

STATES OF JERSEY

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EMPLOYMENT (JERSEY) LAW 2003: THERAPEUTIC WORK SCHEMES

Lodged au Greffe on 23rd July 2007
by Deputy I.J. Gorst of St. Clement

STATES GREFFE

PROPOSITION

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

- (a) to agree that the Employment (Jersey) Law 2003 should be amended to ensure that Therapeutic Work Schemes are not prejudiced by the operation of that Law, with particular regard to provisions relating to the minimum wage; and
- (b) to request the Minister for Social Security to use his powers under Article 19 and 20 of the Employment (Jersey) Law 2003 to direct the Employment Forum to consult upon the proposal in paragraph (a) above and make its report within 3 months following the approval of this proposition and to further request the Minister to bring forward appropriate amendments to the Law to give effect to the proposals once the report of the Employment Forum has been finalised.

DEPUTY I.J. GORST OF ST. CLEMENT

REPORT

I have been contacted by a number of organisations and individuals who have become concerned about the effect that the Employment (Jersey) Law 2003 Minimum Wage Regulations is having upon their ability to provide and access Therapeutic Work Schemes.

I believe that this is an unintentional consequence of that legislation because when the law was originally written the absence of an exemption for therapeutic workers was not a mistake. It was considered that the best way of dealing with these difficult issues was through the issuance of codes of practice (attached at Appendix). These codes of practice were intended to assist 'employers' or 'providers' of these schemes with regard to the need to pay a minimum wage. This assistance was based around the four criteria which must be met for the activity not to be considered as 'employment'. The four criteria are –

1. The activity is focused on needs of the individual rather than needs of the organisation (However it is permissible to sell any output to offset costs).
2. The tempo of the activity/output reflects the individual rather than organisational needs.
3. The individual is referred to the activity and monitored/supported by a health or social care professional.
4. The arrangement is agreed with the individual.

The codes place the onus on the scheme to arrange their administrative affairs, either within the Employment Law where required, or to be able to provide clear evidence that the four criteria have been met.

The codes also acknowledge that there may be a greater problem locally, than in other jurisdictions, due to the different types of schemes and the way they are administered. It states that it is possible that some therapeutic schemes in Jersey would become unaffordable or unsustainable, either if no provision is made when the employment law comes into force, or if there is uncertainty as to their obligations and therapeutic workers' rights under the law.

My concern is that the specifics and scenarios detailed in the codes of practice have created a degree of uncertainty and subjectivity which even the Employment Tribunal have indicated could only be determined by themselves on a case by case basis. Providers of schemes have understandably been reluctant to act, fearing that they might find themselves in front of an Employment Tribunal for exploiting the very people they seek to serve. In my opinion, this is not acceptable and needs clarification.

This proposition therefore quite simply requests that the Minister for Social Security, after a period of consultation amends the Law by Regulations. This request is for greater certainty in a very complex area that needs to balance concern for the protection of vulnerable workers against the specifics of individual therapeutic work schemes.

This request has been left in broad terms to allow the Minister and the Forum to consider any options that they might consider alleviates the problem, it might be that they want to request exempting department approved schemes along the lines of the Isle of Man legislation.

This report gives what I hope is a clear but brief outline of the problem; I would however be delighted to meet with any member to discuss its contents further. The way or extent to which a society protects and encourages its most vulnerable members is a mark of its greatness. I therefore hope that members will be able to support this proposition.

Financial and manpower implications

There are no manpower implications arising from this proposition. There are no obvious financial implications arising from this proposition other than the long-term health saving derived from the provision of meaningful day time occupation, coupled with possible saving in benefit claims.

CODE OF PRACTICE - this code has been approved by the Employment and Social Security Committee.

Therapeutic Work and the Employment Law

Introduction

1. Under the terms of Article 9 of the Jersey Advisory and Conciliation (Jersey) Law 2003, the Employment and Social Security Committee is empowered to issue or approve Codes of Practice providing practical guidance for the purpose of promoting the improvement of employment relations. This Code is intended to provide such guidance on therapeutic work and the Employment Law.
2. The provisions of this Code are admissible in evidence and may be taken into account in determining any question arising in proceedings before the Employment Tribunal or a court. Failure to observe any provision of the Code does not, of itself, render a person liable to any proceedings.
3. Whilst every effort has been made to ensure that the summary of the relevant statutory provisions included in the Code is accurate, only the Employment Tribunal and the courts can interpret the law authoritatively.

Section 1 – Aim of the guidance note

This code is intended to help individuals and organisations understand how the Employment Law applies in relation to ‘therapeutic work’. It is intended to provide guidance on what constitutes employee status for individuals undertaking therapeutic activity to ensure that they are not adversely affected by confusion about the legal position.

