STATES OF JERSEY

TRANSFER OF UNDERTAKINGS PROTECTION OF EMPLOYMENT (TUPE) LEGISLATION

Lodged au Greffe on 8th June 2012
by Deputy G.P. Southern of St. Helier

STATES GREFFE

PROPOSITION

THE STATES are asked to decide whether they are of opinion –

(a) to request the Minister for Social Security to bring forward for approval by the Assembly, no later than the first quarter of 2013, legislation for the protection of employees involved in business mergers and acquisitions (Transfer of Undertakings Protection of Employment 'TUPE' legislation) and, provided that the draft legislation is approved by the States, sanctioned by Her Majesty in Council and registered in the Royal Court in time, to take all necessary steps to bring the legislation and any necessary subordinate legislation into force no later than December 2013; and

(b) to request the States Employment Board, to refrain from reaching any final agreement on schemes to privatise or outsource services currently delivered by the public sector until the legislation referred to in paragraph (a) is in place.

DEPUTY G.P. SOUTHERN OF ST. HELIER

REPORT

The history of TUPE legislation in Jersey is, like most employment law, a long and tortuous one. The previous Employment and Social Security Committee issued a consultation paper, "Fair Play in the Workplace", published in November 1998. This was the Committee's first consultation on employment legislation which was widely circulated and debated publicly. This eventually led to extensive consultation on many aspects of employment law, and a series of recommendations from the Employment Forum which was presented to the Minister for Social Security for acceptance. The full document is included in the Appendix to this report. Relevant extracts are presented below –

> **"Employment Forum**
>
> **Responses**
> The following information was gathered from that consultation:
>
> **Redundancy**
> 81% of the respondents overall supported the right of workers to receive redundancy payments (90% of employees compared with 60% of employers).
>
> 73% of respondents favoured reasonable time off to look for new employment in redundancy situations (76% of employees compared with 66% of employers).
>
> **Business transfers**
> 76% of respondents felt that employees' rights should be protected following the transfer of an undertaking (85% of employees compared with 58% of employers).
>
> **Conclusions**
> Having considered the responses received during that consultation, the previous Committee submitted a Report and Proposition to the States proposing the two-phased approach which was debated in December 2000 (P.99/2000).
>
> As well as approving that a minimum wage, protection against unfair dismissal and a process for the resolution of collective disputes should be included in Phase 1, the States also approved the proposition to develop such further measures as may be necessary in Phase 2 to deal with the issues of:
>
> a) redundancy, maternity, equal pay, equal opportunities and any issues regarding discrimination in the workplace;
>
> b) flexible working and family friendly policies and the protection of employees involved in business mergers and acquisitions."

The minimum wage, along with protection against unfair dismissal came with the adoption by the States of the Employment (Jersey) Law 2003 in July 2003. A legal framework for the pursuance and resolution of collective disputes arrived with the adoption by the States in 2005 of the Draft Employment Relations (Jersey) Law 201- (P.19/2005).

Despite over 80% support from the consultation process, the adoption of redundancy payments was delayed to phase 2. This resulted in the need for the States to respond swiftly in 2009, following the start of recession in Jersey, most notably highlighted by the large-scale redundancies at Woolworths which brought into sharp focus the need for redundancy protection.

This process has recently been completed by the adoption of the Appointed Day Act of Amendments 5, 6 and 7 to the Employment (Jersey) Law 2003, first adopted back in 2010.

Until recently, it looked likely that the majority of items listed above for inclusion in phase 2 for improving employee protection, were to be quietly dropped. The previous Council of Ministers stated that it was not willing to progress a discrimination law until they were faced with my proposition, P.118/2011 "Discrimination Law and delay on pension reform", in July of last year. The current Council of Ministers has accepted the strategic aim of including family values proposed by the relevant scrutiny panel, but we do not yet know whether that will translate into flexible working or family friendly employment laws.

Business Transfer legislation, however, has fallen entirely off the agenda, despite extensive research and consultation by the Employment Forum whose recommendations were largely accepted and welcomed by a previous Minister for Social Security. As I shall attempt to show here, this is perhaps the most important and concrete step of all the options listed in phase 2 that needs to be taken to develop appropriate employment law reform.

Business Transfers – Consultation

The Employment Forum conducted further wide consultation on redundancy and business transfers during 2006 and presented its recommendations to the then minister in February 2007. The summary of these recommendations along with the Minister's responses are presented here.

> **"MINISTER'S RESPONSE**
>
> **BUSINESS TRANSFERS**
>
> ***Protection of rights in business transfers***
>
> - **The Forum recommends that employee's rights should be protected following the transfer of ownership of a business.**
>
> The Minister accepts the recommendation.
>
> ***Public and Private Sector transfers***
>
> - **The Forum recommends that the legislation should protect employees in both the public and private sectors.**
>
> The Minister recognises that business transfers could be an issue in both sectors and accepts the recommendation.

Small Business Exemptions

- **The Forum recommends that there should be no exemption for small businesses.**

The Minister was mindful of the potential impact of such legislation on small business, but was convinced that business transfers happen just as often in small companies and that the effect on affected employees is the same. The Minister recognised that small businesses are likely to be more flexible and able to adapt to such changes. The Minister was concerned that to provide an exemption could allow large employers to create small subsidiary companies in order to avoid the legislation.

The Minister therefore accepted the recommendation.

Transfers Outside Jersey

- **The Forum recommends that the legislation should not give employees the right to maintain their terms and conditions of employment if their job is transferred outside of Jersey.**

The Minister recognises that employers are unlikely to relocate out of Jersey simply to avoid local legislation and wishes to avoid unnecessary complexity and uncertainty as to whether employee's contracts are governed by Jersey legislation.

The Minister therefore accepts the recommendation.

Terms and Conditions to Transfer

- **The Forum recommends that all existing contractual terms and conditions should be automatically transferred, including any contractual terms incorporated into that contract via a collective agreement.**

- **The Forum recommends that where a collective agreement is in place at the time of transfer which covers any of the employees who are transferring, the agreement should transfer and apply, other than where it relates to pensions, for the duration of its application.**

- **The Forum recommends that where the old employer recognised a union in respect of employees who are being transferred, and after the transfer the group of employees maintains an identity that is distinct from the new employers business, then the recognition should apply between the union and the new employer *[in respect of the transferred employees.]***

The Minister accepts the recommendations.

In regard to the third recommendation, the Minister understands that the Forum's intention was that employees should not be in a worse situation than they were before the transfer. Where a union was, either voluntarily or involuntarily (via an Employment Tribunal declaration) recognised, in respect of some or all of the transferred employees, then the new employer would be

required to recognise that union to the same extent after the transfer takes place, so long as the group of transferred employees maintain an identity which is separate from the remainder of the new employer's business. Where the employees do not keep a separate identity and are subsumed into the new employer's business, the trade union recognition lapses and would have to be renegotiated with the new employer.

