STATES OF JERSEY

EMPLOYMENT LEGISLATION: PETITION (P.214/2005) – COMMENTS – ADDENDUM

Presented to the States on 21st March 2006
by the Minister for Social Security

STATES GREFFE

ADDENDUM TO THE SOCIAL SECURITY MINISTER'S COMMENT ON DEPUTY SOUTHERN'S "EMPLOYMENT LEGISLATION: PETITION" (P.214/2005)

Introduction

Deputy Southern's proposition asked the previous Employment and Social Security Committee to review the employment legislation in order to identify if there are any provisions which deny employees the fundamental rights to recognition and representation, or that may breach International Labour Organisation Conventions 87 and 98, and, if any such provisions are identified, to take the necessary steps to remedy the situation.

The report which accompanies the petition leaves the arguments to an appended Opinion, submitted by John Hendy and Sandra Fredman, as the basis for the request. It cites a considerable amount of material beyond the scope of Conventions 87 and 98, all of which had to investigated to give proper consideration to the opinion.

Outcome of Review

As the Hendy/Fredman Opinion ranged quite widely, a thorough review has been conducted and a detailed response to the points made in that Opinion has been prepared. Members will see from the position set out in Appendix 1 that there is nothing of consequence to be concerned about, or that justifies a further review.

The Hendy/Fredman Opinion refers to the lack of unfair dismissal protection for workers who take industrial action (point 44). The authors of that Opinion have not been aware that additional provisions were always intended to be inserted in the Employment Law once the appropriate definitions were available via the Employment Relations Law, and in fact the report accompanying the Employment Law stated as much.

An amendment to the Employment Law (provided in the Schedule to the draft Employment Relations Law) will provide automatic protection against unfair dismissal for employees taking action in contemplation or furtherance of an employment dispute, irrespective of length of service or age.

The equivalent U.K. provisions are more restrictive than ours in that there is a time limit on the protection against dismissal, previously 8 weeks and extended in 2005 to 12 weeks, after which the automatic protection against unfair dismissal is lost.

Amendments lodged

Members will be aware that Deputy Southern has also proposed amendments, one to the Employment Law (P.270/2005) and one to the draft Employment Relations Law (P.5/2006).

As neither the Petition nor the appended Hendy/Fredman Opinion suggest that any other amendments are necessary, I can only presume that the amendments seen as desirable by the Deputy are those dealt with in the two Propositions, and these will be debated at our next two Sittings.

Context

The previous Committee had been researching the matter of employment relations legislation since 2001. Having looked at systems in other small jurisdictions, such as the Isle of Man, Northern Ireland, and Prince Edward Island, not just the U.K., it is my belief that we have prepared a law that is suitable for a small jurisdiction like Jersey.

Each jurisdiction sets a legal framework which is geared to the needs of its own industrial relations traditions and practices, for example, some outlaw strikes for the duration of a collective agreement. The draft Employment Relations Law reflects Jersey's experiences and needs, reconciling the freedoms of individuals and employers, with the freedoms of unions.

The aim is to create a modern law, based on a non-adversarial approach of negotiation and conciliation, seeking to

create more harmonious relationships at work, and building on the success of the 1956 Industrial Disputes Law.

The framework of the draft Employment Relations Law provides –

- clear definitions and a simple process for the registration of employer and employee associations, and trade unions;

- a dispute resolution process, avoiding excessive litigation;

- legal backing to codes of practice that set out reasonable employment practice, the latest draft of which has been prepared on the basis of consultation responses and is attached at Appendix 2 for information.

Conclusion

On the basis of the position set out in Appendix 1, it is my belief that the Laws and the Codes achieve the right balance. A thorough review of all pending legislation has been carried out and, as such, it is not considered necessary to undertake a further review.

APPENDIX 1

Response to the Hendy/Fredman Opinion as appended to the Proposition Employment Legislation: Petition (P.214/2005)

1. The Proposition asks the Employment and Social Security Committee to review the Employment Relations (Jersey) Law 2005, the Employment (Jersey) Law 2003 and the draft Codes of Practice in order "to identify if there are any provisions which deny employees the fundamental rights to recognition and representation, or that may breach International Labour Organisation Conventions 87 and 98", and to take the necessary steps to remedy the situation if any such provisions are identified.

2. The report which accompanies the Proposition is very brief. It begins by saying that the detailed objections and reservations expressed by Trade Union representatives are laid out in the accompanying submission by John Hendy Q.C. The document which is appended is a joint Opinion by Mr. Hendy and Professo Sandra Fredman.

3. The Proposition does not identify in terms the source of the "fundamental rights to recognition and representation". The report sets out an extract from the Employment and Social Security Committee's consultation document of July 2001, which set out a Charter of Basic Trade Union Rights in Jersey and goes on to say that it is the belief of the employees' representatives in Jersey that the Employment Laws and Codes of Practice as currently drafted breach this Charter. The Charter is a policy document, not a Law, nor an International Convention. Its interpretation and implementation is thus obviously a matter of interpretation.

4. Employers have rights as well, and it is not only the International Labour Organisation Conventions which are of relevance in this matter. A point which has not been addressed in the Proposition, the report, or the Hendy/Fredman Opinion is that the legislation and the Codes affect employers as well as employees and trades unions. Employers have certain rights under the European Convention on Human Rights, and in enacting employment legislation it is important to bear those rights in mind and to ensure that they are not breached.

5. The report which accompanies the Proposition referred to Mr. Hendy as one of the U.K.'s foremost Employment Law specialists. Mr. Hendy is the joint secretary of the United Campaign for the Repeal of the Anti-Trade Laws, and Professor Fredman is an academic tenant of the same chambers as Mr. Hendy It is fair to say that they are both committed supporters of trades unions' views and interests.

6. The Hendy/Fredman opinion refers without particular distinction to the ILO (International Labour Organisation). It may be helpful to set out a brief summary of the ILO structure. The opinion also refers to extracts from the Digest without explaining their status or significance. Similarly, it may be useful to include a note on the Digests.

The ILO organs

7. There are three bodies within the ILO which have competence to hear complaints alleging infringements of trade union rights:

   (i) the Committee on Freedom of Association, set up by the Governing Body of the ILO;

   (ii) the Governing Body itself;

   (iii) the Fact-finding and Conciliation Commission on Freedom of Association.

8. The Committee on Freedom of Association ("the Committee") is responsible for considering whether complaints are worthy of examination by the Governing Body of the ILO. When it decides that a

complaint is well-founded, the Committee "recommends" that Governing Body endorse its report and conclusions and indicates that the Government concerned should be invited to state what action it has taken on the recommendation made. Where the Governing Body acts on the Committee's recommendation the ILO's Committee of Experts then investigates whether the Government has taken appropriate action. A variety of processes may be instigated in the case of non-compliance including, occasionally, referral to the Fact finding and Conciliation Committee.

9. Breach of an ILO Convention to which a state is a party entitles the Governing Body to invite the Government of the offending state "to make such statement on the subject as it may think fit": see Article 24 of the ILO Constitution.

10. The Committee's role is not confined strictly to consideration of breaches of the ILO Conventions relating to freedom of association. It extends also to cases affecting ILO matters which concern "freedom of association" in a wider sense. The ILO website records that:

> "By membership of the International Labour Organisation, each member is bound to respect a certain number of principles, including the principles of freedom of association".

