for work in Jersey. The figures quoted by Deputy Southern in his proposal suggest that in 2012 there are 1,100 births in Jersey, and 86% of mothers, namely 944, claimed maternity allowance. In order to qualify for this allowance they would probably have been working before their children were born, and were unable to work whilst receiving maternity leave. This suggests that approximately 950 temporary employees would have been needed that year to cover maternity leave.

4.19 There are also difficulties with hiring a replacement, as this process can take some time and will therefore divert valuable resources away from the core focus of the business. Specific consideration needs to be given to certain sectors, where there may not be an immediate replacement available or the skills are not available from those people actively seeking work. For instance a law firm may not be able to source a qualified lawyer or a restaurant may not be able to hire a senior chef. Therefore valuable time might be wasted without managing to obtain a solution.

4.20 This leads on to the fact that sometimes the only available cover has to be sourced off island. There are also likely to be higher costs involved in paying for someone from outside of Jersey, including work permit and staffing applications, relocation fees, and agency fees.

4.21 CHWEO 2013 states that a person engaged on maternity cover for a period of up to nine months is not counted towards the total headcount of registered/licensed staff. The current policy of the Population Office is that this will allow employers to replace an entitled employee with a registered employee during maternity leave, as opposed to only being able fill an entitled spot with an entitled employee. However they do not allow employers to employ two people at the same time in respect of the same job. Therefore employers with no unused staffing permissions will not be able to employ registered temporary staff until the maternity leave has started. Nor will this exemption apply when someone in a dangerous role is suspended with pay. Employers could therefore be unable to ensure that suitable continuity provisions are implemented prior to the maternity leave commencing.

4.22 Discussions will be necessary with the Population Office to ensure that suitable temporary replacements will be available to employers without contravening their business licences. Given the position in the Amendment, the CHWEO 2013 should probably be altered to include adoption leave.

4.23 The potential costs of hiring a temporary replacement include:

(a) recruitment agent fees;

(b) advertising costs;

(c) compliance/background checks;

(d) higher hourly rates; and

(e) the cost of off island recruitment, including relocation costs, accommodation costs, licence applications, work permits etc.

4.24 Finally, the most efficient way to ensure continuity, and that work is transferred to the temporary maternity cover properly is to start the period of maternity cover before the maternity leave starts. If an employer chooses to do this, subject to any regulatory restrictions, then they will have the cost two salaries for this period.

Notice

4.25 The administrative impact is potentially compounded by the way the notice provisions within the Amendment have been drafted. The notice provisions (ie Art 55E) require an employee to give 15 weeks notice if possible. However there is no sanction on an employee for failing to provide sufficient notice. Nor is there a safeguard as in the UK, where the employer can defer the start of maternity leave (if the employee wanted to start this early).

4.26 The immediate reason why there should be some freedom with the notice is that in certain circumstances an employee may not be able to give notice, or an emergency may preclude them from giving notice. However the 15 week period is also there to allow employers to properly plan for the maternity leave, and to ensure that suitable cover is in place where necessary.

4.27 Therefore, under the Amendment as drafted, an employer could face late notice of an employee's intention to take maternity leave, and then be left in the difficult position of not having sufficient time to source a replacement. Reasons for late notice could include a) being a new employee, b) concerns about the employer's reaction leading to a desire to wait, and c) a change in personal circumstances so that employee now wants to take ordinary maternity leave. Greater clarity is therefore required over the notice procedure, and the application of the "*reasonably practicable*" exemption from the requirement to provide 15 weeks notice.

Conclusion to Impact on Businesses

4.28 It should be apparent from the above issues that there are wider costs and implications for employers than having to pay an employee's salary during the compulsory maternity leave period.

4.29 It needs to be remembered however that the majority of recruitment costs are costs that businesses face now in any event whether they offer maternity leave or not. At the moment businesses will either replace a pregnant employee or hire a temporary replacement. Therefore these ancillary costs and burdens are little different under the Amendment.

4.30 There is a real impact though, because the Amendment guarantees an employee their job on their return from maternity/adoption leave. This means that employers are likely to have to source a temporary replacement, with the appurtenant costs, rather than hire a full time employee.