Pension Protection

- **The Forum understands that pension scheme provision is a complex subject, and considers that it is not qualified to make a recommendation on this point without the benefit of full consideration of the possible complications from a business perspective. The implications of making an uninformed recommendation on this issue are serious. It is therefore recommended that expert actuarial advice is sought on this matter prior to drafting the legislation.**

The Minister understands that it was not possible to make a simple recommendation on this matter and agrees that expert advice should be sought during the drafting of the legislation.

Type of Pension Scheme

- **The Forum recommends that (subject to obtaining actuarial advice in the drafting process) the law should give some protection of employee's pensions, but the level of contribution or type of scheme should not have to be identical to that which applied before the transfer.**

The Minister agrees with the principle that some pension protection should be provided, and that it should not necessarily have to be identical to that which applied before the transfer.

Following a transfer, should there be a time limit after which any agreed changes to terms and conditions are not void?

- **The Forum recommends that there should not be a time limit after which any agreed changes to terms and conditions cannot be declared void. The Forum is advised that the position as set out by the two law firm respondents; that the common law situation combined with the protection provided by the Employment Law, is sufficient to protect employees, and that to introduce such a period would introduce excessive complexity.**

The Minister understands that the UK provisions on this aspect of business transfers were intended to prevent employers from changing employees terms and conditions immediately after a transfer and as a result of the transfer. Unfortunately, a more restrictive situation has been unintentionally created, whereby any re-negotiated terms and conditions may be declared void by a tribunal at any time in the future, if found to be less favourable than the original pre-transfer terms.

It was therefore suggested that if Jersey wishes to allow changes to be renegotiated between the employer and employees at a future time after the

transfer without the possibility of the changes being declared void, our law could provide a time limit, after which changes may not be declared void on the basis of comparison with pre-transfer terms.

During the preparation of the recommendation, the Forum was persuaded that the common law situation in Jersey, coupled with the provisions of the Employment Law, would provide adequate protection in this regard. However, following discussions with representatives of the Forum, the Minister understands that although this would protect employees, it would not protect employers and the recommendation does not therefore reflect the Forum's intentions.

The Forum was concerned that employers should be able to renegotiate terms and conditions an appropriate length of time after the transfer has occurred so that over a period of time, the terms and conditions of existing and transferred employees may be brought on a par. The Forum is now of the view that the advice followed in preparing this recommendation was based on a misunderstanding of the issue being consulted upon.

The Minister is assured by the Forum that in the absence of that advice, it would recommend a one year period, after which any changes can be freely negotiated (as in any other employer/employee relationship) and the Minister accepts that recommendation.

Employee Information

- **The Forum recommends that the employer should be required to provide all of the listed information (points 1 to 12) to the new employer at least 14 days before the transfer, with the following exceptions; points 5 and 6 should be limited to "current" action, not action within the previous 2 years, and points 9 and 10 should be provided only where they are "<u>due to be taken</u>, or are owed".**

    1. The identity of the employees
    2. Their ages
    3. Information contained in their statements of employment particulars
    4. Information relating to collective agreements which apply to those employees
    5. Instances of any disciplinary action within the previous 2 years
    6. Instances of any grievances raised by the employees in the previous 2years
    7. Instances of any legal actions taken by the employees against the former employer in the previous 2 years
    8. Instances of potential legal actions that may be brought by those employees
    9. Maternity leave taken or due
    10. Annual leave taken or due
    11. Employees educational or vocational qualifications
    12. Information relating to employees work permits / Regulation of Undertakings licensing information

- **The Forum recommends that any other information that the new employer wishes to be provided with before the transfer should be agreed between the two parties and shared at least 14 days before the transfer occurs, or within a time period agreed between the two parties.**

- **The Forum recommends that, where the old employer has failed to provide the required information in the time period, the Tribunal may award compensation to the new employer, such as it considers just and reasonable in the circumstances.**

On the basis that this transfer of information is intended to help the new employer to understand the inherited rights, duties and obligations in relation to employees who will be transferred, the Minister accepted the Forum's recommendations and agreed with the changes to the list of information, as suggested in the first recommendation.

Due to data protection and confidentiality concerns, the Minister suggests that the requirement to share the information should apply only after a sale and information is being shared with third party, who might terminate the transfer after receiving this information. It is also important that this information is released subject to the employee's agreement, where appropriate.

The Assistant Minister suggested that consideration should be given to a requirement for information to be transferred about arrangements for employees with special needs, for example, access needs.

Informing and Consulting Employees

- **The Forum was minded to recommend that detailed information and consultation requirements of employers should be included in guidelines rather than legislation. However, in the interest of ensuring that employees are informed of business transfers and the potential consequences for their jobs, the following sections provide the Forum's recommendations for legislative provision.**

The Minister accepts the Forum's justification for legislative provisions rather than guidance.

Information and Consultation Procedure

- **The Forum recommends that employers should be required to inform and consult employees "in good time" before a transfer occurs, meaning, as soon as reasonably practical after a binding business transfer agreement has been reached between the old and new employers.**

- **The Forum recommends that the legislation should require employers to inform the employees who will be affected by the transfer (or appropriate representatives of such employees) of the following information:**

    - **The date or proposed date of the transfer**
    - **The reasons for the transfer**

- **The legal, economic and social implications of the transfer for the employees**
- **Any measures envisaged in relation to the employees.**

- **The Forum also recommends that a model procedure should be provided in the guidelines, elaborating on those legal requirements.**

The Minister accepted the recommendations, but expressed caution regarding the phrasing of the requirement for employers to inform employees of the "social implications" of the transfer. The Minister is concerned that employers cannot reasonably be expected to anticipate the social implications for individual employees and if it is to appear in the legislation, employers must be clear on what is expected of them in this regard.

Similarities with Consultation Requirements in Collective Redundancies

The Forum recognised that where a business transfer agreement has been reached, the purpose of consulting employees (or their representatives) differs from the purpose of consulting employees about collective redundancies. Where collective redundancies are planned, employers must undertake collective consultation with employees to include suggestions for alternative solutions to redundancies. However, consultation regarding business transfers is intended to provide employees with sufficient information regarding measures that will be taken by the old or new employer as a result of the transfer, with a view to reaching agreement to those measures with the affected employees, rather than agreement to the transfer itself.

- **The Forum recommends that the legislation should require employers to consult with "appropriate representatives" of affected employees; the provisions for the election of appropriate representatives (in cases where there is no recognised trade union) to be the same as those recommended by the Forum in relation to collective redundancies.**

- **The Forum recommends that this should apply irrespective of the number of employees likely to be affected by the business transfer, and must not necessarily occur at least 30 days before the transfer takes place.**

- **The Forum recommends that where an employer has failed to comply with the recommended information and consultation requirements, employees may be awarded compensation up to a maximum of 90 days pay, having regard to the seriousness of the employers' failure to comply. The Tribunal should also have the power to consider whether the old or new employer is liable (or whether jointly liable) for the failure to inform employee representatives of measures envisaged with regard to the transfer.**

The Minister understands the similarities and differences between the importance of consulting and informing employees in these two different situations and approves the Forum's recommendations."

