Recommendation to the Social Security Minister -

Employment Tribunal Powers in Unfair Dismissal Awards (Amendment No. 4)

Issued by the Employment Forum on 17 June 2008

PURPOSE OF RECOMMENDATION

This recommendation is issued by the Employment Forum as directed by the Social Security Minister.

Its purpose is to provide the Minister with recommendations based on responses from interested parties (received during the period 27 February to 11 April 2008) in regard to a proposed amendment to the Employment (Jersey) Law 2003 which would give the Employment Tribunal ("the Tribunal") additional powers in regard to unfair dismissal compensation.

Introduction

The Forum had previously issued a recommendation to the Social Security Minister in regard to this proposal and a draft amendment had been prepared on the basis of the Minister's response to those recommendations. When the draft amendment was lodged for States debate in January 2008, the Minister became aware that further consultation on the particulars of the amendment would be necessary and so directed the Forum to consult further with the public. The Forum's original recommendation and the Minister's response can be found on the website -

www.gov.je/SocialSecurity/Employment/Employment+Relations/The+Employment+Forum.htm

The Forum is grateful for the responses that were received to this consultation.

Contents **Page**

Recommendation to the Social Security Minister - **Employment Tribunal Powers in Unfair Dismissal Awards (Amendment No. 4)**	

SUMMARY OF RECOMMENDATIONS

Reduced Award

The Forum recommends that the Employment Tribunal should have the power, as proposed, to reduce an employee's unfair dismissal award.

The Forum recommends however that the draft amendment should be clarified in that, when considering whether to reduce an award, the Tribunal must not take into account any conduct that did not give rise to the dismissal so that it does not become a debate about the employee's general conduct or attendance record, for example.

The Forum recommends that the draft should specify that the Tribunal has the power to reduce an award where, in advance of the Tribunal hearing, the employee has rejected an offer from the employer for the full amount of the award that they would receive if the Tribunal found the dismissal to be unfair. This may not be appropriate in all circumstances, such as when the employee is seeking re-employment.

The Forum also recommends that the circumstances leading to a reduced award should not be exhaustive as currently drafted, but that the Tribunal should also be able to take into account other just and equitable circumstances that merit a reduced award.

Re-employment

The Forum recommends that the Employment Tribunal should have the power, as proposed, to award re-employment (whether reinstatement or re-engagement), *as an alternative to a financial award*, where an employee has been found to have been unfairly dismissed.

The Forum recommends that the amendment should be clarified in that the Tribunal must take into account the evidence presented by both parties in its consideration of whether re-employment is "practicable".

The Forum recommends that where the Tribunal orders that an employee must be re-employed, the employee's continuity of employment should be preserved for the period between the dismissal and the order to re-employ.

The Forum recommends that the amendment should not give the Tribunal the power to compensate the employee for any financial losses during the period between the dismissal and the order to re-employ, until such a time as a review of the award making powers of the Tribunal can be undertaken.

CONSULTATION PROCESS

The Employment Forum consulted with the public during the period 27 February to 11 April 2008 by contacting all of those on the Forum's consultation database (approximately 140 individuals, organisations and associations). Some media publicity was undertaken in March. The Forum was pleased to receive 18 responses to this consultation

Responses were received from the following categories of respondent:

Employers	8
Trade unions (including employee/staff associations	3
Advisory bodies	2
Law firms	3
Others	2
TOTAL	**18**

RECOMMENDATIONS

REDUCED UNFAIR DISMISSAL AWARD

This consultation was not conducted in questionnaire form. The Forum has therefore inferred each response as being in favour or opposition to the proposal for reduced awards from the strength and content of each of the respondent's comments.

Yes – 12 (3 Law firms, 6 employers, 2 others, 1 advisory body)

No – 2 (2 unions)

No clear yes or no – 4 (2 employers, 1 advisory body, 1 union – in most cases these respondents had commented only on the proposal for re-employment)

Responses

Most of the respondents, not only employers, were overwhelmingly in favour of giving the Tribunal the power to reduce an unfair dismissal award in certain circumstances. However, the Forum noted that two of the unions were opposed to this proposal (the third union did not comment on reduced awards).