11. The Committee's first report states:

> "The function of the ILO in regard to trade union rights is to contribute to the effectiveness of the general principle of freedom of association as one of the primary safeguards of peace and social justice".

The Digests

12. In 1985 the Committee published a Digest of its decisions. A 1996 Digest updated the 1985 Digest. The Digests do not consist of case summaries but rather of rules or principles of general application which have been abstracted from the cases. Despite the generalised nature of these statements the introduction to the 1985 Digest specifically stresses the importance of context in stating:

> "It is appropriate to note that the decisions of the Committee have been taken in the light of the special circumstances prevailing in each case and accordingly they should be considered within the context in which they appear. However, when examining a case, the Committee usually makes reference to decisions which it has taken or mentioned previously when it has been faced with circumstances similar to those in the case under examination, so that a certain continuity as regards the criteria employed by it in reaching its conclusions can be maintained".

13. Thus whilst statements in the Digest are authoritative as to:

(a) the effect of the particular Convention under consideration; and

(b) the general principles concerning freedom of association which it regards as "customary rules above the Conventions",

it may be important to examine the context of the case from which the principle derives.

Registration

14. The Hendy/Fredman Opinion states at paragraphs 5 to 19 that "[r]egistration which depends on meeting statutory conditions constitutes a requirement for previous authorisation, infringing the [ILO] Convention". The implication that the existence of statutory conditions for registration necessarily entails infringement is ill-founded. Paragraph 259 of the 1996 Digest states:

> "259. If the conditions for the granting of registration are tantamount to obtaining previous authorisation from the public authorities for the establishment or functioning of a trade union, this would

undeniably constitute an infringement of Convention no. 87. This, however, would not seem to be the case when the registration of trade unions consists solely of a formality where the conditions are not such as to impair the guarantees laid down by the Convention" *(emphasis added)*.

Paragraph 260 then goes on to note that although a registration procedure "very often consists in a mere formality" there are some countries:

> "In which the law confers on the relevant authorities more or less discretionary powers in deciding whether or not an organization meets all the conditions required for registration, thus creating a situation which is similar to that in which a previous authorisation is required. Similar situations can arise where a complicated and lengthy registration procedure exists, or where the competent administrative authorities may exercise their powers with great latitude…".

15. Thus, the existence of statutory conditions does not in itself constitute a "requirement for previous authorisation" infringing the Convention. The nature of the conditions has to be examined. Are they a formality or do they impair the guarantees laid down by the Convention? The registration conditions in the Employment Relations Law are essentially formal. They are not such as to impair any Convention guarantee.

16. Case 1575 (cited at para.16 of the Hendy/Fredman Opinion) is not inconsistent with these views. Central complaints in that case were that Zambian legislation gave the Minister and Labour Commissioner "unwarranted discretionary power" over the basic right to organise:

(i) by giving discretion to the Minister to lay down statutory conditions for registration (which he had used to lay down minimum membership requirements); and

(ii) by empowering the Commissioner to refuse registration if he considered the union incapable of implementing its principal objectives and to cancel registration if the Commissioner considered that the union had ceased to pursue those objectives (see para. 847).

17. In upholding the complaint the Committee concerned itself with the content and operation of the registration scheme and not with the mere existence of registration conditions. It reasoned that "some of the requirements are indeed extremely difficult to fulfil, such as the minimum membership threshold of 100 members" (para.901). The Committee was not saying that every statutory condition would amount to an infringement.

18. At paragraph 11 of the Hendy/Fredman Opinion it is suggested that the registration powers "are highly problematic because of the extent of discretion left in the hands of the Registrar, aggravated by the absence of procedural safeguards or guarantees of independence or objectivity." This is difficult to understand. The Registrar has not been given a significant discretion. A requirement of independence or objectivity does not need to be made express in the statute in order to comply with ILO principles. No explanation has been given, and it is not readily apparent, what "procedural safeguards" are thought to be lacking.

The strike immunity point

19. An additional strand of objection to the Employment Relations Law is indicated in the second half of paragraph 11 of the Hendy/Fredman Opinion and in paras 12 to 14. It is there suggested that by basing the lawfulness of strike action on immunities (rather than conferring a positive right to strike) the Employment Relations Law gives rise to a large number of "uncertainties". It is said this may cause difficulty in determining whether the purposes of the union are lawful and reference is made to English law.

20. This calls forth the following observations. First, English law is based on providing a system of immunities rather than a positive right to strike. (These immunities are in certain respects similar to those in the Employment Relations Law as indicated below.) Secondly, it is not obvious why a scheme based

on immunities should be intrinsically less certain than a scheme based on a right to strike which must inevitably become qualified by definitions and limitations. Either approach will give rise to issues of interpretation. The differences in juridical structure probably represent little more than a difference in legal tradition between the common law and continental (codified) traditions. Thirdly, no examples of U.K. case law have been cited in the Hendy/Fredman Opinion and we have traced none where it has been alleged that the purposes of an independent trade union with a standard constitution/rule book might be illegal because of complications or ambiguities surrounding the extent of legal protection of strike action. It would be considered unusual for a trade union's constitution or rule book to specify the precise circumstances in which strike action or other industrial action would be taken.

21. It is certainly true that in the U.K. there have been many circumstances in which strike action for particular purposes has been held to fall outside the scope of the immunities for the time being in force[1]. The Gate Gourmet dispute referred to at paragraph 13 of the Hendy/Fredman Opinion involved unballotted strike action, the consequent dismissals of strikers and subsequent picketing. The picketing became the subject of a reported case on specific points as to picketing: Gate Gourmet London Limited -v- TGWU [2005] 1889 (QB). There is no suggestion that the dispute raised any previously unforeseen issue about the scope of the immunities. In University College London Hospitals NHS Trust -v- UNISON [1999] ICR 204, to which the Hendy/Fredman Opinion also refers, industrial action about:

(i) terms and conditions of individuals who had never been employed by the strikers' employer; and

(ii) the prospective employment of current staff by an unidentified future employer,

was held to be unprotected by the immunities. Similarly, in Universe Tankships Inc. of Monrovia -v- ITF [1982] ICR 262 industrial action to secure payment by employers to the union's welfare fund was not found to be protected. It has also been acknowledged in Universe Tankships and other cases that legal wrongs may be committed by the organisers of industrial action which are not within the categories of tort to which the immunities apply. These points do not appear to have any bearing on whether registration arrangements comply with ILO principles.

22. In paragraph 17 of the Hendy/Fredman Opinion, it is stated that the "contravention" is not cured by the right of appeal. As will be clear from the foregoing, the Minister has been advised that there is no contravention, and he does not believe that there is. Be that as it may, and for the sake of completeness, it is right to refer members to the appeal provisions. They are to be found in Article 15 of the Employment Relations Law, where it is stated that the persons specified in paragraph (1) have "a right of appeal". Paragraph (2) fixes the timescale for appealing, and paragraph (3) says that on hearing the appeal, the Royal Court "may confirm or reverse the decision of the Registrar and may make such order as it thinks fit as to the cost of the appeal." This differs from the form in which a statutory right of appeal is given by some Jersey statutes, where it is said that a party may appeal on the ground that the decision is unreasonable in the circumstances of the case. Where the ground is specified in that way, the Court is restricted in the extent to which it can set aside the decision which is the subject of the appeal, but where a statute simply provides that a party may appeal, and does not stipulate any specific ground, the Court's role is much wider, see Mesch -v- Housing Committee 1990 JLR 269. The statement in paragraph 10 of the Hendy/Fredman Opinion that there is a possibility that the Royal Court may consider that it may only review rather than re-hear the case, is thus not supported by local case law.