Back in 2007 the then Minister, Senator P.F. Routier, committed himself to a tight timetable for the introduction of Business Transfer legislation, as follows –

> *"I will now request that the drafting of these proposals begins, with the intention of preparing draft legislation during 2007. I hope to bring a draft Law to the States in early 2008."*

Unfortunately, he failed to meet his deadline. Following the elections in 2008 he was replaced as Minister for Social Security by Deputy I.J. Gorst of St. Clement, who had a different attitude to this legislation. In September he was still keen on introducing this legislation, as follows –

> **"2.15 DEPUTY G.P. SOUTHERN OF ST. HELIER OF THE MINISTER FOR SOCIAL SECURITY REGARDING THE PRIVATISATION OR OUTSOURCING OF PUBLIC SERVICES:**
>
> **Question**
>
> In the light of the potential for the privatisation or outsourcing of public service delivery in stage 2 of the CSR, can the Minister confirm that TUPE (Transfer of Undertakings Protection of Employment) legislation has already been drafted?
>
> Does he consider that such legislation needs to be in place as soon as possible and will he advise members when he intends to bring TUPE legislation to the Assembly?
>
> **Answer**
>
> Legislation to protect employees in business transfer situations has been drafted, subject to further discussion and resolution of one outstanding but fundamental point relating to the definition of a 'relevant transfer'. This includes complex jurisdictional issues.
>
> Advice has been received and discussion is ongoing. This is particularly important in view of the UK Coalition Government's plan to review the scope of the definition of a 'relevant transfer' in their equivalent legislation.
>
> The Minister is further considering these issues and will bring forward the legislation before the end of the year.
>
> Whilst introducing the legislation is important, the Minister believes that providing the States continues to adhere to the principles of TUPE ahead of the legislation's interpretation, improving States services and their efficient delivery should not be held up."

By 5th April 2011 the Minister had lost his enthusiasm –

> ***"5. Questions to Ministers without notice - The Minister for Social Security***
>
> **5.1 Deputy G.P. Southern:**
>
> Just to get us back in the swing of things, will the Minister state what protection will be in place for workers on transfer of business, the equivalent of the U.K. T.U.P.E. (Transfer of Undertakings (Protection of Employment)) legislation?
>
> **Deputy I.J. Gorst of St. Clement (The Minister for Social Security):**
>
> As the questioner well knows, he attended a briefing at lunchtime where I confirmed to Members that I would not be bringing forward T.U.P.E. legislation to this Assembly for approval and I also confirmed that it was my strong recommendation that whoever sits in this seat, metaphorically as it were, for the next political term, does likewise.
>
> **5.1.1 Deputy G.P. Southern:**
>
> Supplementary, if I may? So the 250-plus States workers who will be likely to be made redundant by outsourcing or privatisation over the next 2 years have got what protection over any terms and conditions under which they are employed?
>
> **Deputy I.J. Gorst:**
>
> It is my opinion that T.U.P.E. is not right for Jersey. It is not right for small communities, it is unnecessarily cumbersome and it would not, of course, in any case affect our main industry. With regard to any States employees, that falls within the remit of the States Employment Board, but I believe that if we wanted to produce legislation to protect those employees - although I am not convinced that we need to - we could deal with it on a case by case basis like our sister Island did in Guernsey. Having said that, I understand that the States Employment Board will provide necessary commitments with regard to any transfers that might or might not take place, I am not party to whether that is intended or not."

In the recommendation paper of 2007, the Employment Forum had the following to say of the situation in comparing Jersey and Guernsey –

> **Guernsey**
> The Transfer of States Undertakings (Protection of Employment) (Guernsey) Law, 2001 only applies in circumstances where a States Department is being 'commercialised'. It was introduced for Guernsey Telecom, Guernsey Post and Guernsey Electricity. ***The Law can be amended to include any other similar transfer of States Departments to a commercialised organisation but it does not cover the private sector.*** (my emphasis)

Business Transfers

In Jersey, most business transfers will already be protected because share transfers are more common than 'whole' business transfers and are protected by common law; if the shares of the employer are bought, the existing contracts of employment will remain in force. Transfers of whole business are unusual in Jersey, particularly in the finance industry. It is thought that service providers would be most affected, for example when tendering for a new provider.

It is considered that locally, the protection of employees' contracts when businesses are transferred is likely to be more relevant to the Public than the Private sector. (my emphasis) If a tender for a contract is lost, there are less likely to be other suitable jobs for the employees. When the local bus service provider was changed, the new service provider was under no obligation to take the employees of the former employer on the same terms and conditions.

The need for a Jersey equivalent of TUPE legislation was last raised when the sale of Jersey Telecom was proposed in 2006, when Senator B.E. Shenton brought a proposition, P.95/2006 "Employee protection: legislation", to the States.

In a brief report, Senator B.E. Shenton gave the following justification for the introduction of TUPE legislation –

> *"The whole privatisation saga and timescale sums up the attitude of the type of Government that we have been saddled with during the past 10 years. Everything has been done to facilitate the sale, to make money, to add to the coffers – but no one gave a thought to the real people of Jersey – the workers that we the politicians are meant to represent. Where is the employee protection? Should we not have considered this when we started down the privatisation path?"*

The same argument, I believe, applies equally today.

He continued –

> *"As I said before, I am not a fan of sledgehammer regulation and I never thought that I would be bringing a proposition adding to the current employment regulation. However if you read the TUPE requirements they are not onerous, and this proposition seeks TUPE type legislation tailored to the Jersey marketplace. In fact the regulations are no more than an employee should expect faced with a takeover. Change is disconcerting and as a Government we have a duty to ensure that look after our workers."*

The then Minister for Treasury and Resources promised the employees –

> *"I am willing to guarantee that I will not bring proposals to the States to sell Jersey Telecom unless employment benefits, at their current level, are protected."*

In the debate on P.95/2006 he further promised –

> *"…. safeguards at a sufficient level, equally as good as would be under TUPE. If I cannot do that, I shall not bring the proposition."*

The sale of JT was abandoned in the face of extensive evidence contained in a scrutiny report S.R.5/2007 that concluded that the Minister for Treasury and Resources had not made the case for a 100% sale. One of the 5 main recommendations of the report was that TUPE style legislation should be introduced at the earliest possible opportunity.

Today, it is not just JT which faces the prospect of transfer into the private sector, but many of the public sector services. In order to deliver the second stage of the Comprehensive Spending Review (CSR), the Council of Ministers is committed to £14 million of savings through changes to public sector terms and conditions. This will undoubtedly involve consideration being given to privatisation or outsourcing some services.

