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# **STATES OF JERSEY**



## **INSOLVENCY: TEMPORARY SCHEME FOR COMPENSATORY PAYMENT IN LIEU OF STATUTORY PERIOD OF NOTICE ON TERMINATION OF EMPLOYMENT – REVISED REPORT**

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**Presented to the States on 27th January 2011  
by the Minister for Social Security**

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**STATES GREFFE**

## REPORT

*This Report (previously published as R.44/2009) has been updated to reflect the changes to the statutory minimum periods of notice required by the Employment (Jersey) Law 2003 as a result of the enactment of the Employment (Amendment No. 5) (Jersey) Law 2010 on 1st January 2011. Appendix 1 provides further details.*

### **Background and context**

This temporary insolvency scheme is designed to pay compensatory statutory notice pay to employees where their employer is insolvent.

The scheme's rationale is to make compensatory notice payments in the case of insolvency based on the number of weeks' statutory notice an employee was entitled to receive in accordance with the Employment (Jersey) Law 2003 ("the Employment Law"). The scheme does not cover any other types of payment in an insolvency situation, such as unpaid wages, and it does not cover statutory notice pay or any other payment when the employer is not insolvent.

This temporary scheme is designed to operate until the formal insolvency scheme, backed by legislation, is put in place. It is important to recognise that this temporary scheme is effectively operating in isolation and, as such, its provisions will differ from the formal statutory insolvency scheme.

As well as avoiding unnecessary delay, another priority has been to design a scheme that is easily accessible to those submitting a claim and that pays out relatively quickly to those who qualify.

In a written answer to the States on 31st March 2009, the Minister for Social Security said –

*'As I stated during the debate of P.34/2009, the system will be very closely based on the UK insolvency scheme, and to that effect, the payments in lieu of notice will be calculated based on the employee's actual losses suffered. Any income received from employment and some benefits received during the period of notice will be offset against statutory notice payments, therefore reducing the period remaining to be paid in lieu by the States. Employees will be expected to attempt to minimise their losses by actively seeking employment during any period of notice in which they are not working. In particular, employees turning down the offer of employment, by either the employer or administrator of the insolvent business, without good reason, will not be entitled to any payments under the scheme.'*

To incentivise people to return to work as swiftly as possible, all those who qualify will receive up to 4 weeks of any compensatory notice pay entitlement – with no reductions. This removes any disincentive to find work quickly.

Prompt payment is another key aspect of this scheme. In the U.K., any payment in lieu of notice is only made after the end of the notice period (up to 12 weeks) when any earnings during that period have been established. Under this temporary scheme, eligible employees will not have to wait unduly for their notice payment (or part of it).

When an employee's entitlement to statutory notice has been established based on their rights under the Employment Law (see Appendix 1), a payment will be made to cover up to the first 4 weeks of statutory notice that the employee was entitled to receive (where the employee had not already worked their notice or received payment in lieu). The payment in respect of the first one to 4 weeks' notice would not be reduced by any earnings from employment, Short-Term Incapacity Allowance, Maternity Allowance or *additional* Income Support payments to the individual or their household as a result of their unemployment.

However, beyond this 4 week period, any such income received in respect of the remaining notice period would be deducted from the compensatory notice pay, on a pound-for-pound basis. For example, an employee with 9 years' service who is entitled to 9 weeks' notice must declare any income in respect of weeks 5 to 9 of the notice period. That employee would receive a payment in respect of the first 4 weeks, and then a further payment in respect of the remaining 5 weeks' notice on the expiry of that period.

If it became apparent at a later date (from contributions records, for example) that a claimant had failed to declare any income, then the Department would take action to reclaim any monies that had been falsely claimed.

## **THE SCHEME IN DETAIL**

The following sets out the criteria that the Social Security Department will apply where an employer has become insolvent and has not given employees their statutory period of notice on termination of employment, as required by the Employment (Jersey) Law 2003.

The terms of the temporary scheme will reflect the requirement for the scheme to come into effect as soon as possible in the absence of statutory redundancy provisions. These terms may not necessarily mirror those of the formal scheme, but will operate until the planned statutory insolvency scheme comes into operation. It has been proposed that the formal scheme will broadly follow the U.K. and Isle of Man insolvency schemes, as Jersey is comparable to these jurisdictions in terms of legislation and practice relating to employment rights and insolvency.