Some of the work designated ‘therapeutic’ for benefits purposes is similar to that undertaken in open or supported employment. People undertaking this work are potentially entitled to the protections offered by the Employment Law. The basic principle, consistent with the provisions of the legislation, must be that an individual should be considered an ‘employee’ unless the employer can demonstrate otherwise.

- The Employment Law only applies to “employees”. So the key question is whether or not any particular person is an “employee”. If not, then the provisions of the Employment Law do not apply. “Employee” has a legal definition and depends on the existence of a contract.
- Usually, employees have written contracts of employment so it is a straightforward matter to establish their status. But the definition of “employee” says that people can count as employees if they have an oral contract or an implied contract. This leads to some ‘grey areas’ where status may be disputed. One such grey area is the issue of people doing work (or work-like activities) for therapeutic reasons.

This is of particular importance in relation to payment of the minimum wage as the onus is on the employer to ensure that they are complying with the requirements of the Law by paying the appropriate minimum wage and maintaining adequate records.

Section 2 – The Legal Position

Who does the Employment Law apply to?

It is important to note that there is nothing in the Employment Law, or the Minimum Wage Regulations, that make any reference to a worker’s productivity, ability or effectiveness. There is no distinction between the non-disabled and disabled, and there is no reference to ‘therapeutic work’ or ‘therapeutic workers’ anywhere in the legislation.

It follows that the criterion for determining whether a person with, for example, a disability or mental health problem is entitled to the protections contained in the Employment Law will rest on precisely the same criterion as for any other person; namely – is he an employee? In addition to the usual tests that would be applied by a Tribunal in determining employment status, this Code provides four criteria that the Tribunal may consider.

This note does not attempt to provide a full analysis of the legislation. Rather, it explains which provisions of the Law are relevant to the issues of therapeutic work, explores some difficult areas and attempts to provide clarity as to whether an individual should be treated as a ‘client’ or an ‘employee’.

The definition of an employee

Article 1 of the Employment (Jersey) Law 2003 defines a worker as someone who is an employee (that is, someone who works under a contract of employment, including a contract of apprenticeship) or anyone else who works under some form of personal contract for somebody else, and is not genuinely self-employed.

The usual tests to decide whether someone is an ‘employee’ are difficult to apply in the case of therapeutic work, as the focus of the ‘work’ is usually rehabilitation, reintegration and training, rather than on producing ‘outputs’ for the employer.

Jersey’s definition of ‘employee’ goes wider than the UK definition of ‘employee’ to include those defined as ‘workers’ in the UK. This was a deliberate choice, taken because the Committee wanted to ensure that people such as agency workers, casual workers and workers on short term contracts would still be entitled to the provisions of the Employment Law, even if their contracts were not contracts of employment in the traditional sense.

How to recognise an employee’s contract

The Law specifically states that a contract can be express (either oral or written) or implied. It is important to emphasise that an employee may have a contract without having it in writing. The difficulty of establishing the existence or otherwise of verbal and implied contracts is long-standing and is an inevitable result of the many and varied forms of working arrangements that exist. Much of the case law in the field of employment law and contract law in other jurisdictions has centred on this difficult question.

The right to be paid at least the minimum wage is expected to be of particular concern to those involved with therapeutic work because that right is more likely to impact directly on their arrangements (and employees themselves are more likely to enquire about) than some of the other employment rights which will also apply (depending on number of hours worked), but tend to have an impact only occasionally, such as the right not to be unfairly dismissed.

In attempting to establish employment status, the assumption will typically be that the person is an employee, and the burden is on the alleged employer to show that he is not. This reversal is intended to ensure that an employer cannot avoid his obligation to meet the provisions of the legislation by being non-co-operative or pleading an absence of documentation. However, the following section provides further information that may be taken into account by the Tribunal in determining whether there is employee or client status in therapeutic work activities.

Section 3 – ‘Therapeutic work’ and the Employment (Jersey) Law 2003

To recap, why is the notion of ‘therapeutic work’ a particular problem?

- There is no reference in the minimum wage legislation to a worker’s productivity, ability or effectiveness.
- The legislation also makes no distinction between disabled and non-disabled people, or between people with mental health problems and other people, and contains no reference to ‘therapeutic work’.

- The basic criterion for determining whether anyone is entitled to the minimum wage and the protection of the Employment Law is simply - is he an employee?

‘Therapeutic work’ is not a legal term. It is used to describe a number of arrangements whereby people who have problems functioning in the normal labour market are nonetheless given the opportunity to undertake some form of work-like activity, for which they may receive payment. They are often in receipt of benefits as well. It follows from the legal position described in Section 2 that if a person with, say, a disability or mental health problem is involved in work-like activity under an arrangement that is an explicit or implied employee’s contract, then they must be paid the minimum wage and are entitled to the other protections of the Employment Law.