Already we have seen that the Minister for Home Affairs has outsourcing of prisoner transport under active consideration. We are told that developments in the delivery of health and social services in the community will involve greater use of third sector organizations in the form of charities, and not for profit organizations such as Family Nursing and Home Care (FNHC). But this may well include some private sector service providers which operate for profit.

If this government really wishes to engage with the public sector employees about meaningful "modernisation" of service delivery, then it must surely put some protection in place to safeguard the position of employee terms and conditions. In the absence of some safeguards any modernisation programme will be made extremely difficult to deliver.

At the time of the proposed sale of JT, one employee summed up his fears thus –

> *"I do not have any faith in what will happen to the company or the staff if we are sold to a large company. …. We have seen it in so many companies throughout the world that the least of their worries is the staff and their wellbeing."*

As one employers' association put it, trust is an important factor in any transfer –

> *"It is important to maintain good employee relations and to treat employees fairly and with respect. There is often a lot of uncertainty and concern when business transfers occur and it would be beneficial for employees to understand what the transfer means and how it affects them to avoid future concerns."*

As far back as 2009 in his Annual Report, the Chairman of the Jersey Advisory and Conciliation Service (JACS) was anticipating further employment law developments –

> *"While proposals to introduce new legislation have been delayed, over the next year or two we expect to see the introduction of a number of new laws, or amendments to the Employment Law, covering Redundancy and Transfer of Businesses (TUPE) legislation as well as the proposed Discrimination, Maternity, Paternity and Family Friendly Laws."*

This emphasis on future progress is repeated in 2010 and 2011 –

> *"There is still a great deal to do in regard to employment law in order to meet the basic standards expected of a fair society."*

There has been extensive consultation on the need for TUPE over the past decade and the result of this process is a recommendation to introduce this form of employee protection in Jersey. Many employee representatives would agree that such a step is an essential pre-requisite to engaging in any negotiations over potential privatisation. Much of the law has already been drafted, with only one or two points which await resolution. As with a proper scheme for redundancy pay, the time is right to put this essential element of employee protection in place.

Financial and manpower statement

There is a requirement for some further law drafting time. As pointed out above, issues are more likely to arise from public sector rather than private sector transfers. Should disputes arise, they will be dealt with by JACS. The Director of JACS considers that if Jersey introduced TUPE legislation along the lines previously envisaged (i.e. relatively simple) then he does not consider there would be any financial implications for JACS. With £316,000 of a total budget of £343,000 funded by a grant from Social Security, there are no financial or manpower implications for the States.

APPENDIX

EMPLOYMENT FORUM CONSULTATION (TUPE)

BUSINESS TRANSFERS

THE UK

Regulations to protect employees in business transfers have been in place since 1981. The latest Regulations, the Transfer of Undertakings (Protection of Employment) Regulations (commonly referred to as TUPE), were introduced in April 2006 and were created to implement the EC Acquired Rights Directive. [Note that Jersey is not required to implement this Directive.]

As in Jersey, the "continuity of employment" provisions already give some protection to employees, whereby if a trade, business or undertaking is transferred, the employee's period of employment is not interrupted, but is regarded as continuing under the new employer. This is important for employment rights that are based on an employee's length of service, such as protection against unfair dismissal.

The TUPE Regulations were devised to ensure that employees who are transferred with a business do not suffer any detrimental change to their contracts.

The new employer takes over;

- the contracts of all employees (they cannot pick and chose which employees to take on),
- all rights and obligations arising from the contracts or the employment relationship between the employee and previous employer (other than criminal liabilities, and occupational pensions which are treated differently on transfer),
- any collective agreements, and
- the recognition of any independent trade union.

Since their introduction in the UK, the TUPE Regulations have been the cause of some of the most difficult and intractable employment law problems, which have mainly focussed on whether a transfer has actually occurred, who should be transferred and changing terms and conditions.

Relevant transfers

The TUPE Regulations have mainly been of relevance in the service providing industries. The stability of certain sectors, such as catering, have relied upon them.

The Regulations apply to both the public and private sectors; an administrative reorganisation of public authorities is not a transfer, however the Government's practice has been for the process to be covered by TUPE through specific regulations.

TUPE also applies where a business is transferred outside of the UK, so long as it was situated in the UK immediately before the transfer.

Effects on contracts

When a business is transferred, the new employer takes over all existing terms and conditions of the employees who were employed immediately before the transfer, including all rights and obligations arising from their contracts of employment, but excluding criminal liabilities and some benefits under an occupational pension scheme.

Pensions

Pensions are treated differently than other terms and conditions in business transfers, whereby they are not automatically transferred. In most cases, it would be very difficult for a new employer to fulfil the exact pension provisions of the previous employer.

The UK's 2004 Pensions Act now provides a minimum safety net for pensions whereby, following a transfer, a new employer is not required to continue identical occupational pension arrangements for the transferred employees, however where the transferred employees were previously entitled to participate in an occupational pension scheme, the new employer must provide a minimum level of pension provision. This requires the new employer to match employee contributions, up to 6% of salary, into a stakeholder pension, or offer an equivalent alternative.

Before the 2004 Act, there was no pension protection, other than in the public sector where there was limited protection for pensions by policy, not statute.

Changing terms and conditions

If the terms and conditions of employees who have been transferred are changed by the new employer, such changes will be void if the sole or principal reason for the change is the transfer itself. If terms and conditions are varied for a reason connected with the transfer, the variations will only be valid if the reason is an economic, technical or organisational reason ('ETO' reason) requiring changes in the workforce. This provision is intended to stop the new employer from making extensive changes to employees' terms and conditions simply because they are new to the organisation. In practice, showing that a change is for an ETO reason is relatively easy, but showing that the reason requires "changes in the workforce" is much more difficult and reinforces the fact that changes to terms and conditions following a transfer are likely to found to be void.

The new employer is not prevented from renegotiating the employees terms and conditions, however any detrimental changes may be declared void by a tribunal or court, particularly if they occur at the same time as a transfer, or soon after, but may be declared void at any time in the future.

Employee information

An employer who is transferring his business to a new employer must provide a specified set of information, listed below, at least 2 weeks before the transfer, to help the new employer to understand the inherited rights, duties and obligations in relation to those employees who will be transferred;

1. The identity of the employees
2. Their ages
3. Information contained in their statements of employment particulars
4. Information relating to collective agreements which apply to those employees
5. Instances of any disciplinary action within the previous 2 years
6. Instances of any grievances raised by the employees in the previous 2 years
7. Instances of any legal actions taken by the employees against the former employer in the previous 2 years
8. Instances of potential legal actions that may be brought by those employees

Informing and consulting employees

Before a transfer takes place, the employer must provide various details to appropriate representatives of employees who will be affected by the transfer, including the proposed date of transfer and the reason for it. The employee representatives to be informed are broadly the same as those required for consultation on collective redundancies and again, there are provisions for the election of representatives where necessary.