### **Application criteria**

**All of the following criteria must apply to allow an employee to submit a claim to the Social Security Department for a compensatory payment in lieu of their statutory period of notice –**

- The employer became the subject of a formal insolvency process having effect in Jersey on or after 4th February 2009. These processes include *désastre*, court and creditors' winding up. The temporary scheme will therefore have application in Jersey in the case of external foreign insolvency proceedings, such as administration, as well as in domestic scenarios.

The temporary scheme only applies where the employer has become formally insolvent. It does not cover cases of redundancy or termination of employment where the employer is still operating or has just closed down out of choice, or is otherwise not the subject of formal insolvency proceedings. Where the employer is still

operating, former employees who feel they have a grievance can visit the Jersey Advisory and Conciliation Service and can, if necessary, pursue any claim through the Jersey Employment Tribunal. In other cases where the employer has ceased trading, employees may take advice from a lawyer. The Viscount's Department and the Citizen's Advice Bureau may also be able to provide independent views.

- The employee must have been employed by the employer at the date of insolvency.

An employee who terminates (or gives the employer notice to terminate) their own employment during the notice period or prior to the effective date of termination of employment is not entitled to statutory notice under the Employment Law and therefore is not entitled to a compensatory payment in lieu of notice.

- The employee was entitled to receive a period of notice on termination of employment subject to the provisions set out in Part 6 of the Employment Law (as amended by the Employment (Amendment No. 5) (Jersey) Law 2010, on 1st January 2011. See Appendix 1).
- The employee's employment was terminated and the employee was not given the statutory minimum period of notice (either in full or in part) by the employer as required on termination of employment by the Employment (Jersey) Law 2003.

Where notice has not been given to employees and the employer either has become, or is about to become, the subject of a formal insolvency process, the Minister will expect the employer to have given written notice to each employee at the earliest opportunity.

The Minister will establish, in conjunction with duly appointed insolvency practitioners (IPs) with a local presence, what is expected of an IP in terms of best practice and intends to issue a code of practice for IPs, including the giving of notice where that is possible, and the information that needs to be provided to each employee.

Notice of termination of employment does not need to include a specific termination date, as each end date will depend on the individual's length of service.

In the event of notice not having been given to an employee, the following dates will apply, notice having been deemed to have been given to the employee for the purpose of the temporary scheme on the earlier of –

- (a) The date on which the employee was notified that the employer became the subject of a formal insolvency process;
- (b) The date of the automatic termination of contracts, by operation of law, via the formal insolvency process (if any);
- (c) The last day worked by the employee; or
- (d) The date on which the employment ended if different from (c).

For the avoidance of doubt, any one of the dates chosen under (a), (b), (c) or (d) constitutes 'deemed' notice for the purposes of the temporary scheme.

- The employee did not receive a payment from their employer in place of any statutory period of notice not given by that employer.

Notice payments will be made in accordance with Article 56 of the Employment (Jersey) Law 2003, set out in Appendix 1 as amended from 1st January 2011. A week's pay is calculated in accordance with Schedule 1 of the Employment Law. Only the statutory minimum notice payments owed (or the balance thereof) will be paid to employees. Where an employee has a contractual right to a greater period of notice on termination of employment, only the statutory minimum will be paid.

- The Social Security Department receives confirmation from the employer, IP or Viscount that it has not given notice or pay in lieu.
- The employee falls within the definition of "employee" provided at Article 1A of the Employment Law (see Appendix 2). Some people, including those who are self-employed and self-employed contractors will not be entitled to claim under the scheme.
- The employee was not at any time during the year preceding the employer's insolvency – (1) a director of the company (as provided by Part XIV of the Companies (Jersey) Law 1991); or (2) the beneficial owner of one-half or more of the issued share capital of the company, or of any other company which at that time had control (directly or indirectly) of that company.
- The Social Security Department has received or was due to receive Class 1 contributions from that employer in respect of that employee in the quarter prior to insolvency.
- The employee worked wholly or mainly in Jersey.
- The employee who wishes to claim a compensatory notice payment must submit an initial claim form within 4 weeks of the employee having been given actual or deemed notice. In circumstances where there is uncertainty or delay in the commencement of insolvency proceedings and it is not clear whether employees will be entitled to claim under this scheme, the Department will extend the time period for the submission of claim forms accordingly.