4.31 There are also wider administrative costs in implementing and managing the new FFRs.

5 Small businesses

5.1 The costs and implications we have identified apply whatever the size of the business. However because of the nature of small businesses, the administrative and financial burdens are likely to have a greater impact on them then a larger business.

5.2 We do not think it is correct to assume that small businesses are more likely to pay lower wages and therefore the financial costs should be limited. Our own experience is that small businesses may include trust companies or family offices, where employees can receive significant salaries and benefits. Therefore there could well be a high financial cost to certain small businesses.

5.3 However the greater impact is over the disruption to the workforce. A small business is less likely to be able to spread any work to its other employees during the maternity leave. The impact on staff is also likely to be much greater and Employers would have a higher risk of facing a claim for stress at work. Therefore they may be compelled to pay for temporary maternity cover. Small businesses are also less likely to be able to deal easily with any time taken for ante-natal care for the same reason.

5.4 The other advantage large businesses are likely to have over small businesses is a developed human resources function, and possibly even in house counsel, both of whom can adapt the internal policies to deal with the FFR and develop internal training to ensure that staff does not breach the new rights. Human resources departments in larger employers will also be able to manage the recruitment process, without any significant impact on other staff.

5.5 In a small business these steps will have to be undertaken by the manager diverting their valuable time away from the core business. This in turn could have a wider impact on the profitability or viability of some smaller businesses. In some cases this manager may have no or little qualifications in management, human resources or policy reviews. A cleaning company for instance may not have anyone who can immediately deal with the FFR. A review of the JET cases following the implementation of unfair dismissal, and then redundancy, suggests that small employers on Jersey generally struggle to adapt to new laws.

5.6 Anecdotally a number of small businesses currently choose not to recruit a temporary replacement. They currently have the freedom to either a) recruit a new employee or b) retain the job for the pregnant employee, depending on their individual circumstances. The impact of the Amendment is therefore quite noticeable, as small businesses will now have to keep the job open for their employee. Employees will then be asked to assume the burden of the pregnant person's work during this period.

5.7 Our view is that small businesses will probably lose valuable manpower and hours to implement the new policies and procedures. This will also require a great deal of assistance from JACS, or incur the cost of human resources or legal advice. Either way this will affect a small employer much more than a large employer.

6 Employees

6.1 The position in relation to employees is primarily positive in terms of the ability to have paid antenatal care, request flexible working, and to take up to the relevant parental leave. They also have the benefit of being able to return to their same job, which is a significant improvement on their rights. There are also statutory mechanisms in place to protect the employee from any detriments or dismissals.

6.2 There is an argument that the level of the maternity allowance is such that women cannot afford to take maternity leave unpaid for all or part of the ordinary allowance. The weekly sum is £191.38, if they qualify. If they do not qualify for maternity allowance, then they will clearly be impacted by any maternity leave they take.

6.3 However this is no different from the current situation. If anything the position is being improved as women no longer have to take a period prior to birth. Furthermore there is no evidence that the low level of maternity allowance currently prohibits women from taking maternity leave. The Social Security 2012 Report and Financial Statement cited by Deputy Southern indicates if anything the majority of women claim the allowance. According to those figures 86% of mothers received the allowance, and they could only have received it if they were not working. This suggests that employees already take maternity leave, but their real need is protection against dismissal or being discriminated against.

6.4 The only other potential direct financial impact on employees arises in situations where they might have to pay contributions towards their pension in order to qualify for employer contributions. An employee receiving the maternity allowance may not be able to afford such contributions.

6.5 Closely allied to this is the issue of preserving the employee's social security contributions. If employers are not paying any salary, then we understand that they will not make any social security contributions. Amendments will be required to ensure that all parties in receipt of their FFR (including maternity, adoption and paternity leave) should have their social security contributions protected. They should not be penalised later for taking unpaid leave.

6.6 There is however an indirect impact on employees, which is the attitude of employers to young female employees. We suspect that there is an unspoken feeling that employers in Jersey will be reluctant to hire younger women if there is a risk that their business might face the increased burden of maternity leave. This in turn could lead to a reduction in available roles for young female workers.

