STATES OF JERSEY

DRAFT ACT ANNULLING THE EMPLOYMENT RELATIONS (CODES OF PRACTICE) (JERSEY) ORDER 2007

Lodged au Greffe on 15th January 2008
by Deputy G.P. Southern of St. Helier

STATES GREFFE

Jersey

DRAFT ACT ANNULLING THE EMPLOYMENT RELATIONS (CODES OF PRACTICE) (JERSEY) ORDER 2007

PROPOSITION

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

to adopt an Act annulling the Employment Relations (Codes of Practice) (Jersey) Order 2007.

DEPUTY G.P. SOUTHERN OF ST. HELIER

REPORT

As members will be aware, the passage of the Employment Relations (Jersey) Law 2007 (ERL) has been a long, and occasionally difficult, one. In particular, it was brought before the International Labour Organisation (ILO) by the Regional Secretary of the T&G Union (now UNITE), Mr. Frampton.

On 20th November 2007 Mr. Frampton wrote to the Minister for Social Security with further comments concerning issues that he considered had not been fully resolved. The Minister responded on 6th December as follows –

> *"I am currently considering the comments on the codes of practice that you sent me, along with all of the others that were received. The opinion is very clear and has identified some areas of the codes that could be improved. I see nothing in the opinion that requires further discussion in regard to finalising the codes.*
>
> *As you know, the ERL has already been passed by the States of Jersey and approved by the Privy Council. The Law will come into force on 21 January 2008 along with the codes of practice, which will be made by Order when I am satisfied with the content. It is not necessary to refer the codes or any other matter relating to this law to the UK again before enactment.*
>
> *The Committee of Experts have not requested that any further opinions are awaited from them before the Law comes into force; their report asked "to be kept informed of developments" and made various recommendations. A response to the recommendations was sent to the Department of Work and Pensions (DWP) who are responsible for responding to the ILO on our behalf. It is for that Department to decide whether the response may be shared with you."*

I leave it to members to decide what the tone of this letter is. It certainly appears a little on the brusque side to me, especially when one considers that the response was sent to DWP back in October, but the Union who initiated the complaint were not kept informed.

Despite some improvements in the ERL and in the associated codes, there remain areas which are deeply flawed and are likely to inflame, rather than improve, industrial relations in the Island. As I have pointed out to members previously, the Law could not be properly understood until the codes of practice were in place; in particular in areas which define "unreasonable" actions on the part of unions. These definitions are now in the codes, and are,

as I say, inflammatory, and probably unworkable.

Under the terms of Article 25 of the Employment Relations (Jersey) Law 2007, the Minister for Social Security is empowered by Order to approve codes of practice which may, in particular, provide for –

> *"(a) the recognition of trade unions;*
>
> *(b) the manner in which ballots of members of trade unions may be held to support the doing of acts by unions in contemplation or furtherance of employment disputes;*
>
> *(c)* ***conduct that is or is not reasonable conduct when done in contemplation or furtherance of employment disputes;*** *and*
>
> *(d) recommended procedures for the resolution of employment disputes."*

The importance of the definition of what constitutes the "reasonableness" or otherwise of an action is that it effectively limits the extent of immunity from committing a legal wrong (tort), as outlined in articles 6 to 10 of Code 2– Balloting and Conduct in Employment Disputes –

6. Examples of action in contemplation or furtherance of an employment dispute include where employees collectively:
   - Withdraw their labour
   - Refuse to undertake some of their duties
   - Refuse to carry out reasonable instructions
   - Take part in a sit-in, go-slow or work to rule (such as an overtime ban)
   - Take part in picketing.
7. Most forms of action in furtherance of a dispute would amount to a breach of contract on the part of each of the employees taking part. Those organising the action or calling on individuals to take part in it would ordinarily be committing a legal wrong (Tort) and would be liable to be sued for damages or issued with an injunction preventing them from taking further action.
8. However the Employment Relations Law recognises that individuals and unions are entitled to organise and take part in legitimate action in furtherance of a dispute in order to protect and further their interests. Article 18 of the Employment Relations Law provides that an employee shall not be liable in damages for a breach of his or her contract of employment committed through taking part in action in contemplation or furtherance of an employment dispute, where there has been a cessation of work, a refusal to work, or a refusal to work in a manner lawfully required by the employer.
9. More significantly, Article 19 of the Employment Relations Law provides wide-ranging immunity in tort for those (including trade unions) who organise such action and seek to induce employees to take part in it. To take advantage of this immunity a trade union must be registered in accordance with the Employment Relations Law.
10. However, in two instances the Employment Relations Law removes that immunity from a trade union:
    - Immunity is lost if an approved code of practice provides that a ballot should be held before performing the act in question and the union has not held a ballot in accordance with the code.
    - Immunity is lost if the union has engaged in conduct defined in an approved code of practice as not being reasonable conduct.
11. This Code is therefore of central importance in setting out appropriate standards in the organisation and conduct of action in furtherance of an employment dispute. A union which endorses or takes action without the support of a ballot, or engages in conduct that is defined as unreasonable by this code, will lose its immunity in relation to any action. This can have consequences, including financial consequences, for the union which will then be vulnerable to legal action.

