STATES OF JERSEY

DISCIPLINARY AND GRIEVANCE HEARINGS: RIGHT TO A FRIEND (P.112/2011) – COMMENTS

Presented to the States on 5th July 2011
by the States Employment Board

STATES GREFFE

2011 Price code: B P.112 Com.(2)

COMMENTS

Background

The Deputy previously brought a similar proposition, P.46/2009, extending the right to bring a friend to the Suspension Review Panel. P.112/2011 extends this beyond suspension to grievance and disciplinary hearings.

The States Employment Board both encourages and sets good employment practice. It is firm in its view that the current arrangements in place regarding the right to bring a workplace colleague or Trades Union Representative meet both the legal requirement under the Employment (Jersey) Law 2003 and is compliant with Jersey Advisory and Conciliation Service (JACS) and UK ACAS (Advisory, Conciliation and Arbitration Service) advice and guidance.

The recent judgement on 29th June 2011 made by the Supreme Court in the case of *R v Governors of X School* has deemed that existing practice already facilitates compliance with Article 6 of the European Convention on Human Rights (ECHR) and hence there is no requirement to amend Jersey Law. The States Employment Board recommends that Part (a) of the proposition should be opposed on the grounds that Article 78A of the Employment (Jersey) Law 2003 remains human rights compliant, and Article 78A of the Law does not need to be amended in light of the judgement in *R (G) v Governors of X School.*[1]

Furthermore, the SEB believes that Part (b) should be opposed, both in light of the Supreme Court Judgement and since the terms of employment already make provision for legal representation where risk of loss of profession is likely to be relevant (but no right to representation by other representatives, e.g. family members). The SoJ does in any case abide by good practice in this regard as established by JACS and ACAS[2].

Financial and manpower implications

Since the proposition would allow the right to representation by a lawyer, there are financial implications for employing a lawyer in the HR Department at a minimum salary of £120k plus employment costs. It would also necessitate HR practitioners being trained as a lay person to deal with qualified legal experts, again at additional cost. This would require on occasion to be supplemented by external legal advice, which is extremely expensive and could easily escalate costs to £500k+ per annum taking into account complex cases.

Statement under Standing Order 37A [Presentation of comment relating to a proposition]

Following the lengthy States meeting, it was necessary to reschedule the States Employment Board meeting and the comment was not approved by the Board until Friday afternoon.

[1] Appendix 1
[2] Appendix 2

APPENDIX 1

STATES EMPLOYMENT BOARD COMMENTS ON P.112/2011

1. The proposition states that the previous Comments made in response to P.46/2009, 'showed how the author and the Chief Minister were out of touch with reality and public opinion. They were also oblivious of Human Rights judgements …'. The view of the Chief Minister was that by using the term "friend" in this respect, the proposition was effectively allowing lawyers to join proceedings. JACS[3] view on this has not changed since previous comments and is that they do not support the use of lawyers for in-house grievance and disciplinary matters in "normal" circumstances, and that that modern employment practice should be to encourage settlement of issues in a non legal framework whenever possible. In this view JACS is not out of touch with reality as their guidance has clear precedence in UK law, is embodied in statute, is in alignment with UK ACAS advice and guidance[4], and reflects their current practice.

2. In relation to "normal circumstances" this would exclude those circumstances where allegations against an individual are so grave as to seriously damage an individual's future (e.g. teachers, doctors, nurses, lawyers, etc. who may, as a result of disciplinary action, be prevented from following their profession and whose right to employment is monitored by an external professional body), JACS would advise employers to give serious *consideration* to allowing representation by a lawyer. In such circumstances an employee could not be fairly expected to represent themselves, and being accompanied by a trade union official or work colleague would not be sufficient. States of Jersey Human Resources would concur with this view.