One trade union had *"concerns regarding the issue of whether the tribunal should be given the power to reduce the level of an award (by up to 100%) where the employee is found to have contributed towards their dismissal. It is important to clarify how the Tribunal will arrive at such a reduction. We feel that the standard amount is much clearer and less controversial - deciding percentage costs and splits will delay and attract appeal after appeal. This causes more suffering on the individual who had brought the case to trial/tribunal. At the end of the day the employer tends to be funded or covered by their insurance policies when they make payments so there is no great loss to them."*

The Forum is of the view that in fact Tribunal hearings can be a considerable expense for employers, both in terms of manpower and legal defence costs, and can also create difficulties with future insurance policies (if indeed employers have such policies).

The second trade union considered the amendment from a UK perspective noting that the drafting of this amendment is different from provisions in the UK. The union commented that the drafting would allow an employer to raise issues of conduct unrelated to the dismissal in that Article 77F(5) refers to conduct of the complainant before dismissal being taken into account, not only conduct which contributed to the dismissal. The Forum notes the point and would recommend that the draftsman's advice is sought.

That trade union also suggested that the amendment should ensure that certain types of alleged misconduct relating to trade union activities must not be regarded as contributory conduct, as in the UK. The Forum noted that if an employer dismisses an employee on the grounds of specified trade union related activities (as well as other reasons, such as asserting a statutory right), the dismissal will be automatically unfair. The Forum considers it implausible that the Tribunal would allow that same conduct to be considered as contributory conduct for the purpose of reducing the award. The Forum does not consider it necessary to follow the full UK route whereby trade union related circumstances are specifically excluded.

The Forum noted the comments of other respondents who were in favour of introducing the power to reduce an unfair dismissal award, including one employer who commented that the proposal is reasonable as it is in line with UK best practice and makes employees more answerable for their actions.

A second employer noted that it was always the intention that the Tribunal should have this power and *"the reason for the large number of claims we are currently seeing is partially due to a fixed level of settlement and I believe that if the amendment should be rapidly accepted we would see a greater number*

of pre-tribunal settlements and quite possibly a lower number of claims in the first place."

A Law firm noted that the Tribunal has commented on the lack of this power; in the case of Sousa v Hotel Revere Limited (2006) in which the Tribunal stated that it was *"unable to use Mrs Sousa's contributory fault as a means of reducing her award."*

An advisory body said that this amendment *"would be welcomed by employers who were found to have dismissed an employee unfairly on a procedural technicality, in circumstances where the employee had contributed to his dismissal."*

An employer considered that *"this is clearly a necessary change. I would argue that it is rarely the case that when the employee/employer relationship breaks down one or the other is entirely at fault and hence the Tribunal must take the actions of both parties into account."*

Another employer noted that "It has been shown in recent tribunal cases that employees have been unfairly dismissed on procedural grounds only and clearly contributed to their dismissal. For a fair process for both parties I think this is a necessary amendment."

Grounds for reducing an award

A Law firm suggested that *"the proposed provision of an exhaustive list of permissible grounds for reducing compensatory awards is unnecessarily restrictive and, therefore, potentially unjust to employers. Such an approach could operate to preclude the reduction of a compensatory award in circumstances no less equitable and unjust than those legislated for simply because the Law did not envisage such circumstances."*

The Forum is aware that this suggestion differs from the UK legislation, which provides that reductions may only be made in the specified circumstances, however the Forum notes that Guernsey's Employment Protection (Guernsey) (Amendment) Law, 2005, provides that the Employment and Discrimination Tribunal may take into account whether an offer of reinstatement has been unreasonably refused and any other circumstances in which the Tribunal considers that it would be just and equitable to reduce the award of compensation, to whatever extent it sees fit.

Another Law firm suggested that the amendment should give the Tribunal the power to consider reducing an award where the employee has rejected a without prejudice offer from the employer for the full amount of the award that

they would receive if the Tribunal found the dismissal to be unfair. The Forum considers that this could reduce vexatious claims from employees and reduce the impact on the employer in the absence of an award for costs, and therefore recommends that the draft is amended accordingly.