This becomes dangerous, and I believe, unworkable when it is applied to all secondary action, as defined by articles 36 to 38 of the same Code:

Targeting employers not party to the dispute – secondary action

36. It would be unreasonable conduct for a union to call upon employees to take part in secondary action in furtherance of an employment dispute.

37. Secondary action is action in pursuit of an employment dispute taken by employees whose employer is not a party to the dispute to which the action relates.

38. Article 5(3) of the Employment Relations Law provides that a dispute between a Minister and employees should typically be treated as a dispute between an employer and employees, notwithstanding that the Minister in question is not the contractual employer. It will amount to secondary action for a union to call on employees to take part in action that relates to any such dispute if the employees in question are not actually party to that dispute.

These articles not only make all secondary action illegal, but also redefine the relationship between all States employees and their employer so as to eliminate the possibility of supportive action for one part of the workforce by any other. Thus, despite the fact that the States employer is only the States Employment Board (SEB) and that all negotiation of terms and conditions now take place, for example, at the Manual Workers Joint Council, as far as disputes are concerned, the employer is the Minister.

Thus, a dispute with manual workers employed by the Harbours cannot be supported by manual workers of Transport and Technical Services, even though they work at the same place and with identical terms and conditions negotiated with SEB. A dispute with cleaners in schools (say, over outsourcing) could not be supported by cleaners in Health or Social Security, despite similar conditions and employment contracts, all negotiated through SEB.

This is a recipe for disaster. It will destroy labour relations in the Island and may end with our imprisoning union representatives.

The second area where the definition of unreasonable is suspect and unworkable comes in articles 31 and 32 of Code 2 concerning essential services:

Action in Essential Services

31. Where a particular service is essential to the well-being of the community, it would be unreasonable for the trade union to fail to reach an agreement with the employer that action will not be taken by key personnel in, for example, the emergency services, utilities and health sector. This would apply if any action would seriously interrupt such a service, endangering the life, personal safety or health of the whole or part of the population; or where the extent and duration of the action might be such as to result in an acute national crisis endangering the normal living conditions of the population; and in services of fundamental importance.

32. A small Island community such as Jersey may have services that in certain circumstances are considered more essential to the population than they would be in a larger jurisdiction. For example, a stoppage in transport links could be detrimental to the health and safety of the population if services were interrupted for a prolonged period of time.

Here the problem is that, once again, all industrial action is automatically deemed "unreasonable" if it takes place in an "essential" service. But what constitutes an essential service is not clearly defined. A wide-ranging definition of sorts is contained in article 31, but is then extended way beyond what any normal person might consider reasonable. Certainly the extension to "a stoppage in transport links" as essential goes way beyond what appears in any other jurisdiction, to my knowledge. Would this render any strike by bus or taxi drivers illegal? What about any dispute at the airport or harbour? It would seem so.

The point is that these contentious and divisive issues have not been agreed with those concerned. The Minister *"sees nothing that requires further discussion"*. These Codes have not been agreed by the States, nor have they been agreed with employee representatives. They are unsustainable and could lead to very damaging confrontations. They are due to come into force on 15th February, so there is time for the Minister for Social

Security to reconsider his position and hold further discussions with stakeholders. These Codes should not be enacted without further serious consideration.

Financial/manpower implications

There are no financial or manpower implications arising from this proposition.

Jersey

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Made	*[date to be inserted]*
Coming into force	*[date to be inserted]*

THE STATES, in pursuance of the Subordinate Legislation (Jersey) Law 1960[1], annulled the Employment Relations (Codes of Practice) (Jersey) Order 2007[2].

[1] *chapter 15.720*

[2] *R&O.184/2007*