3. This is in keeping with the UK interpretation of the ECHR Article 6 (right to a fair and public hearing) which was tested in law in the case of *R v. Governors of X School*[5] where it was deemed that representation was appropriate where loss of profession was involved. It is important to note that in the UK, this has not caused the government to follow a path that legal representation is a right in any public (or private) sector disciplinary or grievance hearing. The initial ruling in this case was overturned on 29/06–11 and this ruling limits the right to legal representation only in case involving externally regulated professions. JACS suggests a better solution might be to make a simple amendment to the official Code of Practice in relation to disciplinary hearings only where loss of profession may be a possible outcome. This would be in line for individuals such as doctors, and teachers who already have this right covered in their disciplinary codes. Current practice already facilitates compliance with the ECHR. Jersey law closely follows UK precedent, which is in line with other European States, and to follow the Deputy of St. Martin's proposition would place the Island out of kilter with the rest of Europe, especially in light of the Supreme Court ruling on 29th June 2011.

[3] Correspondence JACS 15/06-11
[4] ACAS Code of Practice 1 Disciplinary and Grievance Procedures, and ACAS Rights at Work
[5] TLR 24/04-09: R(G) v Governors of X School QBD

4. Following legal advice[6], the judicial determinations set out in *R v Governors of X School* does not make the Employment (Jersey) Law 2003 no longer Convention compliant, and Article 78A of this Law does not need to be amended in light of the Supreme Court judgement. Article 78A merely sets out the standard position for both disciplinary and grievance hearings, and should not be interpreted as a limit on what an employer may allow in serious disciplinary hearings. Whereas, the proposed amendment would bring about a significant departure from the equivalent position in English law (the statutory provisions of which have not been amended in consequence of the said judgment), and it is not necessary for the purpose of human rights compliance.

5. One of the other issues where right to bring a friend could entail legal representation on a wider basis (rather than in circumstances of potential loss of profession) is that of equity. If this right was extended to all, it can be argued that legal access for some will be too expensive. At present if an individual is supported by their Trades Union Representative, and it is considered that legal advice is necessary, this would be sought on their behalf by the Union. Employees can join a Union at any time for a modest fee to obtain professional advice if they so wish.

6. Legal advisers also bring a different dimension into the proceedings in that the test in law is that of 'beyond reasonable doubt' whereas in employment terms the test is that of 'balance of probabilities'. Arguing to a different level in the presence of lawyers, would mean that it would be necessary for the employers' side also to have legal advice available at every grievance and disciplinary when the employee indicates they will be represented by a lawyer. The presence of a lawyer would undermine the professional integrity of the HR officer managing the case, and may unreasonably intimidate them by bringing an adversarial element to the proceedings. The Deputy of St. Martin states that his proposition seeks to clarify and simplify the position by allowing a person to have automatic and unfettered rights to be assisted by a person of their choice. However, accepted practice is not to allow spouses, partners and other family members. This is because understandably it would create a very emotive occasion, allowing emotional clouding of the issues protracting proceedings. In equity terms not everyone has a family member who could assist, but in every situation an individual does have the option of either a Trades Union representative and/or workplace colleague being able to attend.

7. Deputy Hill is also asking that SEB amends the terms and conditions to enable any person the employee wishes to attend any disciplinary or grievance. This is not straightforward as the right to be accompanied by a Trades Unions representative or workplace colleague is a legally binding, negotiated collective agreement with the Unions, which would not necessarily be in the interests of the Trades Unions to rescind.

8. It would seriously blur the separation of duties and responsibilities from Politicians and Officers if Politicians were allowed to be used as friends. This would bring into direct conflict a politician representing an employee with Officers hearing a case. Quite clearly, this would place undue pressure on officers to meet the politician's wishes when in fact politicians should be

[6] Law Officers' Department 17/06-11

involved in determining strategy and policy, not operational issues, some of which could be of a relatively minor nature. Such a situation would not be perceived as justice, and could even be counterproductive where genuine disciplinary cases would not come forward due to fear of reprisals/career consequences, etc., of dealing with a case supported by a politician.

9. The Deputy of St. Martin's proposals do not stop a friend being a politician of that employee's department. Such a situation could place a disciplinary panel of officers facing their own Minister/Assistant Minister and compromise disciplinary or grievance process.

10. In addition, the granting of an employee to choose a friend would inevitably place more senior, well-connected officers at an advantage over lower-graded employees when choosing a friend, which is presumably not what the Deputy had in mind.