Similarity and divergence of U.K. law and Jersey law on immunities

23. There is a fundamental similarity between the Employment Relations Law and the English statutory scheme now contained in the Trade Union and Labour Relations (Consolidation) Act 1992 as amended ("the U.K. 1992 Act"). Article 19 of the Employment Relations Law starts by establishing a general immunity for acts done by a person "in contemplation or furtherance of an employment dispute" in respect of certain economic torts, including importantly inducing breach of contract. Section 219 of the U.K. 1992 Act contains very similarly worded immunities for acts done "in contemplation or furtherance of a trade[2] dispute". Section 219 includes a special protection for picketing which does not appear in the

Jersey law.

24. Article 20 of the Jersey law then "withdraws" the immunity where:

(i) the union is not registered;

(ii) a ballot has not been held in accordance with an approved code of practice;

(iii) the Trade Union has been guilty of conduct which is not reasonable conduct under the terms of an approved code of practice.

It is at this point that divergence between U.K. and Jersey law becomes greater.

25. Under the U.K. 1992 Act immunity is "withdrawn":

(a) in a series of specific cases (broadly where the tortious act is to enforce union membership or is a response to dismissals for taking "unofficial" industrial action or amounts to a secondary action which is not lawful picketing, or is done by way of pressure to impose union recognition requirements[3]),

(b) where the act is done by a Trade Union[4] if the detailed balloting requirements (under sections 226 to 234) have not been satisfied.

26. U.K. statutory law does not seek to distinguish between "reasonable" and "unreasonable" conduct in the context of a trade dispute, although:

(a) there are Codes of Practice (most significantly in the area of picketing) which can be taken into account for various statutory purposes;

(b) some features of the Jersey Code of Practice (for example on pickets and secondary action) reflect elements of the U.K. statutory provisions about immunities, but the English statutory provisions are much more elaborate;

(c) the reasonableness of particular behaviour can occasionally influence the construction of the highly technical provisions about immunities and balloting.

Jurisdiction of the Jersey Employment Tribunal

27. At paragraph 23 of the Hendy/Fredman Opinion it is concluded that the power of the Jersey Employment Tribunal ("JET") to issue a binding declaration as to the meaning of terms and conditions of employment amounts or is "tantamount" to binding arbitration and therefore is (at least) at risk of infringing Article 4 of Convention no. 98.

28. Article 4 of ILO Convention no. 98 provides:

> "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers organisations and workers organisations, with a view to regulation of terms and conditions of employment by means of collective agreements".

29. Case 1450 (against Peru) concerned a system of compulsory arbitration by an administrative authority (the Ministry of Labour) which extended to the fixing of conditions which had not been agreed by the collective parties. This was found to be an infringement of the Convention. The Committee stressed that under Article 4"the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and ... the level of negotiation should not be imposed by law"[5]. Similarly, in cases 1478

and 1484 (also against Peru) a statutory prohibition on striking after a dispute had been submitted by one party to the administrative labour authority was held contrary to the Convention. It was found objectionable that "one of the parties may undermine collective bargaining by unilaterally entrusting the settlement of the dispute to the labour authority, thereby suspending the right to strike" (paragraph 547).

30. The 1996 Digest states at para. 518:

> "provisions which establish that, failing agreement between the parties, the points at issue must be settled by arbitration **by the labour authorities** do not conform to the principle of voluntary negotiation contained in Article 4 of Convention no. 98 …
>
> A provision which permits either party unilaterally to request the intervention of **the labour authority** to resolve a dispute may effectively undermine the right of workers to call a strike and does not promote voluntarily collective bargaining …
>
> The Committee considers that a system of compulsory arbitration **through the labour authorities**, if a dispute is not settled by other means, can result in a considerable restriction of the right of workers organizations to organize their activities and may even involve an absolute prohibition of strikes, contrary to the principles of freedom of association" *(emphasis added)*.

31. The following points are significant. First, as confirmed by the quotations from the Digest, the ILO's concern has hitherto been with compulsory arbitration by administrative authorities, not judicial authorities such as the Jersey Employment Tribunal ("JET").

32. Secondly, it is significant that the power of the JET does not extend to fixing the amount of wages or the content of other terms which have not been agreed in collective bargaining. It is the fixing of terms which have not been agreed in collective bargaining, (rather than the interpretation of terms which had been agreed or the making of other legal rulings) which infringes the case law and guidance on Article 4 cited above. The Hendy/Fredman Opinion suggests that the JET's ability to make a declaration "which incorporates the JET's interpretation of the disputed terms and conditions into the individual contracts of employment" is "still tantamount to binding arbitration". This seems untenable. Although the power to deem collectively agreed terms to be terms of the individual employment contracts goes further than a normal judicial role, since the JET would not be altering the content of the collectively bargained arrangements it would not be interfering with the substance of the collective bargaining process. It is also significant that a term incorporated by virtue of a declaration can be varied by the parties: see Article 24 (1)(a) and (b) of the Employment Relations Law. This is a further feature which points against any infringement.

Right to strike (Paras. 24 to 28 of the Hendy/Fredman Opinion)

33. Although the ILO Convention does not provide a "right to strike" as such, the 1996 Digest, for example, records:

> "The Committee has always recognised the right to strike by workers and their organisations as a legitimate means of defending their economic and social interests".

34. The International Covenant on Economic, Social and Cultural Rights does provide for a right "to strike" but this is subject to the express proviso "that it is exercised in conformity with the laws of the particular country" (see Article 8(1)(d)).

35. It is also notable that the protection of freedom of assembly and association under the European Convention on Human Rights does not embody a right to strike as such. Under Article 11 a right to strike is said to be "one of the most important ... means" of an effective enjoyment of Trade Union rights "but there are others". It is not an indispensable right: see Schmidt and Dahlstrom -v- Sweden (1978-79) 1 EHRR 632. In UNISON -v- U.K. 53574/99 (10th January 2002) the Court stated:

> "The Court recalls that while Article 11(1) includes trade union freedom as a specific aspect of freedom of association this provision does not secure any particular treatment of trade union members by the state. There is no express inclusion of a right to strike or an obligation on employers to engage in collective bargaining. At most Article 11(1) may be regarded as safeguarding the freedom of trade unions to protect the occupational interests of their members. While the ability to strike represents one of the most important means by which trade unions could fulfil this function, there are others. Furthermore contracting states are left with a choice of means how the freedom of trade unions ought to be safeguarded . . ."

36. The ILO position appears to be that workers should not be dismissed or refused re-employment on the grounds of having participated in what case 1540 (National Union of Seamen and Great Britain) describes as a "legitimate" strike.

37. It has proved impossible to trace the basis for the assertion in paragraph 28 of the Hendy/Fredman Opinion that the ILO Convention requires that workers dismissed for taking part in a lawful strike should be entitled to reinstatement if the dismissal is unfair.