RE-EMPLOYMENT (Reinstatement and Re-engagement)

Noting that this consultation was not provided in questionnaire form, the Forum has again inferred each response as being in favour or opposition to the proposal for re-employment from the strength and content of each of the respondent's comments.

Yes – 6 (2 others, 1 Law firm, 3 unions)

No - 8 (1 Law firm, 7 employers)

No clear yes or no – 4 (2 advisory bodies, 1 employer, 1 Law firm) Where it was unclear whether a respondent supported or opposed the proposal, most had noted that re-employment would be likely to be possible only in exceptional circumstances, and/or that further consideration is necessary in regard to the circumstances of re-employment, and potential difficulties relating to the practicalities and enforcement of the amendment.

Responses

The Forum was not surprised to note that employer respondents objected more strongly than other categories of respondent to the proposed power for the Tribunal to order the re-employment of unfairly dismissed employees.

Most of the employers commented similarly; that the proposal is likely to be unworkable in most cases. One employer was concerned, particularly for small businesses, about the detrimental effect on the business and other staff, particularly if the employee who was dismissed held a position of seniority and trust, and also commented that there are likely to be many alternative job opportunities in Jersey's employment market.

Another employer said, *"I find it incredulous that the Tribunal could consider that once the relationship has broken, the issue has failed to be resolved through mediation, a Tribunal case has been heard and verdict reached, that an order by them for re-instatement and hence mending of the relationship is going to occur. I doubt such an order will rarely, if ever, resolve a situation and it will only lead to future problems. If the employer is at fault and the Tribunal has found this to be so, then current arrangements provide appropriate*

awards to the employee. Anything further is not only unnecessary but possibly destructive."

A third employer referred to a previous recommendation of the Forum which *"indicated that where such a facility was available that it was rarely used, due to its impracticality, as a person who has been dismissed, fairly or unfairly and their respective employer are highly unlikely to be able to re-engage the important psychological contracts that needs to be in place for a successful working relationship."*

That employer also commented that the only reason for including this power would be to increase the potential penalty against employers. Two Law firms also commented with some concern that this power effectively doubles the award making powers of the Tribunal. In its 2007 recommendation to the Minister, the Forum had recommended that the additional award should be a maximum of 26 weeks. The intention was to provide a significant deterrent against refusing to re-employ, but that the potential value of the award should not be greater than the existing unfair dismissal award.

An advisory body commented that *"only in very exceptional circumstances could this be perceived as a sensible outcome… following dismissal, the trust and confidence necessary between employer and employee would have been destroyed, making re-engagement a totally unrealistic option… in large, multi-site employers, re-engagement at another location may be more realistic."*

The Forum considered that as the Island's largest employer, the public sector will, in general, be more able to cope with re-employment than private sector businesses. As the main employer of specialist positions, such as fire fighters and teachers, the States of Jersey might be an employee's only prospect for re-employment in a similar job. However, there are likely to be many positions in both sectors where the employee would be unable to find alternative employment due to the specialised nature of the work. The Forum noted that in large private sector businesses, there may be opportunities equivalent to the public sector for that business to re-engage the person in a different department or section.

One trade union welcomed the amendment and wished to *"stress the importance of this being a meaningful remedy."*

A second trade union also supported the option for re-employment, commenting that *"this should be supported on the grounds that Jersey does have a restricted job market making this provision very relevant. We agree with the distinction made between re-instatement and re-engagement and that Tribunal should take into account the wishes of the employee, the practicality*

and whether or not it is just before deciding whether or not to order re-employment.."

Detailed comments were provided by the third trade union, including the following suggestions;

1. There may be opportunities for legal challenge in regard to the drafting of the Tribunals' duty to consider the wishes of the claimant in awards for re-employment. The Forum does not consider that simply drafting legislation differently than the UK may leave it open to challenge, however would suggest that for assurance, the view of the draftsman is sought.

2. Up to 26 weeks as an additional award is not sufficient compared to the UK award of a minimum of 26 weeks and up to 52 weeks. The Forum notes that the UK award is capped at £330 per week, whereas no cap is proposed on a week's pay in Jersey.