6.7 This orthodoxy is unlikely to be stated publicly, and therefore would not have come out in the Forum's research. We are not sure, but it appears that the Forum did not ask employers to address this specific issue. If employers are guaranteed anonymity in relation to this question, then you should be able to garner whether there is likely to be this indirect impact on the employment prospects of young women.

6.8 There is also the potential for the FFR to impact other employees, including:

(a) Increasing the burden on them during maternity leave, which in turn could give rise to health and safety issues;

(b) Resentment within the workforce from those who do not qualify for FFR (eg do not have children or no longer have young children).

7 Conclusion

7.1 There is inevitably an administrative and financial burden on employers. We recognise that some of these costs exist already, but these will be accentuated by the Amendment. We think that all employers will be affected, but small businesses are likely to feel the greatest impact due to more limited resources.

7.2 The way the Amendment has been drafted provides sufficient protection for employees. However there is the potential that the provisions will be viewed as one-sided and provide little comfort or protection to employers, who have to face a) additional costs and burdens, with b) no requirement for loyalty either before or after maternity leave.

7.3 We recommend considering the following safeguards for all employers: i) a qualification period, ii) clarifying the provisions on notice, and iii) the ability to claw back any contractual payments made during compulsory maternity leave and any benefits paid during ordinary maternity leave if an employee leaves before the end of or shortly after the end of maternity leave.

7.4 Furthermore, whilst there is no formal small business exemption in the UK, the statutory maternity pay system has been developed to reduce the burden on small employers. For instance eligible businesses receive 103% of statutory maternity pay (larger employers receive 92%), and they can request advance payment if they have cash flow problems. This recognises the additional burdens on small businesses face when dealing with maternity leave and costs.

7.5 In the USA, all business with less than 50 employees are exempt from the compulsory maternity leave provisions, namely 12 weeks unpaid maternity leave. This is in recognition of the administrative and financial burden in having to source a temporary replacement for employees on maternity leave.

7.6 We have included two articles within the documents referred to. One is from the Guardian and the other from the Harvard Business Review. These both point to the positive impact a degree of flexibility over FFRs can give to small businesses. The FFR do not have to be a burden on employers, so long as the focus is on managing their employees, along with recognition that strong maternity policies allow for businesses to retain their best staff.

7.7 We think that greater thought needs to be given to small businesses, and whether assistance can be provided to them to mitigate the impact of the Amendment. They make up 80% of all businesses, which in turn makes up a key part of the economy in Jersey.

Conclusion

1 Report 1) Forum's Recommendations

1.1 The Forum reported in 2008, over six years ago. Even so the vast majority of the recommendations are still valid today. A number of the recommendations may need to be re-considered. These are set out at paragraph 1.3 of Report 1.

1.2 We think particular consideration should be given to:

(a) small businesses

(b) flexible working/maternity in light of impending alterations in the UK

(c) the interplay with DJL 2013

(d) fixed-term and agency contracts

1.3 Further research and advice was suggested by the Forum. It is not clear whether this has been undertaken or not. We think that the following matters require particular emphasis:

(a) how will social security contributions be maintained during ordinary maternity leave? Will the burden lie on employers, or will employees (whether they receive maternity pay or not) be treated as if they are making contributions?

(b) what will likely the increase to social security contributions be? and

(c) how to deal with accommodation when provided as a benefit?

1.4 Our view is that the staged approach is justified, partially due to the legislative and regulatory burden on employers, but also so that a proper analysis of likely impact of a 26 week maternity period on social security contributions can be carried out. There is no fiscal evidence to allow for an immediate period of ordinary maternity leave of 26 weeks. However this remains the ultimate goal.

2 Report 2) To compare the Amendment with the position in the UK

2.1 The overall framework is very similar to the position that existed in the UK prior to this year. A table of the key comparisons between the Amendment and the UK legislation is at appendix 2. A more detailed table of the legislation is at appendix 3. We also thought it would be helpful to consider the rights in various common law countries, and these are set out at appendix 4.