The application form, available from the Department or the IP, will confirm the employee's details, including length of service and pay, and will set out what further information is needed. Any breaks in continuous service will need to be identified.

- To qualify for the compensatory notice payment, an employee who is not employed during their period of notice must demonstrate that they are actively seeking work (unless in receipt of Short-Term Incapacity Allowance or Maternity Allowance) and they must not unreasonably refuse appropriate employment.

## Compensatory notice payments

### All of the following apply in relation to any compensatory notice payment:

- The employee's entitlement to a payment must have been validated by the Social Security Department as being accurate based on the employee's period of continuous service and earnings details, as confirmed by the employee's contract of employment and wage slips.

The Department must have co-operation from employees, employers and IPs in the provision of the documents required to validate employee entitlements. Delays in validating employee entitlements will ultimately delay any payments due to employees.

- The Department must be provided with a statement confirming that all or part of the statutory notice pay remains unpaid from a person authorised to make such a statement, namely an IP or the Viscount, as appropriate.
- So as not to penalise employees who find a new job in the first 4 weeks, all individuals will still receive up to 4 weeks' full compensatory notice pay in accordance with their rights under the Employment Law (see Appendix 1). This incentive is in line with the permitted changes to earnings under Income Support, where 4 weeks' leeway is given, in some circumstances, before new earnings are taken into account in an Income Support claim.
- Employees must register with the Work Zone at the Social Security Department straightaway and must attempt to minimise their losses by actively seeking employment during any period of notice in which they are not already working. An employee must not unreasonably refuse appropriate new employment.
- Other than in respect of the first one to 4 weeks' notice, any of the following income received will be offset against compensatory notice payments –
  - (a) Short-Term Incapacity Allowance;
  - (b) Maternity Allowance received by the individual; and
  - (c) Additional Income Support payments made to an individual or their household as a result of their unemployment.
- As a condition for receiving *any* compensatory notice pay, employees must not unreasonably refuse to stay on in continued employment after notice has been served (or is deemed to have been given) when asked to do so by an IP.

It is in everyone's interest that in an insolvency situation there is, as far as possible, an orderly rundown of the business. This condition will only be reviewed if there is demonstrably a good reason to do so for a particular individual – such as an offer of new employment which would start straightaway. This arrangement avoids people choosing to give up work, only to receive payment from the taxpayer instead. Employees who continue to be employed after the date of insolvency are paid by the IP out of the funds of the insolvent employer that the IP is entitled to use to continue necessary services.

Employees asked to continue in employment by an IP would still receive up to 4 weeks' compensatory notice pay. In these circumstances, it is not always clear how long such work will last and by allowing employees to retain their 4 weeks' compensatory notice pay, they are not being disadvantaged vis-à-vis other former colleagues who were not kept on by the IP.

- Where the employee has continued to be employed after the date on which notice was given (or is deemed to have been given), any earnings from employment after the fourth week will be offset against any compensatory notice pay, provided that the employee has been paid wages, or is due to be paid wages, by the IP in respect of that period.
- The employee must sign a legal document which will assign their right to the statutory notice payment to the States, via the Minister for Social Security.

This means that the States will take on the employee's claim to the notice payment and will pursue the claim as a creditor when the proceeds of any remaining assets of the company are distributed amongst the creditors. An individual is not obliged to assign their right but if they do not, no payment will be made under the temporary scheme. Employees are encouraged to obtain their own advice, for example from a lawyer or the Citizen's Advice Bureau, before signing the legal document. An employee who does not wish to assign their right to a statutory notice payment to the States is advised to take legal advice regarding their options for pursuing their claim through the Courts as a creditor.

