

STATES OF JERSEY

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DRAFT EMPLOYMENT (AMENDMENT No. 3) (JERSEY) LAW 200

**Lodged au Greffe on 13th February 2007
by the Minister for Social Security**

STATES GREFFE



Jersey

DRAFT EMPLOYMENT (AMENDMENT No. 3)(JERSEY) LAW 200

European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000 the Minister for Social Security has made the following statement –

In the view of the Minister for Social Security the provisions of the Draft Employment (Amendment No. 3) (Jersey) Law 200- are compatible with the Convention Rights.

(Signed) **Senator P.F. Routier**

REPORT

Introduction

The Social Security Minister is proposing to the States an amendment to the Employment (Jersey) Law 2003 to give employees the right to representation in disciplinary and grievance hearings. It is the Minister's intention that the right should be limited, in common with other jurisdictions, to representation in certain types of hearing, by limited categories of representative, and that those representatives should have additional individual rights to ensure their protection in acting as a representative.

Background

The former Employment and Social Security Committee's intention was to draft the Employment Law as a simple framework and to set out reasonable standards for disciplinary and grievance procedures in a code of practice, rather than in primary legislation. The intention was to minimise litigation and provide a more flexible procedure that would be suitable for any size of employer.

The code of practice has been in place since the Employment Law came into force in 2005 and is reported to be working well in practice. The code was developed by the Jersey Advisory and Conciliation Service following consultation and consideration of similar codes in the UK, Isle of Man and Guernsey.

The Employment Tribunal already gives detailed consideration in unfair dismissal claims to whether a fair procedure was undertaken by an employer and looks to the code of practice for guidance in this matter. If an employer has refused to allow representation, the tribunal will currently take this into their consideration of the employer's reasonableness throughout the dismissal procedure.

Local case law exists regarding an employer's obligation to deal with employee's grievances^[1]. If constructive unfair dismissal claims are to be avoided, the tribunal would expect a grievance hearing to follow an employee's raising of that grievance.

In May 2006, a similar amendment had been proposed by Deputy Southern, which was narrowly defeated in the States debate. It has never been the Minister's intention that an employer should be able to unreasonably refuse that an employee be accompanied in a formal disciplinary or grievance hearing and the Minister recognised during that debate that the code of practice could be amended to secure the right to representation as good practice.

However, rather than simply strengthening the code of practice for consideration when a dismissal has occurred, this amendment will give employees the right to enforce their right to representation, irrespective of whether the outcome of the disciplinary or grievance matter has been a dismissal, thereby providing a standalone right to representation, with an associated award to the employee for a breach of that right.

Since the defeat of Deputy Southern's earlier amendment, he has proposed a second amendment (P.128/2006), however it was the Social Security Minister's view that more detailed provisions would be required to make the proposal workable, particularly in relation to rights for representatives. So, in the preparation of this amendment, the Minister has consulted with Deputy Southern with the intention of reaching agreement and has received confirmation that the Deputy is content with this proposed amendment.

The Proposed Amendment

The proposed amendment inserts three new articles into the Employment Law. The first article becomes a new PART 7A – "Disciplinary and Grievance Hearings" which gives the right to representation; the second article provides an unrelated amendment regarding pay slips; and the third article provides for the citation and commencement of the proposed amendments.

ARTICLE 1 - The Right to Representation

Paragraph 78A(1) gives employees the right to be represented in disciplinary and grievance hearings.

Paragraph 78A(2) limits who may be chosen as a representative to the following three categories –

1. a fellow employee who is employed by the same employer;
2. an employed trade union official (who may or may not be an official of a union that is recognised by

the employer, but the union must be registered under the Employment Relations Law);

3. a trade union official who is not employed by a union, but whom the union has reasonably certified in writing as having experience of, or having received training in, acting as an employee's companion at disciplinary or grievance hearings.

An employee does not have to be a member of a union in order to request representation by that union, but in considering whether to represent an employee, the union is likely to take into account the likely cost of representation and whether the employee is willing to become a member of that union.

This paragraph also provides that, where there is a dispute about the chosen representative, the tribunal may consider whether the location of the chosen representative at the time of the request for a hearing made the choice of that representative unreasonable (e.g. geographically remote), which will depend on the individual circumstances of the case. It is considered important that the Tribunal has the jurisdiction to take this into consideration as an award is proposed to be payable to an employee for a breach of this right.

Paragraph 78A(3) provides that the employer must permit the representative to address the hearing in order to do any, or all, of the following; put the employee's case, sum up the case, respond on the employee's behalf to any view expressed at the hearing, and confer with the employee during the hearing.