Consultation with those representatives must be undertaken with a view to reaching some agreement on any measures to be taken in connection with the transfer. The employer must consider any representations made and reply to those representations.

There are also penalties for failing to inform or consult employees in the form of compensatory payment up to a maximum of 13 weeks pay, having regard to the seriousness of the employer's failure.

ISLE OF MAN

There is no legislation specifically to protect employees' contracts on the transfer of a business or undertaking

GUERNSEY

The Transfer of States Undertakings (Protection of Employment) (Guernsey) Law, 2001 only applies in circumstances where a States Department is being 'commercialised'. It was introduced for Guernsey Telecom, Guernsey Post and Guernsey Electricity. The Law can be amended to include any other similar transfer of States Departments to a commercialised organisation but it does not cover the private sector.

Business Transfers

In Jersey, most business transfers will already be protected because share transfers are more common than 'whole' business transfers and are protected by common law; if the shares of the employer are bought, the existing contracts of employment will remain in force. Transfers of whole business are unusual in Jersey, particularly in the finance industry. It is thought that service providers would be most affected, for example when tendering for a new provider.

It is considered that locally, the protection of employees' contracts when businesses are transferred is likely to be more relevant to the Public than the Private sector. If a tender for a contract is lost, there are less likely to be other suitable jobs for the

employees. When the local bus service provider was changed, the new service provider was under no obligation to take the employees of the former employer on the same terms and conditions.

SECTION 4 – PREVIOUS CONSULTATION

Introduction

The previous Employment and Social Security Committee issued a consultation paper, "Fair Play in the Workplace", published in November 1998. This was the Committee's first consultation on employment legislation which was widely circulated and debated publicly.

Responses

The following information was gathered from that consultation;

Redundancy
81% of the respondents overall supported the right of workers to receive redundancy payments (90% of employees compared with 60% of employers).

73% of respondents favoured reasonable time off to look for new employment in redundancy situations (76% of employees compared with 66% of employers).

Business transfers

76% of respondents felt that employees' rights should be protected following the transfer of an undertaking (85% of employees compared with 58% of employers).

Conclusions

Having considered the responses received during that consultation, the previous Committee submitted a Report and Proposition to the States proposing the two Phased approach, which was debated in December 2000 (P.99/2000).

As well as approving that a minimum wage, protection against unfair dismissal and a process for the resolution of collective disputes, should be included in Phase 1, the States also approved the proposition to develop such further measures as may be necessary in Phase 2 to deal with the issues of –

a) redundancy, maternity, equal pay, equal opportunities and any issues regarding discrimination in the workplace;

b) flexible working and family friendly policies and the protection of employees involved in business mergers and acquisitions.

BUSINESS TRANSFERS

Protection of rights in business transfers

Only two respondents did not agree that an employee's rights should be protected following the transfer of ownership of a business.

Staff Side – "at the very least a period during which pay and conditions will be guaranteed. If the acquiring employer is aware of the requirements this will no doubt be incorporated into the agreed purchase price for the business."

- **The Forum recommends that employee's rights should be protected following the transfer of ownership of a business.**

Public and Private Sector transfers

Twenty respondents said that protection is needed in both sectors and one respondent said that protection is only needed in the private sector.

A local law firm said that if such legislation is provided, one group should not have better protection than the other.

JACS – "Experience indicates it is an issue in both sectors."

Staff Side "Particularly in view of recent incorporations and possible future sales to the private sector."

Amicus noted that Luxembourg previously had such a distinction, but this has now been removed.

- **The Forum recommends that the legislation should protect employees in both the public and private sectors.**

Small Business Exemptions

Seven respondents said that small businesses should be exempt and 10 said that they should not. Three were undecided.

Two respondents said that businesses with less than 10 employees should be exempt, and 7 respondents said that businesses with less than 5 employees should be exempt.

A range of useful comments were received in response to this question. A local law firm said that there should be no discrimination between the size of businesses and that it would be better to limit the amount of legislation, rather than have laws with lots of exceptions. The Forum would advocate the view that it is better to limit the complexity of legal provisions, in all aspects of this recommendation, and allow them to apply more widely.

Ogiers – "Very small businesses are likely to be either family or owner run. Making it compulsory that any employees employed by the business should follow it when it is sold is likely to have the effect of making such businesses unsaleable."

States of Jersey "Effect on employees is the same irrespective of size"

Employer Association – "…the States EDD wants to improve business growth and placing more regulatory requirements on how businesses do business may inhibit this. There may well be a reluctance to grow one's own business through other purchases if that means having to retain the rights and resources of that business...Small businesses under 5 or even 10 may find the requirements of such a law too restrictive."

Tim Langlois “The majority of businesses in Jersey are small. It’s all down to economies of scale – the large businesses it will cost more, the smaller less.”

Amicus – “Transferred engagements happen between smaller companies just as frequently as large companies and as a consequence this would create a potential loop hole for subsidiary structured organisations.”

- **The Forum recommends that there should be no exemption for small businesses.**

Transfers Outside Jersey

Nine respondents said that employees should be protected when a business is transferred outside Jersey, 5 said that contracts should not be protected in those circumstances and 6 were undecided.

The Forum recognised from the additional comments received that insufficient information had been provided about the implications of a yes or no response to this question. There were, however, some useful comments from those who already had some experience or knowledge of this issue:

Ogiers - This would simply add needless complexity to an otherwise straightforward approach.

States of Jersey – No – “Employment markets are different outside Jersey”

Employer Association – “Should an employer transfer business outside of Jersey, there should be provision to offer those roles transferred to the existing incumbents in the first instance. However, there should not be a requirement to have to pay relocation costs or additional expenses for those individuals who decide to transfer outside of Jersey – just the option to be offered a transfer.”

Mr Walton suggested that protection is doubly necessary if the business is transferred to a different jurisdiction.

Staff Side – “Ideally yes, but it is difficult to envisage how this would be enforced in practice. Similarly, how do you protect Jersey employee rights where they work for large international organisations outside of Jersey?”

Amicus – “Wherever practicable terms and conditions should be protected no matter where the business base is relocated to. The world lives in a global economy with business becoming increasingly multinational. If the provisions were not protected then it would not take much effort for a base of operations to relocate out of Jersey to avoid the effects of this new protection.”

The Forum considered that, as levels of protection in other jurisdictions are often more stringent than in Jersey, it is unlikely that employers would relocate out of Jersey simply to avoid local legislation. If transfers outside of Jersey were protected by the proposed legislation, it would increase complexity and uncertainty as to whether employee’s contracts are governed by Jersey legislation and how this relates to differences between statutory protections in the two jurisdictions, such as, a greater

entitlement to statutory leave in the new jurisdiction. It must be remembered that employees cannot be forced to transfer to the new employer; if they do not wish to transfer, the employees either become redundant, or resign when the business is relocated. Employees may of course wish to accept or negotiate with the new employer a new package of terms appropriate to the new jurisdiction.