38. There are some general observations which should be made before dealing with some specific points which have been raised.

39. First, the shape and extent of the "right to strike" under ILO principles remains to be mapped out by case law. It seems premature to embark upon amendments to the legislation to deal with what some may perceive as possible defects, when if challenged and litigated at such some future state, the court might hold that they were not defects at all. The fact, however, that the juridical basis of the protective legislation is expressed in terms of immunity rather than as a statement of right subject to limitations is unlikely to be determinative. The ILO would be concerned with substance rather than form.

40. Objection is raised in paragraph 26 of the Hendy/Fredman Opinion to the fact that the Employment (Jersey) Law 2003 contains no special protection against unfair dismissal during lawful industrial action (although the bringing of an unfair dismissal claim by a striker is not debarred). The writers argue, in effect, that unless the dismissal of strikers is deemed unfair, an unfair dismissal claim would be "overwhelmingly likely to fail" because "the employer will assert that the dismissal was justified by the striker's refusing to carry out his obligations under the contract and/or in seeking to disrupt the employer's business". The authors cite Ticehurst -v- British Telecommunications plc [1992] ICR 383.

41. In Ticehurst managers took part in industrial action by withdrawal of goodwill and participating in a half day strike. On returning from the strike the managers were asked to give an undertaking to work in accordance with the terms of their employment. On consecutive days they were turned back from work by their employer when they refused to give the required undertakings. Their claims for wages in respect of days when they had been turned back were ultimately unsuccessful. The Court of Appeal held that they had breached the implied term of fidelity in their contracts of employment by participating in the concerted withdrawal of goodwill.

42. Ticehurst is not an unfair dismissal case but does illustrate that even industrial action short of a strike may constitute a breach of the contract of employment and thus misconduct which is capable of giving rise to a fair dismissal.

43. This does not mean that the Hendy/Fredman Opinion is correct in its implication that under English law the breach of contract implicit in (at least most forms of) industrial action will "almost inevitably" lead to a finding of fairness where a participant in industrial action is dismissed. The extent of guidance on this issue in English case law is limited because most cases of unfair dismissal and industrial action have been concerned with preliminary and jurisdictional questions arising under the U.K. provisions, as amended from time to time; but it is clear that the question under section 98 of the Employment Rights Act 1996 whether the employer acted reasonably in treating the employer's conduct as sufficient to justify dismissal (which has to be determined in accordance with equity and the substantial merits of the case, in common with the similarly worded Jersey provision) does both in principle and in practice permit a

finding of unfairness, where the employee is guilty of "misconduct" in particular:

(a) where the employer failed to follow its procedures or to conduct reasonable investigations;

(b) where there has been inconsistent treatment of employees in comparable circumstances;

(c) where the decision is unreasonably harsh or is for any other reason outside the range of options open to a reasonable employer.

The possibility of unfairness on any of these bases can certainly apply to dismissal for participation in industrial action.

44. It may be the case that the ILO would regard the absence of more specific protection for employees dismissed whilst taking industrial action as an infringement of its Conventions or principles. Such an argument, however, can also be made against U.K. law which, as amended:

(i) permits (very broadly speaking) dismissals of participants in official industrial action which has continued for more than a protected period (broadly 12 weeks); and

(ii) provides a wide immunity for employers when the industrial action is unofficial (i.e. not supported by the Union).[6]

45. In the United Kingdom reinstatement is a remedy which a Tribunal is technically required to consider after every finding of unfair dismissal[7]. I have been advised that in practice it is very rarely sought by claimants and only awarded in a tiny minority of cases. It is particularly unusual for reinstatement orders to be made where there has been industrial strife because one of the matters which the Court is directed to consider in deciding on remedy is the "practicability" of reinstatement. A reinstatement order does not have the affect of an injunction; non-compliance by the employer merely entails additional compensation.

Recognition of Trade Unions. Code 1

46. The Hendy/Fredman Opinion states at paras 33-35 that the ILO Conventions "require that the process of recognition be afforded to the most representative union". Paragraph 617 of the 1985 Digest is cited.

47. Paragraph 617 does not itself distinguish between "representative" and "most representative" unions. It states:

> "Employers including governmental authorities in the capacity of employers, should recognise for collective bargaining purposes the organisations representative of the workers employed by them".

However, paragraph 617 of the same Digest does provide that:

> "where the law of a country draws a distinction between the most representative trade union and other trade unions, such a system should not have the effect of preventing minority unions from functioning and at least having the right to make representations on behalf of their members and to represent them in cases of individual grievance".

The probable implication of the two paragraphs read together is that the duty to recognise does apply to the most representative union.

48. There is, however, nothing to indicate that a rule requiring 35% of the bargaining unit to be members of the applicant union (or likely members if recognition was granted[8]) before a ballot is required is incompatible with ILO conventions and principles.

Code 3

49. At paragraph 37 of the Hendy/Fredman Opinion doubt is expressed as to whether requiring precise information as to the numbers categories and workplaces of employees is necessary to achieve the stated objective of enabling the employer to understand how the workplace would be affected.

50. It is certainly a cause of frequent complaint by unions that the ballot notices they are required to give under U.K. legislation are unnecessarily specific. The University of London -v- NATFHE case is not reported and has proved impossible to trace. It is clearly not notorious as an illustration of any perceived defects in the U.K. legislation or for any other reason.

The statutory requirement to give notice in the United Kingdom

51. Amongst the instances in which immunity is forfeited by trade unions calling for industrial action are:

(i) where the union fails to inform the employer of the ballot (not less than seven days before it is to take place) or to supply a sample ballot paper; see s.226A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act");

(ii) where the union fails to inform the employer of a ballot result under s.231A of the 1992 Act; or

(iii) where the union fails to give the employer notice of the industrial action itself under s.234A of the 1992 Act.

52. The notice under s.226A must contain detailed information in particular as to the categories of employee and workplaces affected. (This is the subject of recent amendments.)

53. Section 231A imposes a requirement on the union to take such steps as are reasonably necessary to ensure that the employers of individuals entitled to vote are informed of the ballot result.

54. Section 234A (also recently amended) contains very detailed provisions, recently amended, as to the notice of industrial action which must be given. The principal elements are:

(i) the notice must be given not earlier than the day when the union notifies the employer of the ballot result but not less than seven days before the first day of industrial action;

(ii) the notice must state whether the industrial action is to be continuous or discontinuous;

(iii) the notice must state that it is given for the purposes of the section;

(iv) the notice must provide detail as to the number of affected employees, the categories of employee to which they belong and the workplaces at which they work.

Balloting requirements in the U.K.

55. Immunity is lost where a trade union calls for industrial action without complying with the balloting requirements. The balloting requirements are exceptionally detailed. They are set out in ss.226 – 234 of the U.K. 1992 Act and include the notice requirements described above.

56. The bare bones of the balloting provisions are as follows. A trade union must give at least seven days notice to the employer that the ballot is to be held. It must appoint an independent scrutineer. Entitlement to vote in the ballot must be given equally to all members of the union whom it is reasonable at the time of the ballot to believe will be asked to participate. The voting paper (of which the employer must be provided with a sample) must be in a specified form and contain specified questions. Those participating in the ballot must be allowed to do so without interference or cost. There must be a majority vote in favour of the action. Circumstances in which separate ballots for separate groups are prescribed. The

ballot result must be announced as soon as reasonably practicable and employers informed. A scrutineer's report must be produced containing specified information. The call to industrial action must come from a specified person in the union and must not take place outside a specified timescale. Employers must then be given notice of the industrial action which has been called.