Paragraph 78A(4) provides that the representative is not permitted to answer questions on behalf of the worker, address the hearing if the worker indicates that they do not wish the companion to do so, prevent the employer from explaining his or her case, or prevent any other person at the hearing from making a contribution to it. This and the preceding paragraph are comparable to legislation in the Isle of Man and UK, the intention being to provide clarity regarding the role of the representative, to avoid disagreements and misunderstandings about the conduct of hearings.

Paragraph 78A(5) provides for flexibility in the arranging of hearings so that if a chosen companion cannot be available at the proposed hearing time, the employee may propose an alternative time, which must be reasonable for both parties and within five working days after the date that had been proposed by the employer.

This flexibility in setting the time and date of the hearing is necessary so that hearings are not allowed to drift. The code of practice can provide more guidance on this aspect, as in the UK and Isle of Man, where the law simply sets the flexibility and time frame for rearranging hearings.

Paragraph 78A(6)(a) provides that when a representative agrees to represent a fellow employee, the representative must be permitted to a "reasonable" amount of paid time off during working hours to prepare and represent the fellow employee. This is an important right in the equivalent UK and Isle of Man legislation.

This paragraph also provides that the activities of a representative (whether a trade union official or a non-union fellow employee) undertaken in accordance with the proposed right to representation, will be treated as the activities of a trade union for the purposes of the existing Article 65(1)(b) of the Employment Law. An employee who is dismissed for taking part, or proposing to take part, in such activities would be automatically protected against unfair dismissal.

Paragraph 78A(7) provides the necessary definitions, including disciplinary and grievance hearings. As in the UK and the Isle of Man, informal meetings would not attract the right to representation and are defined as follows: "Disciplinary hearings" are only hearings that could result in a formal written warning or some other formal disciplinary action being taken against the employee (or the confirmation of such a warning or other action). "Grievance hearings" are only hearings concerning an employee's complaint about the performance of a duty owed to them by their employer.

Article 78B, Paragraphs (1) to (3) provide that where an employer has failed, or threatened to fail, to allow an employee to be represented in accordance with the rights provided by this amendment, an employee has 8 weeks to submit a complaint to the Employment Tribunal (which may be extended in certain circumstances at the discretion of the Tribunal). The Tribunal may award up to 4 weeks pay as compensation and quash any action taken by the employer (other than dismissal).

Where an employee has been dismissed for insisting on their statutory right to be represented at a disciplinary or grievance hearing, the Employment Law already provides automatic protection against unfair dismissal at Article 68, for the "Assertion of a statutory right."

PART 7A - Article 2 is not related to the right to representation. It requires an employer to give an employee an itemised pay slip. Although Part 5 of the Employment Law already makes provision regarding the giving of pay

slips, this amendment clarifies that it is obligatory for employers to give employees pay slips, rather than the current wording which gives the right only if the employee requests it.

The Employment Forum, in its latest review of the minimum wage, recommended that this be addressed. As no other recommendations of the Forum will require primary law amendments and the present amendment for the right to representation was already underway, it was considered prudent to include it here, rather than in a separate amendment to the Law.

PART 7A – Article 3 provides that the proposed amendment will come into force seven days after its registration in the Royal Court, subject to the approval of the Privy Council. The amendment will first require Privy Council approval, which could take five to six months.

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

European Convention on Human Rights

Article 16 of the Human Rights (Jersey) Law 2000 requires the Minister in charge of a Projet de Loi to make a statement about the compatibility of the provisions of the Projet with the Convention rights (as defined by Article 1 of the Law). On 9th February 2007 the Minister for Social Security made the following statement before Second Reading of this Projet in the States Assembly –

In the view of the Minister for Social Security the provisions of the Draft Employment (Amendment No. 3) (Jersey) Law 200- are compatible with the Convention Rights.

Explanatory Note

The main purpose of this Law is to amend the Employment (Jersey) Law 2003 to give an employee the right to be represented at a disciplinary or grievance hearing by a fellow worker or a trade union employee or official.

If the employer denies or threatens to deny the employee this right, the employee may complain to the Jersey Employment Tribunal.

If the Tribunal is satisfied that the complaint is well-founded, it must make a declaration to that effect and award the employee compensation of up to 4 weeks' pay.

If the employer has taken any action against the employee in respect of the disciplinary matter or grievance (otherwise than by way of dismissing the employee), the Tribunal must also declare the action void.

Article 1 inserts a new Part 7A into the Employment (Jersey) Law 2003.

This Part gives an employee the statutory right to be represented at a disciplinary or grievance hearing by a representative. It allows the employee 8 weeks in which to make a complaint to the Tribunal in respect of a denial or threatened denial of this right. It also requires the Tribunal to award up to 4 weeks' pay by way of compensation and to set aside any action taken by the employer (other than by way of dismissal).