- **The Forum recommends that the legislation should not give employees the right to maintain their terms and conditions of employment if their job is transferred outside of Jersey.**

An "employee" member of the Forum recorded his dissent from this recommendation.

Terms and Conditions to Transfer

There was general agreement amongst respondents that employees should transfer on the contractual terms and conditions that are in place at the date of transfer. Respondents also suggested various other additional terms and conditions that they considered should transfer.

JACS – "Any CONTRACTUAL terms and conditions should be automatically transferred. These would include Health insurance, company car, bonus scheme, etc if contractual. The only non-contractual terms and conditions that should be transferred are those relating to pension schemes."

A local Law firm suggested that, except where arrangements have been made between the old and new employer, benefits provided via a third party that pertain directly to the original employer should not transfer (e.g. pension and insurance schemes), and neither should non-contractual policies procedures and benefits.

A local hotelier felt that "All should be renegotiable where Economic, Technical or Organisational reasons apply."

The States of Jersey said that discipline and grievance procedures and job descriptions very much depend on the new place of work and the circumstances of the transfer, so should not be transferred.

Employer association – "any conditions that were originally 'contractual' should be automatically transferred however, there should be some flexibility for the new employer – particularly if they are having to amalgamate two different business models and may have to be making economies of scale."

Finance industry employer – " employees would need to accept 'reasonable' changes as it would not be necessarily feasible for a new employer to replicate all terms in their exact form as they may discriminate against existing staff or cripple the business e.g. if hours/shifts were out of line."

Tim Langlois – "Full union recognition along with full bargaining rights. Once the Employment Relations Law is in place this should then be covered."

Staff Side – "Union recognition and any existing contractual terms."

The TGWU also agreed that trade union rights should be transferred.

In the UK, if a collective agreement is in place at the time of transfer which covers any of the employees who are transferring, then the agreement transfers and applies for the duration of its application. Where the previous employer recognised a union in respect of employees who are being transferred, and after the transfer the group of employees maintains an identity that is distinct from the new employers business, then the recognition applies between the union and the new employer. Where transferring employees' contracts of employment incorporate a collective agreement, then the contractual terms will transfer even if recognition doesn't.

The Guernsey Law (as described on page 10 of this recommendation) provides similar protections in regard to union recognition and the transfer of collective agreements, other than where they relate to pensions.

The EC Directive relating to transfers of undertakings provides that terms and conditions agreed in any **collective agreement** must be observed by the new employer on the same terms that were applicable before the transfer, or until a new collective agreement is in place. However, jurisdictions may limit the period in which those collectively agreed terms and conditions must be observed by the new employer for a period of no less than one year. The Forum does not intend to recommend such a limit.

- **The Forum recommends that all existing contractual terms and conditions should be automatically transferred, including any contractual terms incorporated into that contract via a collective agreement.**
- **The Forum recommends that where a collective agreement is in place at the time of transfer which covers any of the employees who are transferring, the agreement should transfer and apply, other than where it relates to pensions, for the duration of its application.**
- **The Forum recommends that where the old employer recognised a union in respect of employees who are being transferred, and after the transfer the group of employees maintains an identity that is distinct from the new employers business, then the recognition should apply between the union and the new employer.**

Pension Protection

Thirteen respondents across a range of categories said that there should be some protection for employees' pensions following a transfer. Five said that there should not be protection (including the 2 Law firms, an employer and 2 employer associations) and 3 respondents were undecided.

Ogiers commented that it is "likely to be far too complicated and too expensive, especially when taking into account the relative benefit to the employee set against the likelihood of massive costs for the new employer."

JACS – "Pension scheme provision is a complex area. A pension is a key part of the remuneration package and requires protection as part of a business transfer."

Employer Association – Pensions are often contractual and form an important part of employees' total compensation. "Pension funding can be quite complicated – those in final salary schemes are funded to much higher levels than in money purchase schemes because of actuarial requirements. Many companies have now closed their final salary schemes to new entrants and a new employer may find the funding equivalent too high in a money purchase scheme."

Local hotelier – There should be no pension protection but "advice should be sought for individuals to protect any contributions to date. Final salary pensions schemes in particular would be difficult to transfer and would likely put off anyone wishing to acquire the business."

Amicus – "…there is no reason for an employer not to recognise these commitments as one of the caveats during the sale negotiations. From 6 April 2005, employees who transfer on a business sale now have some protection of their pension rights. Under the Transfer of Employment (Pension Protection) Regulations 2005, where a transferring employer made contributions to an occupational pension scheme in respect of employees who are being transferred, the new employer will have to provide either an occupational money purchase or a stakeholder scheme to which it must make relevant contributions; or an occupational final salary scheme which either complies with the reference scheme test or with alternative requirements. The alternative requirements require members to be provided with benefits, the value of which is at least equal to 6 % of pensionable pay plus any contributions which the member himself makes. Employees cannot be required to contribute at more than 6 % of pensionable pay."

- **The Forum understands that pension scheme provision is a complex subject, and considers that it is not qualified to make a recommendation on this point without the benefit of full consideration of the possible complications from a business perspective. The implications of making an uninformed recommendation on this issue are serious. It is therefore recommended that expert actuarial advice is sought on this matter prior to drafting the legislation.**

Type of Pension Scheme

Four respondents said that employers should be required to provide an identical pension scheme and 12 said that an alternative scheme would suffice.

If an alternative scheme were permissible, 6 respondents said that employers should be required to match the contribution level that had been provided by the former employer and 8 said that the employer should not be required to do so.

JACS – "The new employer should be obliged to make a contribution to an alternative pension scheme. The employer should match the employee's contribution to a maximum level. The 6% figure appears to be reasonable."

JEC – "You cannot force the new employer to maintain the existing pension provision if their own employees have a totally different system that is less substantive, inconsistencies arise."

Tim Langlois – "Utilities should be treated as a special case, especially if in States pension scheme. Offering an alternative scheme as a requirement is fair, but should this be a States Utility, all pension requirements must be matched. In other companies there could be some leeway."

A Finance industry employer said that the employer should not necessarily be required to match the previous contribution level and that consideration should be given to "whether the individual is receiving other benefits in the new company than they were with the old company i.e. they can't cherry pick best terms & benefits from both employers."

Staff Side said that employers should be required to match the contribution level, "subject to whether the scheme is defined contribution or defined benefit and as a result of discussions with the actuary as to the adequacy and comparability of employer/ee contribution levels."
The Guernsey Law provides that public servant's pension schemes, as provided in contracts or collective agreements do not transfer, but the new employer must provide something "broadly comparable". Failure to do so results in compensation to the employee based on actuarial advice regarding the loss sustained by the transferred employee.