The Employment Tribunal

When the Tribunal or the courts look at whether the Employment Law applies to an individual, the provisions of this Code are admissible in evidence and may be taken into account in determining any question arising in proceedings. In the absence of further evidence presented to a Tribunal, the basic position is set out in (a) to (c) below;

- (a) **If there is no consideration (usually the payment of money or the giving of a benefit) from the employer and no obligation placed on the individual undertaking the therapeutic activity or the work** then there would not be a contract between the two parties. The underlying point is that there has to be a mutual obligation between the individual performing the activity and the employer paying a reward in return for that activity. It might be possible to pay genuine expenses and occasional ‘ex gratia’ payments to the individual without creating a contract of employment, as long as no expectation of payment for the activity was created and no obligation was placed on the person carrying out the activity.
- (b) **If money is paid by the employer to an individual**, there may still be no employment contract if there is no mutual obligation between the parties i.e. the individual is genuinely not obliged to perform duties and the employer is genuinely not obliged to provide the activity or pay the individual. However a payment is often indicative of a contractual relationship and any payments made will be carefully scrutinised by the Tribunal and courts. If they are genuinely not linked to a mutual obligation between the parties then it is unlikely that a contract will be inferred and the Employment Law will not apply;
- (c) **If the two factors are combined, so that the individual is paid money or given a benefit by the employer over and above expenses and is obliged to perform an activity in accordance with the employer’s instructions**, then there will almost certainly be a contract between the two parties and the individual will be an employee. In such circumstances, it is possible that the Employment Law will apply, even where the activity has genuine therapeutic value. Expenses could be paid to those undertaking therapeutic activity at a flat rate if they represent a fair and reasonable estimate of out of pocket expenses (including travel and subsistence) where it would be otherwise administratively cumbersome for the provider of the therapeutic activity to calculate individual expenses. Therefore a figure which represents genuine average expenses for a group of people undertaking therapeutic activity would be acceptable. But if a person is paid more than expenses and is obliged to perform an activity in accordance with the employer’s instructions, the individual is likely to be covered by the Law, if the following four criteria are not taken into consideration.

Four Criteria

Set out above are the basic facts that the Tribunal would consider in considering employment status, however the Tribunal may also take into consideration the provisions set out in this code of practice. Due to concerns locally regarding the employment status of therapeutic workers and their potential entitlement to protection under the Employment Law, particularly the requirement to pay the minimum wage, it is recognised that some clarity is required for therapeutic work schemes and their clients.

It is considered that there may be a greater problem locally than in other jurisdictions due to the different types of schemes and the way they are administered. It is possible that some therapeutic schemes in Jersey would become unaffordable or unsustainable if no provision is made when the Employment Law comes into force, or if there is

uncertainty as to their obligations and therapeutic workers' rights under the Law.

As the Law currently stands, it appears that therapeutic workers would generally not be exempt from the Employment Law if the basic position and guidelines that are provided in the UK were to be applied in Jersey. This is partly due to the fact that clients working in local schemes are often given a 'contract', are paid a 'wage' and are expected to attend for certain hours per week, which gives the impression of 'employment'. However the following four criteria may also be taken into account by the Tribunal, which provides more certainty as to client/employee status:

All four of the following criteria should be met for the activity not to be considered as 'employment';

1. The activity is demonstrably focused on needs of the individual rather than needs of the organisation (however it is permissible to derive some benefit from the activity, such as selling any output to offset costs). The activity should be intended and designed to serve the needs of the individual rather than the organisation.
2. The tempo of the activity, and of any output or delivery target, reflects the needs of the individual rather than those of the organisation.
3. The individual is referred to the activity and monitored/supported by a health or social care professional, (e.g. a GP, social worker, occupational therapist, charity worker).
4. The arrangement is agreed with the individual and not made over his/her head.

The onus should be placed on the business or scheme to arrange their administrative affairs, either within the Employment Law where required, or to be able to provide clear evidence that the four criteria are met. It is important that those responsible for therapeutic work schemes do not simply change the 'labels' and terms used in their relationships with clients/employees, however if the four criteria are met, terms and conditions may still be provided and a payment of some sort could still be made (e.g. reasonable expenses) without the client becoming an "employee" with entitlement to protection under the Employment Law.

The intention of introducing the four criteria is to balance concerns for the protection of vulnerable workers against the intention of the schemes designed to help in the provision of training, reintegration, work skills and experience. Employers and therapeutic scheme organisers can use the Code of Practice to arrange their work practices and the Code may be referred to a Tribunal as a test of employment status.

However, it must be noted that the facts of different cases will vary and the Employment Tribunal and courts will have to consider those facts in detail, as well as any case law that has developed. In cases of doubt, independent legal advice should be sought.