57. Whilst there is provision s.232B for certain "small accidental failures" to be disregarded, it has certainly been common since these detailed provisions were introduced for trade unions to fall foul of the technicalities with result that injunctions have been granted requiring the calls for industrial action to be rescinded. The technical issues are exceptionally complicated. This does not mean that technical issues must be made equally complicated in Jersey.

Code 4

58. At paragraph 42 of the Hendy/Fredman Opinion it is suggested that the exclusion of classes of what might loosely be described as secondary action constitutes a breach of Jersey's international obligations. Reference is made, however, to the European Social Charter. This does not apply to Jersey. In any event Article 6 of the Charter, which deals with the effective exercise of the right to bargain collectively, does not give any specific indication as to what if any forms of "secondary" action would fall within its reach.

59. It has not proved possible to trace a 2003 source for the quotation in paragraph 42 of the Hendy/Fredman Opinion from the ILO Committee of Experts but a 2005 statement refers to "previous comments" concerning what it describes as:

> "the right of workers to take industrial action in relation to matters which affect them even though, in certain cases, the direct employer may not be party to the dispute, and to participate in sympathy strikes provided the initial strike they are supporting is lawful".

60. This does not appear to provide unambiguous support for the proposition that any restriction on the ability to strike lawfully will infringe ILO principles where the dispute is with a different employer or the action is to support a third party.

61. In general (with the important exception of peaceful picketing) "secondary" action falls outside the protection of the immunities under U.K. law. Thus if a blanket exclusion from protection where the affected employees work at a different place or are not personally involved would be likely to infringe ILO principles, at least in some circumstances, U.K. law itself would fail to reflect ILO principles by the general exclusion of secondary action from the scope of protection.

62. The right to freedom of expression conferred by Article 10 of the ECHR is subject to the qualification which, so far as it is relevant, provides that the exercise of the right may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and necessary in a democratic society for, inter alia, the protection of the reputation or rights of others. Article 11, which confers the right of freedom of assembly and association, goes on to say that no restrictions shall be placed on the exercise of these freedoms other than as are prescribed by law and are necessary in a democratic society for, inter alia, the protection of the rights and freedoms of others.

63. The owner of neighbouring property is entitled under Article 1 of Protocol 1 of the ECHR to peaceful enjoyment of that property. That is a right which the state should protect, and if, as is argued by the authors of the Opinion, the failure to protect picketing from civil suits is an interference with the right of the unions and their members to freedom of expression and/or freedom of assembly, that interference is prescribed by Law and is necessary for the protection of the rights of the neighbouring property owners.

Secondary picketing

64. The Hendy/Fredman Opinion does not deal with the ILO principles in relation to pickets. The 1996 Digest states (at para. 583) that the action of pickets organised in accordance with the law should not be subject to interference by the public authorities; that the prohibition of strike pickets is justified only if the

strike ceases to be peaceful (para. 584); and that taking part in picketing and firmly and peacefully inciting other workers to keep away from their workplace should not be unlawful. Significantly paragraph 587 provides:

> "The requirement that strike pickets can only be set up near an enterprise does not infringe the principles of freedom of association".

65. Much was made in the Hendy/Fredman Opinion of the Canadian case of Pepsi-Cola Canada Beverages (West) Limited -v- RWDSU, Local 558 SCC. 8. The Canadian Supreme Court was concerned with a Saskatchewan dispute. Saskatchewan had not imposed any statutory restriction on picketing. The Supreme Court made it clear that the main issue in the appeal was the legality of secondary picketing at common law. The Supreme Court held that secondary picketing was not unlawful in itself. It is clear that the Court was influenced by the principle of freedom of expression enshrined in the Canadian Charter. Its conclusion was that it was not necessary to recognise secondary picketing as tortious in itself because there were other torts, including trespass and nuisance, which provided sufficient protection. The Court reviewed the position by asking:

> "what is caught by the rule that all picketing is legal, absent, tortious or criminal conduct. The answer is, a great deal. Picketing which breaches the criminal law or one of the specific torts like trespass, nuisance, intimidation, defamation or misrepresentation will be impermissible regardless of where it occurs. Specific torts known to the law will catch most of the situations which are liable to take place in a labour dispute. In particular the breadth of the torts of nuisance and defamation should permit control of most coercive picketing. Known torts will also protect property interests. They will not allow for intimidation, they will protect free access to private premises and thereby protect the right to use one's property. Finally, rights arising out of contracts or business relationships also receive basic protection through the tort of inducing breach of contract".

66. Thus:

(a) the Canadian Supreme Court was not overturning provincial legislation as the Hendy/Fredman Opinion indicates but declaring the common law in the absence of provincial legislation;

(b) the Court's interpretation of the common law position recognised that secondary action would often be tortious and, therefore, unlawful – not least where it amounted to trespass or nuisance.

67. In short, the case does not appear to support the view that secondary picketing is recognised as a constitutional right in Canada or that, in the absence of statutory provisions, there would be any defence at all in Canada where secondary picketing entails the commission of a tort.

APPENDIX 2

Employment Relations Codes of Practice – Draft 2

Contents

Code 1 – Recognition of trade unions

Seeking trade union recognition

Recognition of one or more trade unions occurs when an employer accepts a trade union as entitled to act on behalf of a group (or groups) of employees for specified purposes. Recognition can take a number of forms, but is usually associated with an employer's agreement to participate in collective bargaining with one or more trade unions and provides the basis for changes to be made to terms and conditions of employment.

The United Nations Universal Declaration of Human Rights, Article 23(4), states that "everyone has the right to form and to join trade unions for the protection of his interests."

When recognition is sought, it is important for each party to:

1. enter into voluntary resolution of issues
2. respect the independence of the other
3. be prepared to consult
4. be prepared to negotiate in good faith
5. listen to, take account of, and respond to the other's case
6. maintain adequate records to show that the above processes have been undertaken.

Collective bargaining

The premise of collective bargaining is that it should take place in good faith.

Collective bargaining is a process of conducting negotiations about specified matters, usually about wages or physical working conditions and other terms and conditions of employment, between an employer and representatives of a trade union, with a view to reaching agreement. The scope of collective bargaining is normally specified by the parties in an agreement on recognition and covers negotiations about pay, hours and holidays.

The following matters might be considered for negotiation and inclusion in a recognition agreement. An agreement does not have to cover all of those listed, and may also cover matters that are not listed below.

1. The names of the parties
2. Definition of the bargaining unit
3. Statement of intent
4. The procedure in the event of a dispute over the interpretation of an agreement
5. Procedure for negotiation and constitution of a negotiating committee
6. Issues that may or may not be negotiated, e.g. pensions
7. The procedure, including any relevant time periods that apply, in the event of failure to agree, following negotiations
8. The role of trade union representatives
9. The number and constituencies of trade union representatives
10. The election of trade union representatives
11. Time off for the trade union representatives
12. Training of trade union representatives
13. Facilities for the trade union
14. Deduction of trade union subscriptions from member's pay

15. Meetings of employees during working time
16. The procedure for calling a special meeting of the bargaining unit
17. Forums for consultation
18. Health and safety issues
19. Notice to terminate the agreement
20. Agreement on the disclosure of information (by either party) for collective bargaining purposes
21. An understanding that membership of a union is a matter of individual choice.