APPENDIX 2

ACAS Guidance (this forms the basis for JACS guidance)

Allowing the employee to be accompanied **Extract: ACAS Code of Practice on disciplinary and grievance procedures**

Workers have a statutory right to be accompanied by a companion where the disciplinary meeting could result in:

- a formal warning being issued; or
- the taking of some other disciplinary action; or
- the confirmation of a warning or some other disciplinary action (appeal hearings).

The chosen companion may be a fellow worker, a trade union representative, or an official employed by a trade union. A trade union representative who is not an employed official must have been certified by their union as being competent to accompany a worker. To exercise the statutory right to be accompanied workers must make a reasonable request. What is reasonable will depend on the circumstances of each individual case. However, it would not normally be reasonable for workers to insist on being accompanied by a companion whose presence would prejudice the hearing nor would it be reasonable for a worker to ask to be accompanied by a companion from a remote geographical location if someone suitable and willing was available on site. The companion should be allowed to address the hearing to put and sum up the workers case, respond on behalf of the worker to any views expressed at the meeting and confer with the worker during the hearing. The companion does not, however, have the right to answer questions on the worker's behalf, address the hearing if the worker does not wish it or prevent the employer from explaining their case.

What is the right to be accompanied?

Workers have a statutory right to be accompanied where they are required or invited by their employer to attend certain disciplinary or grievance meetings. The chosen companion may be a fellow worker, a trade union representative, or an official employed by a trade union. A trade union representative who is not an employed official must have been certified by their union as being competent to accompany a worker. Workers must make a reasonable request to their employer to be accompanied.

When does the right apply?

Employees have the right to be accompanied at meetings that could result in:

a formal warning being issued to a worker (i.e. a warning that will be placed on the worker's record);
the taking of some other disciplinary action (such as suspension without pay, demotion or dismissal) or other action; or
the confirmation of a warning or some other disciplinary action (such as an appeal hearing).

Informal discussions, counselling sessions or investigatory meetings do not attract the right to be accompanied. Meetings to investigate an issue are not disciplinary meetings. If it becomes apparent that formal disciplinary action may be needed then this should be dealt with at a formal meeting at which the employee will have the statutory right to be accompanied.

What is a reasonable request?

Whether a request for a companion is reasonable will depend on the circumstances of the individual case and, ultimately, it is a matter for the courts and tribunals to decide. However, when workers are choosing a companion, they should bear in mind that it would not be reasonable to insist on being accompanied by a colleague whose presence would prejudice the hearing or who might have a conflict of interest. Nor would it be reasonable for a worker to ask to be accompanied by a colleague from a geographically remote location when someone suitably qualified was available on site. The request to be accompanied does not have to be in writing.

The companion

The companion may be:

- a fellow worker (i.e. another of the employer's workers)
- an official employed by a trade union
- a workplace trade union representative, as long as they have been reasonably certified in writing by their union as having experience of, or having received training in, acting as a worker's companion at disciplinary or grievance hearings. Certification may take the form of a card or letter.

Some workers may, however, have additional contractual rights to be accompanied by persons other than those listed above (for instance a partner, spouse or legal representative).

Reasonable adjustment may be needed for a worker with a disability (and possibly for their companion if they are disabled). For example the provision of a support worker or advocate with knowledge of the disability and its effects.

Workers may ask an official from any trade union to accompany them at a disciplinary or grievance hearing, regardless of whether or not they are a member or the union is recognised.

Fellow workers or trade union officials do not have to accept a request to accompany a worker, and they should not be pressurised to do so.

Trade unions should ensure that their officials are trained in the role of acting as a worker's companion. Even when a trade union official has experience of acting in the role, there may still be a need for periodic refresher training. Employers should consider allowing time off for this training.

A worker who has agreed to accompany a colleague employed by the same employer is entitled to take a reasonable amount of paid time off to fulfil that responsibility. This should cover the hearing and it is also good practice to allow time for the

companion to familiarise themselves with the case and confer with the worker before and after the hearing.