2.2 The UK has recently brought in a number of changes to FFRs that are dealt with in the body of the report. We recommend observing the impact of these changes to see whether they will be viable in Jersey.

2.3 Overall the provisions in Jersey will be less generous than in the UK. This is partly due to the fact that the UK has had legislation in relation to various aspects of the FFR since the late 1970s. In contrast Jersey is starting from a position of no such rights. It is also due to the staged implementation of the rights.

2.4 The key difference is the period of maternity leave. All women are entitled to 52 weeks maternity leave in the UK, whether they have long service or not. However they only qualify for paid maternity leave from their employer if they have 26 weeks service. In Jersey all employees will qualify for two weeks pay, regardless of service and up to 18 weeks leave in total. There is therefore better protection for employers in the UK.

2.5 The level of the maternity allowance in Jersey is more generous than the UK, although this has to be balanced against the shorter leave period. Once stage 2 has been implemented, then the provisions in Jersey will be comparable to a number of other jurisdictions, and financially there will be little difference with the UK.

3 Report 3) Is the Amendment Fit for Purpose

3.1 There are two outstanding documents that will directly impact on whether the Amendment is fit for purpose. These are:

(a) ACOPs dealing with the various FFR; and

(b) the updated DJL 2013, and how this treats FFR as a protected characteristic.

3.2 The majority of the Amendment is fit for purpose. Attached at appendix 5 is a table of the provisions that we think need to be reviewed or altered.

3.3 Further consideration needs to be given to the treatment of fixed term contracts. A firm decision also needs to be reached over zero-hours and agency workers. The Amendment does not deal with any of these situations sufficiently.

4 Report 4) Impact on businesses and employees

4.1 This report is necessarily hypothetical. We do not have detailed data to provide a complete or accurate indication of the actual impacts and burdens on employers.

4.2 The direct financial impact of the Amendment is relatively clear, and it is primarily the cost of two weeks maternity leave. However there are wider financial costs, including the costs of recruitment, increased administrative and human resources costs. It is these that will create the biggest impact on businesses, as they have to adapt to the new system.

4.3 Small businesses will probably suffer a greater impact than larger businesses, as they are less likely to have the staffing resources or support resources to deal with the additional financial burden of the FFR. They will also require greater support and assistance to implement the changes.

4.4 As for employees, the impact of the FFR is predominantly positive. There is little direct financial impact, and the right to request flexible working and return to the same job after taking family leave will provide a better working environment. There is however the possibility that the FFR will lead to certain employers refusing to hire female employees who might take maternity leave.

5 Conclusion

5.1 There is often incredulity amongst international clients, in particular those based in the UK, that there are no FFR in Jersey. These rights are virtually standard across developed nations.

5.2 We think there is a positive social and business benefit to implementing FFR. There is however a balance to be struck between providing sufficient security and protection for employees, whilst ensuring that employers are not overburdened or vulnerable to being exploited.

5.3 We think that the position in relation to small businesses should be reconsidered. We suggest considering some partial exemptions or qualifications to the FFR and also whether the administrative burden of the FFR can be reduced. For instance small businesses could be exempted from paying for maternity leave or keeping a job open, but they could be bound by the other provisions on detriment, automatically unfair dismissal and discrimination.

5.4 There is time to consider the Amendment as it is not due to be implemented until September 2015. It will be key to ensure that the proposed sex discrimination law is consistent with the FFR. The recent response to the sex discrimination legislation suggests that there is some uncertainty over the difference between the two, and also over how maternity/paternity is going to be a protected characteristic.

5.5 One of the interesting view points that we came across whilst writing this report was the benefit of flexibility. Small businesses actually have an advantage over big businesses when it comes to the structure of the workforce, as they are not normally as regimented. They can therefore adapt their policies to fit their business. If the FFR are approached positively and used creatively by employers, then they can be used as a tool to retain and support the best staff.