The bargaining unit

A bargaining unit is a group (itself perhaps comprising smaller groups) of employees covered by a recognition agreement. In determining the appropriate bargaining unit, the parties should take account of the following points:

a. Its being compatible with effective management and each other's views

b. Any current local, bargaining arrangement

c. The desirability of avoiding small, fragmented bargaining units within an undertaking

d. The characteristics of the employees falling within the proposed bargaining unit and of any other employees of the employer (including the need to avoid conflicts of interests between members)

e. The location of the employees and the true structure of the organisation

f. The wishes of the employees who are seeking to be represented by the trade union

For employers with employees working on more than one site, the factors that should be considered in deciding what constitutes the bargaining unit are all of the factors set out in points a to f above, **plus similarity of work and terms and conditions of employment**.

Percentages for Recognition

In the following circumstances, it would be reasonable for an employer to recognise a union:

1. It would be considered reasonable for an employer to recognise a union if there is a minimum of 50%+1 employees in membership in respect of the bargaining unit. The aim should be to obtain a clear majority.

2. If a union application cannot demonstrate that it has 50%+1 of employees in membership in respect of the bargaining unit concerned, or if the employer does not accept the union's estimate of membership, the union should be able to demonstrate that at least 35% of the proposed bargaining unit are in membership of the applicant union (or would be willing to take up membership if recognition was granted), in order for a ballot of employees in the bargaining unit to be held. JACS may be requested to be formally involved in a membership check.

3. If employees in the bargaining unit are balloted as to whether they are in favour of the union being granted recognition, 50%+1 of those entitled to vote should actually be voting and, of those voting, a minimum of 50%+1 of employees should vote in favour.

The process of seeking recognition

It would be considered reasonable for the employer to give a union applying for recognition such access to the employees constituting the bargaining unit as is reasonable to enable the union to inform those employees of the

object of the ballot and to seek their support and opinions on the issues involved.

Unfair practices and bad behaviour during a recognition or derecognition procedure would be considered unreasonable for either party, such as:

- attempting to influence the result of a ballot by offering to pay money for not attending a relevant meeting or voting a certain way;
- coercing, or attempting to coerce an employee not to attend a relevant meeting, or to disclose how they have voted or intend to vote;
- dismissing, threatening to dismiss, or otherwise treating detrimentally an employee if they attend a relevant meeting or vote a certain way.

The following procedure detailing the required steps for both parties where trade union seeks recognition by their employer would be considered reasonable:

	Seek informal talks with the employer with the aim of agreement in principle to recognise the union.	
Informal talks take place between the employer and the union.		The employer declines to participate in informal talks with the union
	The union should write to the employer requesting recognition for the purposes of collective bargaining, including the following information; identify the union confirm it is listed with the registrar the group/s, of employees on whose behalf recognition is sought the number of those who are members of the union, or who would be willing to take up membership if recognition was granted the extent of recognition sought.	
	It would be considered reasonable for the employer to respond in writing to a request for recognition within 20 working days	If employer does not respond within 20 days, the union could consider approaching JACS
Employer confirms his agreement to recognise the union on different terms (e.g. the composition of the bargaining unit)	Employer confirms agreement to the request on the terms proposed	Employer confirms rejection of the request, giving reasons
The parties negotiate with a		The union should consider

view to reaching agreement.		approaching JACS.
If the parties cannot reach agreement, JACS could be approached by either party.	If the employer agrees to the request, the parties should conclude a written agreement on recognition	
	Where a ballot is appropriate, the union should write to the employer to request a ballot, and to seek a meeting. The employer should respond within 10 working days.	
	Within a further 10 working days, both parties should meet to discuss and conclude arrangements for the ballot and for the union's representative to have access to the employees.	
	The ballot should take place 10 working days after arrangements for the ballot and for the union's representatives to have access to the employees have been finalised.	

Derecognition

The main factor in considering when it would be reasonable for a union to be derecognised is when the union is no longer representative of employees. It would be reasonable for a request for derecognition to be made by the employees, the union or the employer. Derecognition of the union would not of itself affect a recognition agreement with another union.

In considering when it might be reasonable to derecognise a union, a similar procedure to that adopted for recognition should be applied and the following procedure would be reasonable:

1. Where an employer (whether or not at the request of a minimum percentage of his employees) seeks to derecognise a union, then, in cases where recognition was awarded on the basis of union membership and a period of at least three years has elapsed since recognition was awarded, and it can be demonstrated conclusively that fewer than 50% of employees in respect of the bargaining unit concerned are in membership of the union, it is appropriate that the union be derecognised.

2. Where the union does not accept the employer's estimate of membership in respect of the bargaining unit concerned or, where an employer (whether or not at the request of at least 35% of his employees) seeks to derecognise a union in circumstances other than those set out above, then, provided that a period of at least three years has elapsed since recognition was awarded, a ballot of employees in the bargaining unit should be held.

3. If a ballot of employees in the bargaining unit confirms that 50%+1 of those employees voting and 50%+1 of those entitled to vote, are in favour of the union being derecognised, it is reasonable that the employer should derecognise the union.

4. It is suggested that both parties should seek to agree new arrangements and if agreement is not reached, JACS may be invited to assist at any stage of the process.

Changing a recognition agreement

Both the employer and employees/union should agree on the changing of a recognition agreement and where there is disagreement the same mechanism should be used as for the initial setting up of recognition agreements, with JACS assistance.

Re-applying for recognition or derecognition

Where a ballot of employees on recognition or derecognition has taken place, it would not be reasonable for a further request for recognition, or derecognition, to be submitted by the same union or the employer, in respect of the same, or a substantially similar, bargaining unit, expect where the following two conditions are met:

1. Where there have been significant changes in the original circumstances of the case, and
2. Where the following time limits apply:
   - For recognition, an application should not be submitted before a period of at least one year has elapsed since derecognition occurred.
   - For derecognition, an application should not be submitted before a period of at least three years has elapsed since recognition was awarded.

Disputes about recognition or derecognition

Where possible, disputes between an employer and a trade union about recognition or derecognition should be resolved voluntarily by the parties. If this proves unsuccessful, or if no procedures exist for resolving disputes, the matter should be referred to JACS, which may make recommendations to one or both of the parties.

Joint union applications and other inter-union issues

Trade unions may apply either singly or jointly together. Many employers will wish to recognise one or more unions voluntarily in order to facilitate workplace negotiations and consultation. Joint recognition, whether voluntary or by application, may be particularly appropriate where the unions have longstanding membership in the workplace or similar strengths within the workplace.

The following procedure should be adopted in circumstances where there is a joint union application:

1. If two or more unions wish to make a joint request for recognition in respect of the same group of employees, the unions should act jointly in preparing and submitting their request. They should confirm that they will co-operate with each other in a manner that is likely to secure and maintain stable and effective bargaining arrangements. If the employer wishes, the unions should enter into arrangements that provide for collective bargaining to be conducted by their working in unions as a single team at a single table.
2. Where a union considers that another union has low levels of membership, and no agreement or a redundant agreement, within any organisation in respect of any group of employees, the union

should consult with the other union, before commencing organising activities (or as soon as it is informed of the interests of the other union).