- **The Forum recommends that (subject to obtaining actuarial advice in the drafting process) the law should give some protection of employee's pensions, but the level of contribution or type of scheme should not have to be identical to that which applied before the transfer.**

Following a transfer, should there be a time limit after which any agreed changes to terms and conditions are not void?

This question was included in the consultation because the UK provisions on this aspect of business transfers appear to have been intended to prevent employers from changing employees terms and conditions immediately after a transfer and as a result of the transfer, rather than being intended to allow that any re-negotiated terms and conditions may be declared void by a tribunal at any time in the future.

It had been suggested that if Jersey wishes to allow changes to be agreed between the employer and employees at a future time after the transfer without the possibility of the changes being declared void, our law could provide a time limit, after which changes may not be declared void.

Ten respondents said that there should be a time limit after which agreed changes are not void, and 7 respondents said that there should not be a time limit.

JACS – "On acquiring a business, the new owner will most likely need to gain economic, technical or organisational advantages. As showing "changes in the workforce" appears difficult to substantiate, giving rise to the risk of changes being declared void, a time limit after which such changes will not be void appears sensible."

The States of Jersey said that there should be a 1 year time limit: "You may have discrimination claims from an employer's existing employees who may be doing the

same jobs on different terms. Encourage integration of transferred employees…Enables both transferred and existing staff to come to terms with the new situation; encourages integration at an early date."

Amicus stated that "…a set period after which the employer had the right to agree a change of employment conditions with an employee without the terms being declared void would, in our view, place the employee at a disadvantage and leave vulnerable employees at risk of reduced employment conditions with no protection under the transfer provisions.

Ogiers – "The UK approach arises entirely from the Acquired Rights Directive. There is simply no reason to repeat the mistakes inherent in this approach. There is no reason why employers and employees should not be able to agree changes to their terms and conditions under ordinary common law principles…the protection given by the common law and by the unfair dismissal regime contained in the Employment (Jersey) Law 2003 as entirely sufficient for these purposes. Adopting any provisions which prevent employers from changing employees' terms and conditions immediately after a transfer…will simply add ludicrous levels of complexity to provisions which are already likely to be extremely complex."

Another local law firm suggested that there is no need for additional legislation; that there should be no other restrictions on changes to terms and conditions, other than those already under common law and the existing Employment Law. The respondent suggests that the new employer should have the same ability to change terms and conditions as the old employer did. Where changes are made to the employee's detriment and reasons aren't sufficient to be justified, employees can already bring breach of contact and/or constructive unfair dismissal.

- **The Forum recommends that there should not be a time limit after which any agreed changes to terms and conditions cannot be declared void. The Forum is advised that the position as set out by the two law firm respondents; that the common law situation combined with the protection provided by the Employment Law, is sufficient to protect employees, and that to introduce such a period would introduce excessive complexity.**

Employee Information

In the UK, an employer who is transferring his business to a new employer must provide a specified set of information, at least 2 weeks before the transfer, to help the new employer to understand the inherited rights, duties and obligations in relation to those employees who will be transferred.

A list of suggested information was provided in the consultation document and respondents were asked to indicate what information the old employer should have to give to the new employer before the transfer occurs, subject to the employees' agreement where required by the Data Protection Law. Points 1 to 8 are specified as required in the UK and points 9 to 12 were suggested by the Forum. The third column of the table indicates the number of respondents who agreed that the suggested details should be supplied to the new employer before the transfer occurs.

1.	The identity of the employees	16
2.	Their ages	17
3.	Information contained in their statements of employment particulars	18
4.	Information relating to collective agreements which apply to those employees	18
5.	Instances of any disciplinary action within the previous 2 years	12
6.	Instances of any grievances raised by the employees in the previous 2 years	10
7.	Instances of any legal actions taken by the employees against the former employer in the previous 2 years	15
8.	Instances of potential legal actions that may be brought by those employees	15
9.	Maternity leave taken or due	15
10.	Annual leave taken or due	16
11.	Employees educational or vocational qualifications	17
12.	Information relating to employees work permits / Regulation of Undertakings licensing information	18

With the exception of instances of disciplinary and grievance action in the previous two years, the majority of respondents ticked all of the boxes. The additional comments provided proved to be more enlightening.

JACS – "CURRENT disciplinary actions or grievances should be transferred, not "within the past 2 years", as they may have lapsed."

A Law firm said that all of the suggested information about employees should be provided to the new employer as soon as possible, except for the identity of the employees, which should not be provided until the transfer has been confirmed, for example, 1 month before: "This is an area which often previously caused difficulties in the UK, when an outgoing employer refused to provide an incoming employer with relevant information, to the detriment of the incoming employer and transferring employees."

A Utilities company said that pension rights should be transferred "to avoid negligent misstatement" and Staff Side referred to salary. It is assumed that both of these would be included in the statement of employment particulars (point 3).

A local Hotelier said that all suggested information should be provided, plus job descriptions, training records, sickness history, performance appraisal information etc.

The States of Jersey said that discipline and grievance and legal actions should be provided only where they are current, and only information on maternity leave due to be taken should be provided.

Jersey Hospitality Association (JHA) – "All available information should be provided; Performance records, history of sickness, contracts of employment"
Another employer association suggested the same details as the JHA, plus training & development information.

Mr Walton suggested holidays, levels of pay hours of work and all conditions of service including pension entitlements.

In the UK, this matter was previously left open for negotiation between the two parties, however a relatively new TUPE Regulation requires the information in points 1 - 8 to be provided at least 14 days before the transfer, unless special circumstances allow notification to be delayed. The remedy for failure to meet this obligation is that the tribunal can award compensation to an amount it considers just and reasonable (the Regulations specify not generally less than £500 per employee) having regard to any loss sustained and any warranties or indemnities that may exist which would allow damages to be recovered from the old employer.

- **The Forum recommends that the employer should be required to provide all of the listed information (points 1 to 12) to the new employer at least 14 days before the transfer, with the following exceptions; points 5 and 6 should be limited to "current" action, not action within the previous 2 years, and points 9 and 10 should be provided only where they are "due to be taken, or are owed".**

- **The Forum recommends that any other information that the new employer wishes to be provided with before the transfer should be agreed between the two parties and shared at least 14 days before the transfer occurs, or within a time period agreed between the two parties.**
- **The Forum recommends that, where the old employer has failed to provide the required information in the time period, the Tribunal may award compensation to the new employer, such as it considers just and reasonable in the circumstances.**

Informing and Consulting Employees

12 respondents indicated that provisions for informing and consulting employees should be included in guidelines rather than legislation. 8 respondents did not agree, including 3 unions and 3 employees.

Both law firms who responded suggested that "over-regulation" should be avoided and that the law should not seek to be too prescriptive; guidance may be useful but it should not be legislation via the backdoor.

An Independent advisory body did not think it appropriate for employers to have to consult with employees in all situations, but suggested that guidelines would be useful.

Amicus – "Legislation should dictate timescales and some method of procedure for this to be followed, including the opportunity for employees to meet with the prospective buyer."