Ogier

27 June 2014

Appendix 5: Articles requiring amendment or consideration

Article of the Amendment	Current Wording	Recommended Wording	Comments
Part 3A - Flexible Working			
Dealing with an application 15B(1)	*"may agree the change in the terms or conditions applied for under Article 15A or agree different terms and conditions of the employee's employment to those applied for; "*	*"may agree the change in the terms or conditions applied for under Article 15A, agree different terms and conditions of the employee's employment to those applied for, or refuse the application so long as one of the grounds under 15B(5) below is satisfied; and"*	The current wording gives the impression that an employer can only do one of two things: a) agree to the employee's proposal, or b) agree to a slightly different variation. There is no express provision within this article to allow an employer to refuse an application under Art 15A. We think that this is an unnecessary ambiguity
Grounds Art.15B(5)	*"would create a burden of additional costs."*	*"would create the burden of additional costs"*	
Variation Art. 15A	Under the current wording there is no statutory right to allow an employer to vary any contractual changes agreed to under a request made under Art 15A. Any variation would become part of the new terms and conditions of an employee's contract, and so any variation could be dealt with using customary law principles such as discussion and consent.	N/A	This could probably be dealt with under the ACOP issued by JACS, which can make specific reference to the possibility of variation, and that employers may want to put in place a review to ensure that the Art 15A variation is suitable for both parties.
Part 4 - Minimum Wage			
Detriment Art. 31	Currently detriment is not defined in the EJL 2003, and this has not been discussed in the few JET cases that have dealt with a claim under this Article.	This is a point that could probably do with clarification from JACS in the future	.
Part 5A - Maternity, Adoption and			

57

Parental Rights			
Holiday Art. 55D(2)(b)	*"(2) An employee who is not permitted to work under paragraph (1), but who would normally have been required to do so during that period under her contract of employment –* *(b) is entitled, during the compulsory maternity leave period, to the benefit of all of the terms and conditions of employment which would have applied if she had not been absent;"*	We recommend considering wording to make this point clear.	We anticipate that unless it is made clear that maternity leave is not the same, and that there is a separate entitlement.
Benefits Art. 55D(2)(c)	*"(2) An employee who is not permitted to work under paragraph (1), but who would normally have been required to do so during that period under her contract of employment –* *(c) is bound, during that period, by any obligations arising under those terms and conditions, subject only to the exceptions in this Part."*	We recommend reconsidering this as there is a potential conflict with the Forum's recommendation that all benefits continue to accrue during period of maternity leave, including employer contributions, and the current drafting. 22. There may also be a problem, in that the rules of the pension scheme may prohibit employer contributions in the absence of any employee contribution	This applies equally to similar provisions for ordinary maternity leave (Art 55G(1)(b)) and adoption leave (by virtue of Art 55M).
Reduction for Social Security Maternity Allowance - Art. 55D(5)	*"(5) Any remuneration to be paid by an employer to an employee under paragraph (2) shall be reduced by any amount that the employee receives by way of short term incapacity allowance under Article 15 of the Social Security (Jersey) Law 1974, or any maternity allowance under Article 22 of that Law, in respect of the compulsory maternity leave period."*	*"Any remuneration to be paid by an employer to the employee under paragraph (2) shall be reduced by:* *(a) the amount of the maternity allowance under Article 22 of the Social Security (Jersey) Law 1974, whether the employee qualifies for the allowance or not; or* *(b) any amount that the employee receives by way of short term incapacity allowance under Article 15 of that Law."*	We recommend altering this so that it is clear that the employer can reduce the pay by the amount of the maternity allowance in any event, and by any sick pay the employee actually receives.
Ordinary Maternity Leave Art. 55E (1)	*"(1) An employee is entitled to ordinary maternity leave (in addition to*	There is an inherent contradiction in the way the law is framed, which	- Our comments apply equally to Art 55K(2) and Art