Article 2 amends Article 51 of the Law to make it obligatory for an employer to give an employee an itemised pay statement.

Article 3 provides for the citation and commencement of the amending Law. It comes into force 7 days after its registration in the Royal Court.



Jersey

DRAFT EMPLOYMENT (AMENDMENT No. 3)(JERSEY) LAW 200

A LAW to amend further the Employment (Jersey) Law 2003.

Adopted by the States [date to be inserted]

Sanctioned by Order of Her Majesty in Council [date to be inserted]

Registered by the Royal Court [date to be inserted]

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

1 New Part 7A inserted into the Employment (Jersey) Law 2003

Immediately after Article 78 of the Employment (Jersey) Law 2003^[1] there is inserted the following Part –

‘PART 7A

DISCIPLINARY AND GRIEVANCE HEARINGS

78A Right to be represented.

- ((1) This Article applies where –
 - (a) an employer requires or requests an employee to attend a disciplinary or grievance hearing; and
 - (b) the employee tells the employer that he or she wishes to be represented at the hearing.
- (2) Where this Article applies, the employer must permit the employee to be represented at the hearing by one representative chosen by the employee who is –
 - (a) an employee or an official of a trade union; or
 - (b) another employee of the employer,if the location of the proposed representative at the time of the request does not make the request unreasonable.
- (3) The employer must permit the employee’s representative –
 - (a) to address the hearing so as to put the employee’s case, to sum up that case and to respond on the employee’s behalf to any view expressed at the hearing; and
 - (b) to confer with the employee during the hearing.
- (4) However, paragraph (3) does not require the employer to permit the employee’s representative –

- (a) to answer questions on behalf of the employee;
 - (b) to address the hearing if, at the hearing, the employee indicates that he or she does not wish the representative to do so; or
 - (c) to use the powers conferred by that paragraph in a way that prevents the employer from explaining his or her case or prevents any other person at the hearing from making a contribution to it.
- (5) If –
- (a) an employee has a right under this Article to be represented at a hearing;
 - (b) the employee’s chosen representative will not be available at the time proposed for the hearing by the employer; and
 - (c) the employee proposes an alternative time within the 5 working days immediately after the day proposed by the employer that is reasonable for both parties,
- the employer must postpone the hearing to the time proposed by the employee.
- (6) Where the employee’s chosen representative is another employee of the employer –
- (a) the employer must permit the representative to take a reasonable amount of time off during working hours, without loss of pay, to prepare for the hearing and to represent the employee at the hearing; and
 - (b) any activities of the representative undertaken in accordance with this Article shall be taken to be activities of a trade union to which Article 65(1)(b) applies.
- (7) In this Article –
- “disciplinary hearing” means a hearing that could result in –
- (a) the administration of a formal written warning to an employee by his or her employer;
 - (b) the taking of some other formal disciplinary action in respect of an employee by his or her employer; or
 - (c) the confirmation of a warning administered under paragraph (a) or the confirmation of any other disciplinary action taken under paragraph (b);
- “grievance hearing” means a hearing that concerns the performance of a duty by an employer in relation to an employee;
- “trade union” means a trade union registered in accordance with the Employment Relations (Jersey) Law 2007^[2];
- “working day” means a business day as defined by the Public Holidays and Bank Holidays (Jersey) Law 1951^[3].

78B Complaints to Tribunal

- (1) An employee may present a complaint to the Tribunal that his or her employer has failed, or threatened to fail, to comply with Article 78A(2), (3) or (5).
- (2) The Tribunal shall not consider such a complaint unless it is presented within –
 - (a) the 8 weeks immediately following the failure or threat; or
 - (b) such further period as the Tribunal may, in the interests of justice, consider reasonable.
- (3) If the Tribunal finds that a complaint under this Article is well-founded it must –
 - (a) order the employer to pay compensation to the employee of an amount not exceeding 4 weeks’ pay; and

- (b) declare that any action taken against the employee by the employer, other than the dismissal of the employee, is void.”.

2 Article 51 of the Employment (Jersey) Law 2003 amended

For Article 51(1) of the Employment (Jersey) Law 2003 there is substituted the following paragraph –

- “(1) An employee must be given by his or her employer, at or before the time at which any payment of wages is made to the employee, a written itemised pay statement.”.

3 Citation and commencement

- (1) This Law may be cited as the Employment (Amendment No. 3) (Jersey) Law 200-.
- (2) This Law shall come into force on the seventh day after its registration.

[1] Kosmider v. First Class Catering Limited

[1] *chapter 05.255*

[2] *L.3/2007*

[3] *chapter 15.560*