- **The Forum was minded to recommend that detailed information and consultation requirements of employers should be included in guidelines rather than legislation. However, in the interest of ensuring that employees are informed of business transfers and the potential consequences for their jobs, the following sections provide the Forum's recommendations for legislative provision.**

Information and Consultation Procedure

Fourteen respondents indicated that employers should be required to consult with employees before a transfer, 4 said that there not be a consultation requirement (including one employee, one employer association, one law firm and one independent advisory body).

Ogiers – "Informing and consulting employees is in many ways more important than the transfer provisions, such a transfer should not come as a shock to employees."

JACS – "Consultation is a fundamental principle of good employment relations. There should be a requirement to consult at the stage between a decision being taken to transfer an undertaking and the planned date of transfer."

A local Hotelier said that to legislate for consultation may put a transfer at risk and that an employer should have the opportunity to justify any reasons for not consulting.

The Jersey Hospitality Association suggested a code of practice and that best practice should be followed, rather than law because consultation is impractical and each sale of a business is different. Making this Law could put the transfer at risk.

Employer Association – "It is important to maintain good employee relations and to treat employees fairly and with respect. There is often a lot of uncertainty and concern when business transfers occur and it would be beneficial for employees to understand what the transfer means and how it affects them to avoid future concerns. However, Jersey is a small community and we are concerned that possible deals could be frustrated by having open consultation and the confidentialities surrounding this. Consultation should certainly take place once a binding agreement has been reached by both businesses."

- **The Forum recommends that employers should be required to inform and consult employees "in good time" before a transfer occurs, meaning, as soon as reasonably practical after a binding business transfer agreement has been reached between the old and new employers.**

A utilities company provided the following comment regarding the information that should be given to employees in consultation – "The fact that a transfer is to take place (and when, approximately), and the reason for it (but not obliged to justify the transfer or discuss its merits). Explanation of the legal effect in relation to employment contracts, collective agreements and statutory rights, the impact on pay and benefits, and any relocation plans and measures to take in relation to the transfer."

Amicus – "Key information about the employer should be provided so that the employees know who they will be working for, with a full breakdown of their history and the future key objectives of this new company. Additionally if there are to be changes to the management structure or potential job losses the employees can be alerted to this situation and respond accordingly.

- **The Forum recommends that the legislation should require employers to inform the employees who will be affected by the**

transfer (or appropriate representatives of such employees) of the following information;

- **The date or proposed date of the transfer**
- **The reasons for the transfer**
- **The legal, economic and social implications of the transfer for the employees**
- **Any measures envisaged in relation to the employees.**

- **The Forum also recommends that a model procedure should be provided in the guidelines, elaborating on those legal requirements.**

The Forum considered whether the consultation procedure required when a business is being transferred should be the same as that recommended by the Forum when collective redundancies are being proposed. The responses indicated that, although simplicity and consistency is desirable wherever possible, respondents had recognised that the two situations can be very different and may require a different procedure to be undertaken.

JACS – "Standardisation of procedures assists all parties, although due to the need for confidentiality during the initial stages leading up to the decision to transfer an undertaking, the timing of consultation (compared to redundancy situations) may well be different."

Two employer associations said that there should be more flexibility in the timing and the process when consulting on business transfers than for collective redundancies.

An independent advisory body said that there should not be the same consultation procedure as for collective redundancies because they "are particularly sensitive and should be handled appropriately."

JEC - many of the UK requirements in relation to appropriate representatives, elections protections and failure to comply are as for collective redundancy consultation.

The Forum recognises that where a business transfer agreement has been reached, the purpose of consulting employees (or their representatives) differs from the purpose of consulting employees about collective redundancies. Where collective redundancies are planned, employers must undertake collective consultation with employees to include suggestions for alternative solutions to redundancies. However, consultation regarding business transfers is intended to provide employees with sufficient information regarding measures that will be taken by the old or new employer as a result of the transfer, with a view to reaching agreement to those measures with the affected employees, rather than agreement to the transfer itself.

- **The Forum recommends that the legislation should require employers to consult with "appropriate representatives" of affected employees; the provisions for the election of appropriate representatives (in cases where there is no recognised trade union) to be the same as those recommended by the Forum in relation to collective redundancies.**
- **The Forum recommends that this should apply irrespective of the number of employees likely to be affected by the business**

transfer, and must not necessarily occur at least 30 days before the transfer takes place.

- **The Forum recommends that where an employer has failed to comply with the recommended information and consultation requirements, employees may be awarded compensation up to a maximum of 90 days pay, having regard to the seriousness of the employers' failure to comply. The Tribunal should also have the power to consider whether the old or new employer is liable (or whether jointly liable) for the failure to inform employee representatives of measures envisaged with regard to the transfer.**

Additional Comments

Sale of Jersey Telecom

Tim Langlois, an employee, provided the following additional comment – "No utility company should even be considered for sale until all of the above becomes statutory law…I hope the Forum will back these views and indeed go public on supporting these points."

- **The Forum wishes to clarify that it is not within its remit, as set out in the Employment (Jersey) Law 2003 and terms of reference, to publicly support or oppose individual employers, employees or organisations in matters relating to employment legislation. The Forum is an independent body that is required to consult with the public on specific aspects of employment legislation, in particular the minimum wage, at the direction of the Social Security Minister. To publicly comment any issue outside of that remit would be potentially damaging to the reputation of the Forum as a balanced, non-political and independent body.**

Complexity

Many of the respondents commented on the complexity of UK legislation and a desire for Jersey's legislation to be as simple as possible.

Ogiers "have some doubts as to whether a TUPE style provision is required at all in Jersey...its likely complexity will defeat any benefits which might accrue to employees by posing large legal and organisational costs upon employers."

A local Hotelier would "recommend that every effort is made to avoid the confusion created by TUPE in the UK. A balance needs to be found between protection for the individual and allowing businesses to operate effectively and respond to market demands."

Employer Association – "It is important that businesses of every size can grow and develop without too many restrictions but having a balance between protecting employee rights and allowing businesses appropriate flexibility when buying another business."

A Finance industry employer said that "we should be careful not to over complicate the law…best guess numbers are circa 40 per annum…wouldn't want to see a law that

was as complex as the UK TUPE law as this will place large administrative and cost burdens on employers, that may deflect any good will / best practise that they would have ordinarily adopted anyway."

- **In the process of consultation and the preparation of this recommendation, the Forum intended to avoid the complexities of similar legislation in the UK, simplifying provisions wherever possible and providing guidance instead of legislation where appropriate. Whilst it is recognised that Jersey is a small jurisdiction and that there are concerns about overloading employers with complex legislation, the desire to protect employees with appropriate rights that are enforceable, has resulted in recommendations for more legislation than had originally been envisaged. The Forum considers that the Jersey Employment Tribunal is an appropriate body to deal with disputes on these matters.**