Section 4 – Types of support and Benefits available

Workwise

Workwise is part of the Work Zone at Employment and Social Security. The aim of Workwise is to help people who have a special employment need into suitable employment. This may be in open employment or within a sheltered work environment. Training opportunities can be arranged and advice offered about any aspect of getting a job.

- Open employment is where you carry out an ordinary job and earn the going rate for the job.
- Sheltered employment is for those people who, because of their special need, are presently unable to work in open employment. Training and relevant work is provided in a sheltered environment such as Acorn or Oakfield.

Job Coach Scheme

Job Coaches are available to work closely with individuals and, if required, will start with them in a new job, providing support as they learn their new role. The Coach provides support and liaison between the client and the employer, ensuring a smooth transition into work.

Work experience

Depending on individual circumstances, placements can be arranged to enable people to gain valuable work experience and generate a positive reference. These placements usually last for about six to eight weeks.

The Therapeutic Work Scheme -Benefit entitlement

Usually, people who are receiving benefits from the Employment and Social Security Department, are prohibited by law from working. However, it is recognised that after a long illness it may be necessary to return to the workplace gradually.

The scheme is designed for those people who are on a long-term benefit. It enables a person to undertake work of a therapeutic nature and receive a wage (up to half the standard rate of single benefit), and still retain their Sickness or Invalidity Benefit. This must be approved by the Employment and Social Security Department before the individual starts work. One of the aims of the scheme is to assist people back into work and to enable them to gradually stop receiving benefit.

On 1 October 2004 legislation came into force which provided for new forms of Incapacity Benefits. Under the provisions of the new legislation, any person in receipt of Long Term Incapacity Allowance can work without any restrictions; some will undertake work of a therapeutic nature, other will be doing a normal job. Should a person in receipt of Short Term Incapacity Allowance or Incapacity Pension wish to undertake work they will be required to transfer their benefit entitlement to Long Term Incapacity Allowance.

Other Groups who may be able to help

Jersey Employers' Network on Disability - JEND

There is a growing number of employers in the Island who are committed to providing real jobs for people who have a disability. Employers work in partnership with Workwise in maximising employment opportunities for people with a disability. JEND is an organisation which helps employers access potential employees who have a disability.

Jersey Employment Trust - JET

The Jersey Employment Trust (JET) supports the progress of people with disabilities into sustained supported open employment, while continuing to provide on-going training, support and personal development for all those who fall under their remit.

In partnership with other agencies, JET provides a range of complementary training, development and sheltered work; equipping clients with the skills (vocational and social) necessary for supported open employment.

These include Workforce Solutions Ltd., Sunflower Nurseries and Oakfield Industries Ltd.

Interwork Agency

Interwork is the starting point of job development for people who, because of a disability, cannot compete for jobs. Interwork will collaborate with employer and employee to explore job opportunities, develop competence and maintain agreed levels of performance. By working with Interwork the employer will be showing respect for the right of the disabled person to be employed.

Jobscope

Jobscope is a therapeutic workscheme which provides structured occupation for people who suffer from various mental illnesses. An occupational therapist assesses the functional level of clients in relation to work needs and provides advice and support to workscheme employees and work supervisors. The workscheme programme includes:

- Planning, setting up and monitoring appropriate work placements for individuals
- Offering job tasters to enable clients to make informed decisions about vocation
- Liaising with educational agencies in assessing training courses
- Advising and supporting employers about client needs

Section 5 – Frequently asked questions

Q: Why can't the States of Jersey give a definite yes or no answer in specific cases of therapeutic work?

A: Only courts and the Employment Tribunal can decide legal cases, and they do so on the basis of all the facts of the case and having heard the arguments from both sides. Neither States Members nor Officers of States Departments can make legal decisions on real cases. The Code is intended to help clarify the situation but ultimately there is no substitute for independent legal advice.

Q: Can disabled or other workers with very low productivity waive their rights to the national minimum wage?

A: No. Part 8, article 79 of the Law prevents workers from contracting out of their entitlement by providing that any provision in a contract or relevant agreement is void in so far as it attempts to exclude or limit any provision of the law or to prevent a person from bringing proceedings to the Tribunal.

Q: Does the Employment Law apply to work experience/short term tasters?

A: It may do. It will depend on whether the individual has been employed under a contract (if he gets paid for the work, is given set hours, and can be disciplined for failing to turn up, for example, he may well be employed under a contract) and whether the four criteria are met. Some individuals will be free to come and go as they wish and will not receive payment for their work, in which case the Employment Law will not apply as they will not count as employees.

Q: Does the Employment Law apply to individuals who, perhaps because of their disabilities or illness, are not productive?

A: An individual's productivity or effectiveness is irrelevant. The question is simply whether or not that individual is working under an employee's contract. If he is working under such a contract he will be protected by the Employment Law, subject to meeting the four criteria specified in this Code.