

**WRITTEN QUESTION TO THE MINISTER FOR SOCIAL SECURITY
BY DEPUTY G.P. SOUTHERN OF ST. HELIER**

ANSWER TO BE TABLED ON TUESDAY 17th JANUARY 2006

Question

Would the Minister inform members –

- (a) of the names of the 23 respondents to the minimum wage questionnaire conducted by the Employment Forum referred to on page 5 of P.282/2005 – draft Employment (Minimum Wage) (Amendment) (Jersey) Regulations 200-?
- (b) of the two other '*issues of importance*' relating to the training rate and therapeutic work referred to on page 6 of P.282/2005? and,
- (c) of the '*issues arising within certain organisations*' over the Codes of Practice on the training rate and therapeutic work referred to on page 7 of P.282/2005?

Answer

- (a) I am not aware of the names of individual respondents to the minimum wage review conducted by the Employment Forum. The Forum, as always, conducted its review at the direction of the former Employment and Social Security Committee, but independently and confidentially. On the basis of the responses received, the Forum presented the former Committee with a recommendation of the minimum wage rates for April 2006. The Committee did not receive copies of individual responses and it would be improper to release identities of respondents who gave their opinions in confidence.

As the Deputy is aware from previous questions, the Employment Forum has an extensive database. All of those on the database were given the opportunity to respond and the replies can be categorised as from the following respondent types; 12 employers, 2 employees, 4 employer associations, 4 trade union or staff associations and 1 'other' respondent.

- (b) The final question of the Forum's questionnaire asked respondents to provide any other comments that they would like the Forum to consider in relation to the minimum wage. The '*issues of importance*' referred to were, as stated, therapeutic work and the minimum wage trainee rate.

One respondent raised the matter of supported employment work placements and suggested that therapeutic work is a special issue which should be monitored and possibly reviewed in more detail. The Forum accepted this comment and agreed to review the matter. The relationship between employment legislation and therapeutic work is very complex and there is already a code of practice dealing with this subject, (attached at Appendix 1); the Forum may need to assess its suitability in future.

Another respondent made the point that, in some trades, there is not an 'approved' course of study for that specialist area, for example, one provided by Highlands College. There has been concern that employers will have to pay the full rate of £5.08 if they cannot meet the code of practice which sets out the requirements justifying payment of the trainee rate, (attached at Appendix 2). However, the code provides that specific written Ministerial approval may be requested if a course does not appear to meet all of the criteria.

At the time of the review, the codes had been in force for less than 4 months and the purpose of the November 2005 consultation was specifically to seek views on the uprating of the actual minimum wage rates, to provide a decision at the earliest opportunity, allowing businesses time to adjust if new rates were approved.

The Forum would be reluctant to make a recommendation for change when only one comment has been received on each issue and consequently would require further research into these matters. The Forum may undertake further consultation in future, assessing the coverage of the code and the additional written approval system, when test cases are available on which to base considerations.

The Minister is confident that the Forum will consider the two issues when appropriate during 2006.

- (c) The Social Security Department was already aware of some such issues arising in relation to both the trainee rate (particularly in trades and hospitality) and therapeutic work (in various different industries). A small number of queries have been received relating to the codes of practice on these topics where employers have requested some assistance in understanding whether they meet the requirements of the codes, and what action should be taken should they not meet the criteria.

A record has been kept of each of these queries so that when it is time to review the two codes of practice, there is some evidence on which to base consultation and amendments. It was considered that a full review of the content of the codes would not have been feasible during a specific interim review of the minimum wage.

Both codes of practice were issued in June 2005 and it was not considered practical to review them at such an early stage of implementation. The Forum will be seeking evidence from interested parties in a future consultation and will ask the Department to contribute by providing details of the issues that have been raised.

DRAFT CODE OF PRACTICE

Therapeutic Work and the Employment Law

Introduction

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

Section 1 – Aim of the guidance note

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

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

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

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

Section 2 – The Legal Position

Who does the Employment Law apply to?