58

(a)	*compulsory maternity leave) provided that she satisfies the following conditions –* *(a) no later than the end of the 15th week before her expected week of childbirth, or, if that is not reasonably practicable, as soon as is reasonably practicable, she notifies her employer of –(i) her pregnancy,(ii) the expected week of childbirth, and (iii) the date on which she intends her ordinary maternity leave period to start,"*	comes out in the Forum's recommendations, and this is the way that notice of the right to take maternity leave, adoption leave or parental leave is notified to employers. We think it would be better to ensure that there is consistency in the way these terms are meant to work. This may mean being clear that the qualification period is 15 weeks, and notice is required to become "*entitled*" for FFR leave, or that notice is not required but will normally be expected to be given at least 15 weeks before the expected week of childbirth but that later notice does not affect an employee's entitlement to leave.	55P(2)(c). - There is no guidance as to how the reasonably practicable provision will be applied in practice. - This is an area that requires more thought, and a consistent approach in respect of the different FFRs being brought into force.
Termination - Arts. 55F(5), 55L(7) & 55Q(3)	*"(5)Where the employee's employment terminates after the commencement of the ordinary maternity leave period but before the time when (apart from this paragraph) that period would end, the ordinary maternity leave period ends at the time of the termination of the employment."* *"(7) Where the employee's employment terminates after the commencement of the adoption leave period but before the time when (apart from this paragraph) that period would end, the period ends at the time of the termination of the employment."* *"(3) Where the employee's employment terminates after the commencement of the parental leave period but before the time when (apart from this paragraph) that period would end, the period ends at the time of the*	We think that Arts 55F(5), 55L(7) and 55Q(3) would be improved by the inclusion of the words "for whatever reason," eg: *"Where the employee's employment terminates for whatever reason after the commencement of the ordinary maternity leave…"*	

59

	termination of the employment."		
Work during maternity leave - Art. 55I	*"(4) Reasonable contact from time to time between an employee and her employer which either party is entitled to make during a compulsory maternity leave period or ordinary maternity leave period (for example to discuss an employee's return to work) –* *(a) shall not constitute work; and* *(c) shall not bring that period to an end."* *"(2) For the purposes of this Article, any work carried out on any day shall constitute a day's work".*	-**Section (4)** is missing a sub-paragraph (b): it jumps from (a) to (c) - **Section (2);**the drafting at section (2) states that any work carried out will constitute a day's work. This is likely to be interpreted consistently with the rest of the EJL 2003 (ie Art 16), and accordingly an employee is entitled to be remunerated for a day's work under this article. This can be remedied by including wording that expressly confirms that any attendance by an employee during ordinary maternity leave is unpaid. - **Section (1)** There is no provision to allow an employer to refuse to allow an employee to return, We recommend putting in a control provision so that the right is not solely at the employee's option, such as "(1)*…an employee may, subject to the consent of the employer, such consent not to be unreasonably withheld, carry out unpaid work for her employer during her ordinary maternity leave period…"*	
Right to Return to Work - Art. 55J	Art 55J is expressed in absolute terms, ie*" she is entitled to return to her job"*. There is no mention here as to what happens if the job no longer exists.	We recommend drafting a provision that means that an employee whose fixed term contract has expired during maternity leave is not automatically entitled to return to work.	
Employer's Right to reclaim pay for compulsory	*"(5) Any remuneration to be paid by an employer to an employee under*	There is no provision within the Amendment to allow an employer to recoup any	

60

maternity leave - Art. 55D(5)	*paragraph (2) shall be reduced by any amount that the employee receives by way of short term incapacity allowance under Article 15 of the Social Security (Jersey) Law 1974, or any maternity allowance under Article 22 of that Law, in respect of the compulsory maternity leave period."*	monies paid under Art 55D(5), ie contractual pay less the maternity allowance. We recommend including an article that allows an employer to make such a deduction. We also recommend that the period required should be expressly stated, to provide clarity for employers and employees.	
Adoption Leave - Art. 55K(1)	*"(1) An employee is entitled to adoption leave in respect of a child provided the employee –* *(a) is the child's adopter; and* *(b) has either notified the approved adoption society that he or she agrees that the child should be placed with him or her and has agreed the date of placement or, in the case of an overseas adoption, has received an official notification; and* *(c) has given his or her employer notice of his or her intention to take adoption leave in respect of a child, specifying –* *(i) the date on which the child is expected to be placed with him or her for adoption or, in the case of an overseas adoption, the date on which the child is expected to enter Jersey, and* *(ii) the date on which the employee has chosen that his or her period of leave should begin."*	Art 55K(1) should state *"An employee is entitled to unpaid adoption leave in respect of a child…"* We recommend including a provision that defines *"child"*, so that it expressly excludes a foster child, step-child, or other child that the employee has an established relationship with. We also recommend considering a provision to deal with the situation where an adoption breaks down.	The Minister's intention was that this leave would be unpaid. The Minister also accepted the Forum's recommendation that adoption leave would not be available where there is an established relationship, ie in the case of a foster or step-child (p12). There is no such provision within the Amendment.
Parental Leave - Art. 55N(2)(a)(ii)	*"(2) The conditions referred to in paragraph (1) are that the employee –(a)*	There is no definition of *"partner"* within EJL 2003 or Amendment. We recommend including a	The Forum and the Minister both accepted the interpretation that a partner is someone living in an enduring