A lay trade union official is permitted to take a reasonable amount of paid time off to accompany a worker at a hearing, as long as the worker is employed by the same employer. In cases where a lay official agrees to accompany a worker employed by another organisation, time off is a matter for agreement by the parties concerned.

Applying the right

The employer should allow a companion to have a say about the date and time of a hearing. If the companion cannot attend on a proposed date, the worker can suggest an alternative time and date so long as it is reasonable and it is not more than five working days after the original date.

Before the hearing takes place, the worker should tell the employer who they have chosen as a companion. In certain circumstances (for instance when the companion is an official of a non-recognised trade union) it can be helpful for the companion and employer to make contact before the hearing.

The companion should be allowed to address the hearing in order to:

- put the worker's case
- sum up the worker's case
- respond on the worker's behalf to any view expressed at the hearing.

The companion can also confer with the worker during the hearing. It is good practice to allow the companion to participate as fully as possible in the hearing, including asking witnesses questions. The employer is, however, not legally required to permit the companion to answer questions on the worker's behalf, or to address the hearing if the worker does not wish it, or to prevent the employer from explaining their case.

Workers whose employers fail to comply with a reasonable request to be accompanied may present a complaint to an employment tribunal. Workers may also complain to a tribunal if employers fail to re-arrange a hearing to a reasonable date proposed by the worker when a companion cannot attend on the date originally proposed. The tribunal may order compensation of up to two weeks' pay.

It is unlawful to disadvantage workers for using their right to be accompanied or for being companions. This could lead to a claim to an employment tribunal.

APPENDIX 3

E-mail from Managing Director, Law At Work (Channel Islands) Limited

From: **Managing Director, Law At Work (Channel Islands) Limited**
Sent: Tuesday, June 28, 2011 07:01 PM
To: **Council of Ministers**
Subject: DISCIPLINARY AND GRIEVANCE HEARINGS: RIGHT TO A FRIEND - Employment (Jersey) Law 2003

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Dear Ministers

As you will be aware on 5 July 2011 you will be asked to decide on a proposition which has been lodged by the Deputy of St Martin to basically:

- change the principle law to allow employees to be represented by any person of the employee's choice at internal disciplinary or grievance hearings as opposed to a work colleague or an authorised trade union official (as per the current law); and

- amend the terms and conditions of all public sector employees to reflect the same

The Deputy's proposal appears to have grown out of concerns for the public sector employees but has grown to include private sector; he maintains his proposal protects individuals by giving them an unfettered right to be assisted by a person of their own choice in such matters. Passing such a proposal would result in both public and private employers having to permit any person – including politicians and lawyers - to attend their internal workplace meetings – something other jurisdictions do not allow. If it was a human rights issue (as the Deputy of St Martin is claiming) then other jurisdictions would have changed their own laws, particularly the UK.

Whilst there is no legal requirement to consult with stakeholders prior to putting forward a proposition, it seems unreasonable and completely prejudicial that no consultation has taken place. Just because you don't have to consult does not mean that you should not! This in turn will break the bond that has been created between legislator and employers - that all will be properly consulted with prior to changes in legislation. In the extremely short period I have had to consider this proposal I refer you to my comments below. I seriously believe that I and other stakeholders should have more time to expand on these reservations and any other reservations, particularly as I believe such a change could have a fundamental and detrimental effect on Jersey's businesses. I am the owner of a small business in Jersey and this proposition would cause me serious concerns dealing with any internal employment matters.

Clearly, such a proposal is deeply controversial as our clients view such changes as:

- costly
- counter-productive
- self-defeating and
- even wholly unnecessary.

Several of our clients already exercise discretion and permit family members to attend internal hearings and do not want a compulsory legislative stick. For others, introducing adversarial lawyers into fragile internal workplace relations does not make for good employment relations and could be disastrous. Also where does this leave the unions whose (sometime long-serving) relations would be replaced by others with no insight into the industry in hand?

I hope you are able to take on board my comments prior to such a debate taking place. I am more than happy to speak to any of you, before this debate next Tuesday, if you wish to. The correct outcome for all, would be to defer the debate until such time as all stakeholders can be consulted upon via the forum that was set up by this law.

Yours faithfully

Managing Director
For and on behalf of
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