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

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

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

The definition of an employee

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

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

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

How to recognise an employee’s contract

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

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

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

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

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

- There is no reference in the minimum wage legislation to a worker’s productivity, ability or effectiveness.
- The legislation also makes no distinction between disabled and non-disabled people, or between people

with mental health problems and other people, and contains no reference to 'therapeutic work'.

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

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

The Employment Tribunal

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

(a) If there is no consideration (usually the payment of money or the giving of a benefit) from the employer and no obligation placed on the individual undertaking the therapeutic activity or the work then there would not be a contract between the two parties. The underlying point is that there has to be a mutual obligation between the individual performing the activity and the employer paying a reward in return for that activity. It might be possible to pay genuine expenses and occasional 'ex gratia' payments to the individual without creating a contract of employment, as long as no expectation of payment for the activity was created and no obligation was placed on the person carrying out the activity.

(b) If money is paid by the employer to an individual, there may still be no employment contract if there is no mutual obligation between the parties i.e. the individual is genuinely not obliged to perform duties and the employer is genuinely not obliged to provide the activity or pay the individual. However a payment is often indicative of a contractual relationship and any payments made will be carefully scrutinised by the Tribunal and courts. If they are genuinely not linked to a mutual obligation between the parties then it is unlikely that a contract will be inferred and the Employment Law will not apply;

(c) If the two factors are combined, so that the individual is paid money or given a benefit by the employer over and above expenses and is obliged to perform an activity in accordance with the employer's instructions, then there will almost certainly be a contract between the two parties and the individual will be an employee. In such circumstances, it is possible that the Employment Law will apply, even where the activity has genuine therapeutic value. Expenses could be paid to those undertaking therapeutic activity at a flat rate if they represent a fair and reasonable estimate of out of pocket expenses (including travel and subsistence) where it would be otherwise administratively cumbersome for the provider of the therapeutic activity to calculate individual expenses. Therefore a figure which represents genuine average expenses for a group of people undertaking therapeutic activity would be acceptable. But if a person is paid more than expenses and is obliged to perform an activity in accordance with the employer's instructions, the individual is likely to be covered by the Law, if the following four criteria are not taken into consideration.

Four Criteria

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

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

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

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

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

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

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

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

Section 4 – Types of support and Benefits available

Workwise

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

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

Job Coach Scheme

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

Work experience

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

The Therapeutic Work Scheme -Benefit entitlement

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

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

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

Other Groups who may be able to help

Jersey Employers' Network on Disability - JEND

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

Jersey Employment Trust - JET

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

In partnership with other agencies, JET provides a range of complementary training, development and sheltered work; equipping clients with the skills (vocational and social) necessary for supported open employment. These include Workforce Solutions Ltd., Sunflower Nurseries and Oakfield Industries Ltd.

Interwork Agency

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

Jobscope

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

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

Section 5 – Frequently asked questions

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

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

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

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

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

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

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

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

Code of Practice

Minimum Wage – Accredited training rate

1. Introduction

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

2. Background

The acquisition of skills remains a priority for employees of all ages, especially those moving into a new sector or returning to work. A new employee who brings no prior knowledge or experience to an employer needs time to be developed and initially they may not contribute fully to the workforce.

Bearing this in mind, the States agreed that a statutory minimum wage should not become a barrier to the receipt of structured training or taking on an inexperienced employee. To achieve this and to provide an incentive for employers to train their employees, it was agreed that those on accredited training programmes and courses should be entitled to a “trainee rate” for a maximum period of one year. This provision will only relate to employees over school leaving age who start a new job with a new employer;

According to a survey carried out by the Low Pay Commission recently, only 5% of employers in the UK were using the ‘development’ rate, but it is anticipated that there could be a higher take up in Jersey for a training rate as it would apply to all employees over school leaving age. It is therefore particularly important to keep young people in mind when considering what training courses would be appropriate for accreditation.