3. There should be an option to use interim relief *"whereby the efficacy of re-employment is significantly enhanced by an early direction pending a substantive decision."* The Forum considers that the practicalities are likely to make this option impossible due to the potentially huge risks for employers and possible detriment to other employees. Until it has been decided by the Tribunal whether a dismissal was unfair, it is likely to create an inflammatory situation and places an immediate penalty on the employer for what could have been an entirely fair dismissal with contributory conduct.

Notification of intention to seek re-employment

As currently drafted, the amendment provides that the employment of a permanent replacement does not have to be taken into account by the Tribunal in deciding whether it is practicable for the employer to comply with a direction to re-employ, unless the employer can show that it was not practicable for the work to be done without engaging a permanent replacement, or, that after a reasonable period without having heard that the complainant wished to be re-employed, it was no longer reasonable for the employer to arrange for the work to be done other than by a permanent replacement. Timing is therefore a factor in regard to the hearing of Tribunal claims.

Three employer respondents noted the potential difficulties of a delay between the dismissal and the Tribunal hearing. It is therefore essential that the employer is made aware at the earliest opportunity whether the former

employee is seeking re-employment instead of financial compensation, ideally on the claimant's Tribunal application form (the JET1). This gives the employer the opportunity not to take on a permanent replacement.

The Forum would agree, as stated in its previous recommendation to the Minister on this proposal, that an employee's intention to request re-employment as an alternative to financial compensation should be notified on the JET1. This is not required in the drafting of the amendment and is a matter of Tribunal procedure. That notification would not be absolute, as the employee must have the opportunity to withdraw that intention after evidence has been heard, as the relationship between the two parties may break down further than either party had anticipated.

Continuity of employment

An employer questioned whether a Tribunal direction for re-employment would require the employee's continuity of service to be preserved. Where **reinstatement** is ordered, the draft amendment provides that the employee must be treated in all respects as if the dismissal had not taken place and therefore continuity of employment must be preserved. However, where **re-engagement** is ordered, the draft amendment states that the Tribunal must specify the new terms of employment, including any rights and privileges which must be restored, but does not specifically state that continuity of employment must be preserved. The Forum recommends that continuity of employment should be preserved in both cases and that the period of absence between dismissal and re-engagement should count as service.

Re-employment in other jurisdictions

A Law firm commented that there is little justification for introducing the power to re-employ; *"In practice (in any jurisdiction) few reinstatement or re-engagement orders are made. Those which are made are often where the employer is a large organisation such that it is practical to order the employee to return. Where, as is often the case, the employment relationship is permanently damaged an order will not be made."*

The Forum noted that in a study of 25 jurisdictions, the option to award to re-employment was available in 23 of them. In 6 of these jurisdictions, reinstatement is quoted as being awarded frequently (including Greece, Poland and Norway) and in 5 jurisdictions rarely (including Germany, Austria and Belgium). The Forum noted various different conditions that apply to the possibility of an award for reinstatement in those other jurisdictions, including the grounds on which an employer may refuse to re-employ and

circumstances where it is obligatory to re-employ (e.g. dismissals on the basis of discrimination).[1]

In contrast to respondents who argued that the option for re-employment is rarely used in other jurisdictions and should therefore not be introduced in Jersey, one trade union commented that *"justice and the benefits to society should demand that a more effective law is introduced in Jersey",* implying that the option should not only be introduced, but should be used more often, or more effectively in Jersey.

An "other" respondent was in full agreement with the option for the Tribunal to consider re-employment as an alternative to financial compensation and commented that such an option should be available in Jersey's more restricted employment market.

The Forum understands that in reality, many Tribunal complainants already have a new job by the time of their hearing, however appreciates that it may not always be the case that Jersey has a buoyant employment situation. The Forum considers that reinstatement may be requested more frequently in Jersey than in other jurisdictions given the limited breadth of the employment market. An employee who works in a narrow or specialised industry may be more likely to submit a Tribunal claim in order to seek re-employment, particularly if they do not have long service with their former employer and therefore have little to gain by pursuing an unfair dismissal claim for a financial award (given that the unfair dismissal compensation scale is based on length of service).