3. A dispute between trade unions about recognition should be resolved by the unions themselves using procedures that have the confidence of the parties to the dispute. Reference should be made to the recognition and derecognition procedures in this code of practice. JACS may be asked to assist and mediate where appropriate.

Existing Recognition agreements

Where a recognition agreement existed before the introduction of the Employment Relations Law and associated codes of practice, this code **does not** require the parties to engage in a new process of recognition.

Code 2 – Resolving Collective Disputes

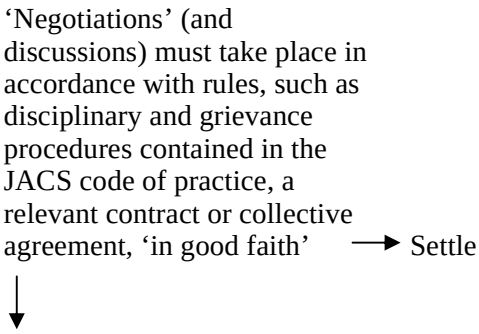
Dispute resolution procedures

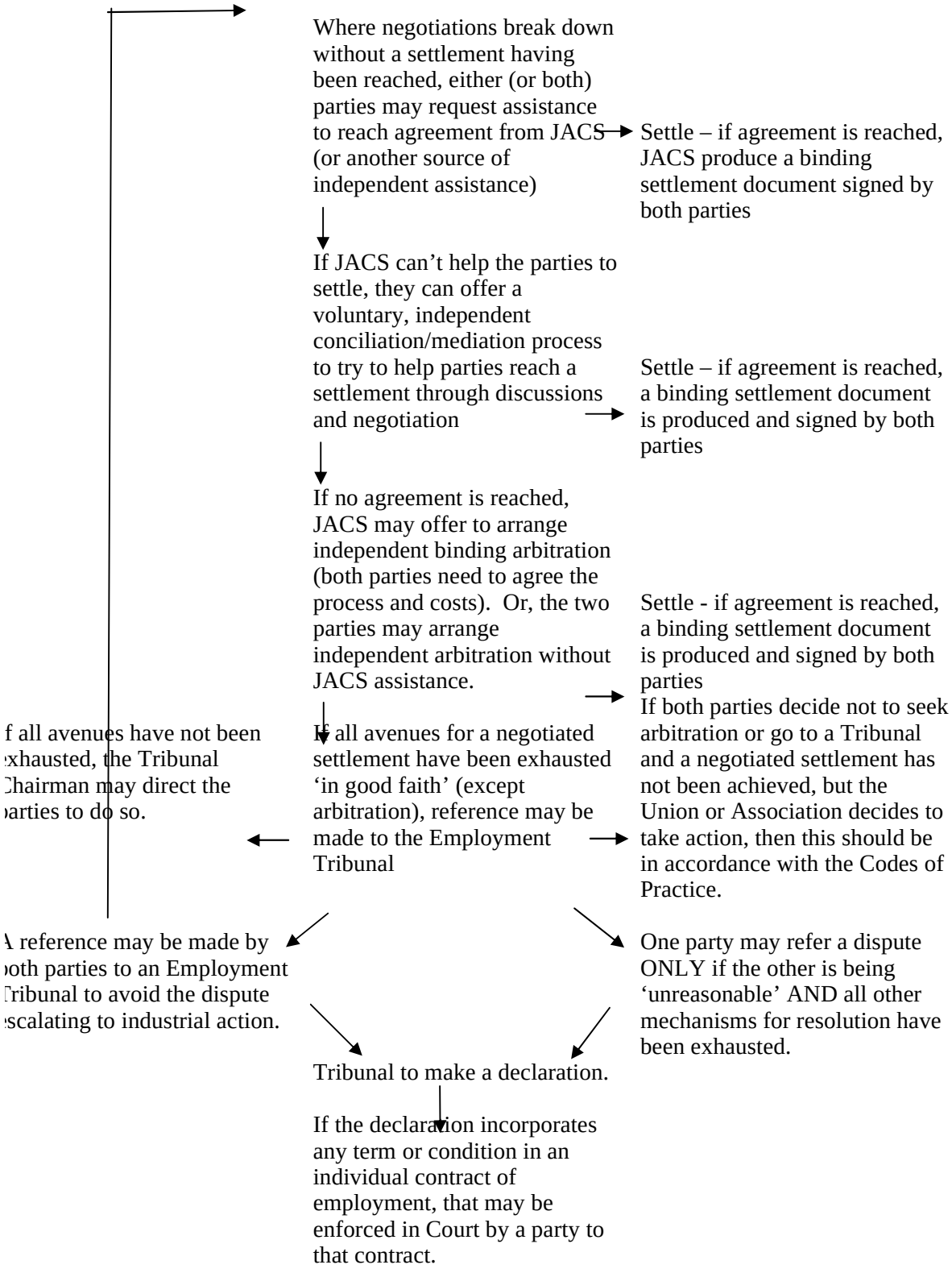
In accordance with the framework provided by the draft Employment Relations Law, the following dispute resolution procedure should be adopted. The assistance of JACS, or another independent source, should be invited, where necessary, if agreement is not reached by the parties.

A negotiated settlement between the parties would be preferable (whether it has been achieved with or without assistance from JACS or another independent source), and may be reached at any stage of the process before the Tribunal makes a declaration.

Balloting for industrial action does **not** constitute unreasonable behaviour at any stage of the process. Limited immunities (see Part 3 of the draft Employment Relations Law) would apply if a ballot and any action was taker in accordance with the codes of practice, though it would be expected that both parties had tried to negotiate in good faith and brought in JACS, or another independent source, to try to resolve their differences beforehand.

It would be considered unreasonable for industrial action to be taken before all available and appropriate procedures have been exhausted.


‘Negotiations’ (and discussions) must take place in accordance with rules, such as disciplinary and grievance procedures contained in the JACS code of practice, a relevant contract or collective agreement, ‘in good faith’
Settle


Where negotiations break down without a settlement having been reached, either (or both) parties may request assistance to reach agreement from JACS (or another source of independent assistance)
Settle – if agreement is reached, JACS produce a binding settlement document signed by both parties
If JACS can't help the parties to settle, they can offer a voluntary, independent conciliation/mediation process to try to help parties reach a settlement through discussions and negotiation
Settle – if agreement is reached, a binding settlement document is produced and signed by both parties
If no agreement is reached, JACS may offer to arrange independent binding arbitration (both parties need to agree the process and costs). Or, the two parties may arrange independent arbitration without JACS assistance.
Settle - if agreement is reached, a binding settlement document is produced and signed by both parties
If both parties decide not to seek arbitration or go to a Tribunal and a negotiated settlement has not been achieved, but the Union or Association decides to take action, then this should be in accordance with the Codes of Practice.
f all avenues have not been exhausted, the Tribunal Chairman may direct the parties to do so.
If all avenues for a negotiated settlement have been exhausted 'in good faith' (except arbitration), reference may be made to the Employment Tribunal
A reference may be made by both parties to an Employment Tribunal to avoid the dispute escalating to industrial action.
One party may refer a dispute ONLY if the other is being 'unreasonable' AND all other mechanisms for resolution have been exhausted.
Tribunal to make a declaration.
If the declaration incorporates any term or condition in an individual contract of employment, that may be enforced in Court by a party to that contract.