It is difficult to define what a ‘trainee’ is, and employers could classify younger employees as trainees to justify paying them the lower rate, unless there are strict rules on what can be classed as a trainee. Enforcing such rules to ensure only ‘genuine’ trainees are paid at the lower rate could be expensive and difficult to enforce. Inexperience at doing the job should not be justification for paying the trainee rate. If there was a dispute over hourly rate of pay, it would be up to JACS, the Employment and Social Security Committee, or ultimately the Employment Tribunal, to determine whether the training is “accredited” and the onus would be on the employer to produce the relevant records.

This code of practice outlines what qualifies as “accredited training”, but also allow flexibility to change in line with the development of new training schemes in Jersey.

3. The Employment (Minimum Wage) (Jersey) Regulations 200-

The Minimum Wage Regulations provide that ‘trainees’ may be paid at a different hourly rate. The Regulations require that a ‘trainee’ is;

1. an employee over compulsory school leaving age

2. undergoing an 'accredited course of training' by written agreement with his or her employer
3. in the first year of employment by that employer, in the particular job for which the employee is being trained.

After one year of employment, with the same employer, on the trainee rate, employees will become entitled to the full rate of minimum wage.

An 'accredited course of training' is defined as a course of training that is approved in writing by the Employment and Social Security Committee as an accredited course for the purpose of the Regulations. Any training course that meets the requirements of this code of practice is deemed to have met the written approval of the Committee.

However, where there is uncertainty as to whether the provisions of this code have been met, a written request may be submitted to the Committee, with appropriate and detailed documentation about the training, asking if the Committee will give it's written approval.

4. Requirements

In addition to those requirements provided in the Regulations, (i.e. points 1 to 3 above), the following requirements must be met in order to justify the payment of the trainee rate.

- Employers must keep a copy of the agreement for three years from the end of the training period and be able to produce it on request.
- Training must be of a sufficient quality and duration to enable the employee to reach the required standard and to complete the course successfully.
- Participation on an accredited training course may be at or away from the workplace but must be primarily during the normal/contractual working hours for that employment and must be paid.
- There must be a formal qualification at the end of the training that is a locally or nationally recognised and certified qualification, although the qualification does not necessarily have to be attainable within one year and the employee does not necessarily have to achieve the qualification within that year.
- There must be some supervision of the training.
- The trainee rate should only be payable while the provision of training is ongoing, i.e. the maximum duration that the trainee rate may be paid is either the time taken to successfully complete training, or one year, whichever is the shorter. Even if the training is not successfully completed within the year, the employer is not entitled to pay the employee for a longer period than one year.
- The training should be provided at no cost to the employee
- The training should be of relevance to the job for which the employee is being trained.

5. Course types, providers and qualifications

Any of the following count as 'accredited training' for the purpose of the Minimum wage trainee rate, as long as the requirements described in section 4 are also met;

- i) training that is recognised and accredited by a national or international exam board, e.g. City and Guilds.
- ii) a course which leads to a National Vocational Qualification (NVQ); or to a General National

Vocational Qualification (GNVQ), or equivalent;

- iii) a course which leads to a GCSE or A level;
- iv) an “access” course for entry to higher education;
- v) In-house company training which has been certified as including at least 50 per cent of the requirements in terms of whole units of one or more S/NVQs by the awarding body or similar suitably qualified independent organisation.
- vi) a course designed to assist persons whose first language is not English to achieve any level of competence in English language.
- vii) a course for basic literacy in English, basic mathematics, or a course in independent living and communication for those with learning difficulties, which prepares them for entry to the other courses above.
- viii) any course that is included in the Economic Development Committee’s Training and Employment Partnership ‘Skills Strategy for Jersey’.
- ix) a training course that does not fit into the above categories but meets the requirements outlined in section 4 and would meet formal verification tests of validity, e.g. would meet criteria and inspections in line with the UK’s Learning and Skills Council or Adult Learning Inspectorate. In this case the employer must be particularly vigilant in maintaining adequate records to demonstrate that the training and its outcomes meet these criteria and should apply in writing for the Committees’ approval of the training scheme or course.