61

	is *(ii) married to, the civil partner of, or the partner of, the child's mother or adopter, but not the child's father or adopter; and"*	definition of "*partner*" in Art 55N so that it is clear that there needs to be some form of long relationship to qualify for the right. Otherwise the provision is open to ambiguity..	relationship with the mother, but who is not an immediate relative (p11 of the Minister's Response).
Part 7 - Article 67 - Dismissal for Family Reasons			
Connected With - Art. 67(1)	*This makes any dismissal unfair if it "is connected with" one of the FFRs.*	We recommend giving consideration to the way Art 67(1) has been drafted, and the reasons for including the lower test of "*connected with*." If this was not intentional, then we suggest reverting to the usual test of "*the reason (or, if more than one, the principal reason...*" This would provide consistency.	This is a very significant departure from the rest of the protections under Part 7 EJL 2003. The test of "*connected with*" creates a much lower threshold, and could give rise to difficulties for employers, who would have to show that there was no connection at all with one of the FFRs. This is a very difficult hurdle to overcome.
Redundancy - Art. 67(2)	*"(2) An employee who is dismissed shall also be regarded for the purposes of this Part as unfairly dismissed if –* *(a) the reason (or, if more than one, the principal reason) is that the employee was redundant;* *(b) it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who had positions similar to that held by the employee and who have not been dismissed by the employer; and* *(c) it is shown that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was a reason connected with any of the reasons referred to in paragraph (1)(a), (b), (c), (d), (e) or (f)."*	We think consideration should be given to Art 67(2) at it will arguably force employers to prioritise pregnant employees.	

62

Schedule 1 - Calculation of Week's Salary	Schedule 1 sets out the method for calculating a week's salary for the purposes of the EJL 2003. For the purposes of the claims in relation to ante-natal care or compulsory maternity leave, the period required for a calculation is reduced to 12 weeks.	This requires clarification and further amendments to schedule 1.	There is no mechanism for calculating an employee's weekly salary if they have worked for an employer for less than 12 weeks
Fixed Term Contracts/Agency Contracts/Zero Hours Contracts			
Fixed term contracts.	There has been little specific drafting for fixed term contracts	We recommend giving consideration to whether employers might, in limited circumstances, be able to break a fixed-term contract. - Technically an employee also has the right to return to the job in which she was employed prior to her maternity leave (Art 55J). There is no carve-out to say that this does not apply to a fixed-term contract that has expired during the period of the employee's ordinary maternity leave.	A person working under a fixed term contract is classed as an employee for the purposes of EJL 2003. If a person is on a fixed term contract and they cannot complete the contract due to pregnancy then employer will be forced to pay maternity leave, and will have to arrange further temporary cover. This is a heavy burden to impose on employers.
Agency Contracts	There is also no provision to deal with agency contracts and temporary employees provided under those contracts	This is an area that warrants further consideration	This contrasts starkly to the UK where a there are number of specific protections in place for agency contracts.
Zero-Hours Contracts	Workers under a zero-hours contract will be specifically excluded from claiming any of the FFR as they are not classed as employees under EJL 2003.	This is an area that warrants further consideration	There may be a way to provide some protection under the DJL 2013.

63