Employees must make every effort to ensure that applications can be processed as quickly as possible. Any delays in providing the information that has been requested to validate claims, or in signing the legal document, will lead to delays in issuing payments. If claim forms and other documents are not submitted by any deadlines as advised by the Department in writing, employees may lose the right to claim any compensation from the scheme.

- It is the intention that any payments due to each individual will be made as soon as possible; after the first period of up to 4 weeks' notice, and then a second payment at the end of the employee's notice period, subject to statutory notice entitlements (in accordance with Appendix 1) and complete submission of all paperwork.
- The Social Security Department will take action to reclaim any monies that have been falsely claimed by an employee.
- Any other amounts owed to an employee by the employer or the insolvency practitioner, such as holiday pay and wages owed, as well as other contractual amounts such as contractual notice where that is greater than the statutory notice, can be claimed by the employee as a creditor via the insolvency proceedings.
- An employee who disagrees with a decision made by the Social Security Department regarding their compensatory notice payment will have the right to request a review by the Minister for Social Security, whose decision will be final.

- In wholly exceptional circumstances, where the employer has ceased trading, but has yet to become subject to formal insolvency proceedings, the Minister will give consideration, in consultation with the Viscount, to making compensatory payments where he is reasonably satisfied that the employer will become subject to such proceedings, or that related proceedings have commenced. A review of this nature may be instigated by an Officer of the Social Security Department at the request of one of the following – the employer, a former employee of that employer, the Viscount, or the prospective insolvency practitioner. The Minister’s decision will be final.
- The principles and rules of the scheme have been determined by the Minister for Social Security, as set out in this Report, and are not grounds for Ministerial review.



**APPENDIX 1****Statutory period of notice under the Employment (Jersey) Law 2003**

Any claims under this scheme that relate to dismissal without notice due to insolvency that occurred on or after 1st January 2011 will be paid in accordance with the statutory minimum notice periods required by the Employment (Jersey) Law 2003 (as amended by the Employment (Amendment No. 5) (Jersey) Law 2010 on 1st January 2011), as follows –

<b>Employee's length of continuous service for that employer</b>	<b>Minimum number of weeks' notice</b>
More than 1 week but less than 2 years	1 week
More than 2 years but less than 3 years	2 weeks
More than 3 years but less than 4 years	3 weeks
More than 4 years but less than 5 years	4 weeks
More than 5 years but less than 6 years	5 weeks
More than 6 years but less than 7 years	6 weeks
More than 7 years but less than 8 years	7 weeks
More than 8 years but less than 9 years	8 weeks
More than 9 years but less than 10 years	9 weeks
More than 10 years but less than 11 years	10 weeks
More than 11 years but less than 12 years	11 weeks
More than 12 years	12 weeks

Note: Any valid outstanding claims relating to dismissal without notice due to insolvency that occurred up to 31st December 2010 will be paid in accordance with the periods required by the Employment Law at that time, as follows –

<b>Employee's length of continuous service for that employer</b>	<b>Minimum number of weeks' notice</b>
Up to 26 weeks	1 week
More than 26 weeks but less than 1 year	2 weeks
More than 2 years but less than 5 years	4 weeks
More than 5 years but less than 10 years	8 weeks
More than 10 years but less than 15 years	12 weeks
15 years or more	16 weeks

**APPENDIX 2****Definition of “employee” from the Employment (Jersey) Law 2003****1A “Employer” and “employee”**

- (1) *In this Law –*
  - (a) *“employer” means a person who employs another person; and*
  - (b) *“employee” means a person who is employed by an employer.*
- (2) *For the purposes of paragraph (1), a person is employed by another person if the first person works for the second person under a contract of service or apprenticeship with the second person.*
- (3) *For the purposes of paragraph (1), a person is also employed by another person if the first person enters into any other contract with the second person under which –*
  - (a) *the first person undertakes to do, or to perform personally, work or services for the second person; and*
  - (b) *the status of the second person is not that of a client or customer of any profession or trade or business undertaking that is carried on by the first person.*
- (4) *It is immaterial whether a contract to which paragraph (2) or paragraph (3) refers is express or implied.*
- (5) *If the contract is express, it is immaterial whether it is oral or in writing.*