Code 3 – Conduct of ballots

This code is not overly prescriptive and provides only basic principles and minimum standards for balloting on industrial action that are not intended to conflict with provisions for ballots in unions own rule books.

Negotiations need **not** be stopped or suspended during the balloting process.

What is industrial action?

There is no legal definition of industrial action, however 'strike' is defined in the Employment Law as:

> *"the cessation of work by a body of persons employed acting in combination, or a concerted refusal or a refusal under a common understanding of any number of persons employed to continue to work for an employer in consequence of a dispute, done as a means of compelling their employer or any person or body of persons employed, or to aid other employees in compelling their employer or any person or body of persons employed, to accept or not to accept terms or conditions of or affecting employment."*

Action short of a strike is less straightforward to identify. Industrial action must be concerted action against the employer's interests (it would not usually cover action taken by an individual) and it must be taken in order to put pressure on the employer in an attempt to achieve some objective. Employees will probably be taking part in industrial action if they:

- 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
- Take part in picketing.

Balloting on industrial action

A ballot must take place before industrial action is taken.

Where a ballot is to be held, both parties should co-operate and behave reasonably and responsibly in connection with the ballot and access to the employees.

Certain requirements should be satisfied in relation to balloting in order to be considered 'reasonable', as follows:

1. The ballot should be conducted by an appropriate independent person and the name of the ballot scrutineer should be specified. JACS can assist in this process.

2. The ballot should be held in secret.

3. The ballot should be held in the workplace, by post, or a combination of the two, depending on the circumstances.

4. The ballot should be funded by the union, unless otherwise agreed with the employer.

5. The ballot should only ask questions that require a 'yes' or 'no' answer and more than one question may be asked on a ballot paper.

6. Ballot papers should be retained by the independent person for at least one month after the result is announced. Following this elapsed time, the ballot papers may be destroyed, subject to any ongoing dispute or Court action where the papers may need to be retained.

7. If industrial action is to be taken following a ballot, notice should be given to the employer 7 days before the proposed action can begin. At that time any information in the union's possession should also be given to help the employer make plans to enable him to advise his customers of the possibility of disruption so that they can make alternative arrangements or to take steps to ensure the health and safety of his employees, or the public, or to safeguard equipment which might otherwise suffer damage from being shut down or left without supervision e.g., the number, category or workplace of the employees concerned (not necessarily by individual name).

8. If Industrial action is to be taken, it must start within 4 weeks of the close of the ballot (including the 7 day notice period), except where action is delayed following an injunction or court proceeding prohibiting action during that period. The 4 week period can be extended to up to 8 weeks through agreement between the employer and the trade union.

9. The holding of ballots should not interrupt negotiations, if at all possible.

The following would be a reasonable procedure for the conduct of ballots:

1. An access agreement, preferably in written form, should be established at the time of the dispute. It should be agreed who should have access to the employees constituting the bargaining unit, and where, when, for how long and in what form this access is to be provided. The arrangements should reflect local circumstances and JACS may provide a model access agreement.

2. Approaches to employees from the employer and union should be balanced and fair. Where they are suitable for the purpose, the employer's typical methods of communicating with his workforce should be used as a benchmark for determining how the union should communicate with members of the same workforce during the access period.

3. Where practicable, the employer should allow the union to hold a **minimum** of one meeting of at least 30 minutes in duration for every 10 working days of the access period, or part thereof, which all workers or a substantial proportion of them are given the opportunity to attend. If a longer meeting is required, it should be arranged to overlap the beginning or end of the day, running into the employees own time.

4. Where practicable, employers should provide a notice board for the union to display written material at the place of work. The notice board should be in a prominent location in the workplace and the union should be able to display material, including references to off-site meetings, without interference from the employer.

5. The union should ensure that disruption to the business of the employer is minimised. Consideration should be given to arranging meetings of employees at the bargaining unit during rest periods or towards the beginning or end of the working day/shift.

6. The employer should not be expected to pay the employees if they are present at the workplace for the purposes of access when they would not otherwise have been at work nor receiving pay from the employer.

Code 4 – Limitations on Industrial Action

Essential services

The International Labour Organisation definition of the term 'essential services', includes only those services "whose interruption would endanger the life, personal safety or health of the whole or part of the population."

If any special provisions or limitations on industrial action are to be imposed by employers on employees working in an 'essential service' that falls within the ILO definition, they should be negotiated and agreed directly between the trade union and the employer and should be included in a 'relevant agreement' (i.e. a collective or individual agreement, as defined in the Employment Law).

It would be unreasonable for industrial action to be taken when such 'essential services' would be interrupted if special provisions or limitations have been made in a relevant agreement.

Secondary Action

It would be considered unreasonable to take industrial action in furtherance of a collective dispute in any of the following circumstances:

1. Where action is taken in support of a 3rd party
2. Where employees are not directly involved
3. Where the dispute is not with the same employer
4. Where the employees are not at the same place of work of those directly affected.

It is not necessary for all 4 statements to be applicable to a case in order for industrial action to be considered as 'secondary' action.

N.B. Provision is made in Article 5 of the Employment Relations Law for each Ministry to be treated as the employer of the employees of that Ministry. The employer party in a States collective employment dispute is therefore the individual Ministry, not the States. Industrial action taken by the employees of one Ministry in support of employees who are employed by a different Ministry may be considered as secondary action.

Picketing

Picketing is considered reasonable only when it is one of the following:

- ○ to peacefully obtain and communicate information
- ○ to peacefully persuade a person to work or not to work.

Picketing in these two circumstances would be protected by immunities if all of those union members who are likely to be called to take part in the action have been balloted (in accordance with the code) and the majority of those are in favour of taking (or continuing) industrial action.

Civil wrongs would not be protected by immunities and would be considered unreasonable, such as:

- ○ Unlawful threat or assault
- ○ Harassment (e.g. threatening or unreasonable behaviour causing fear or apprehension to those in the vicinity)
- ○ Obstruction of a path, road, entrance or exit to premises
- ○ Interference (e.g. because of noise or crowds) in the rights of neighbouring properties (i.e. private

nuisance)

- Trespassing on private property.

Re-issue Note

This projet is re-issued because the version of Appendix 1 that was originally transmitted to the States Greffe for publication was incorrect.

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[1] *The precise scope of the immunities has been the subject of many statutory amendments.*

[2] *The meaning of trade dispute is defined in different terms from the Employment Relations Law's concept of "employment dispute".*

[3] *See sections 222 to 225 of the U.K. 1992 Act.*

[4] *As especially defined by section 20 of the Act.*

[5] *The background to this case was that the employers had allegedly chosen to use Ministry arbitration in order to exploit their lobby with the Government (see para. 204).*

[6] *See sections 238A and 238 respectively of the Employments Rights Act 1996.*

[7] *See s.112 of Employment Rights Act 1996.*

[8] *See page 4 of the draft Code.*