"Practicability" of re-employment

A number of the employer respondents questioned what evidence the Tribunal would take into account in making its decision and to what extent the employer would have an opportunity to make a case against re-employment.

A Law firm, suggested that in addition to the matters under article 77D(2), an employer should have the right to be heard on the practicality of re-employment and the Tribunal should be required to consider this in exercising its discretion.

The Forum understands the concerns of employers, in particular regarding the difficult circumstances in which they may be faced if an inappropriate order for re-employment is made. However the Forum understands from the detail of the responses, that with greater clarity regarding the evidence and

[1] From CESifo Research Network (run by the Center for Economic Studies of the University of Munich)

circumstances that may be taken into account by the Tribunal, the provision may become more acceptable to employers.

Having considered various provisions in other jurisdictions, the Forum considered the potential benefits of detailing the particulars that the Tribunal must take into consideration when considering whether it is "practicable" for an employee to be re-employed, such as, the employer's circumstances, the relationship between the employer and employee, the relationship between the employee and other concerned parties (e.g. co-workers) and the circumstances of (and reasons for) the dismissal.

The Forum also considered whether it would be helpful to specify situations in which re-employment may not be awarded by the Tribunal, for example; if either party can demonstrate that there is insufficient trust on which to base the employment relationship, or where the employee materially contributed to their dismissal.

The Forum considers however that this would be over prescriptive and does not wish to reduce the Tribunal's options: The danger of including a list is that the Tribunal might only take into account the circumstances listed, rather than considering the wider circumstances of the case. Any list of matters for the Tribunal to consider would have to be non-exhaustive so as not to preclude the presentation of arguments that are no less valid simply because the Law did not envisage those circumstances.

The Forum noted that article 77D(2) already provides that the Tribunal must take into account whether it is "practicable" for the employer to comply with a direction for re-employment and that UK Tribunals consider a wide range of factors when deciding whether re-employment is "practicable", taking a broad common sense view of the circumstances of each case based on the evidence, for example, where relationships in the work place have been seriously damaged, or the employee was partly to blame for the dismissal.

The Forum recommends that, for the purpose of clarity, the amendment should specify that the Tribunal must take into account the evidence presented by both parties in regard to the practicability of re-employment.

Compensation awards

One employer commented that employers may be required to pay large amounts of compensation to employees for loss of earnings if a Tribunal case is significantly delayed.

The Forum noted that the draft amendment provides that employees who are awarded re-employment instead of financial compensation are entitled to compensation for any loss of earnings during the period between the dismissal and the date of re-employment, whether or not the employer complies with the Tribunal's order to re-employ the person.

The Forum considers that it is appropriate for an employee to be compensated for loss of salary, however recommends that the award making powers of the Tribunal should be reviewed generally before this power is introduced only in the context of re-employment. As currently drafted, the Employment (Awards) Order 2005 provides that the award for unfair dismissal is a fixed award based on salary and length of service. There is no option for an employee to seek additional compensation for financial losses following an unfair dismissal (as in the UK); only contractual amounts owed up to the date of dismissal.

The amendment as drafted would introduce compensation for financial losses in relation to awards for re-employment, but not where there has been an unfair dismissal without a request for re-employment. The Forum is concerned that this will create an incentive for employees to claim to be seeking re-employment as a matter of course in order to increase their potential award and wishes to highlight the potential for a reduced number of settlements.

The Forum recommends that this amendment should be introduced with the power for the Tribunal to make an additional award of up to 26 weeks pay where an employer has failed to comply with a direction for re-employment, but that the Tribunal should not at this stage have the additional power to award for financial losses for the period between dismissal and the order for re-employment.

The Forum recommends that if compensation for financial losses is to be introduced in future, a review of how these compensatory sums are awarded in the UK should first be undertaken.

Although beyond the scope of this recommendation, that review may also consider the views of one Law firm which advocated that instead of the existing fixed scale award, employee's should be compensated for their actual losses (subject to an appropriate cap) in both the unfair dismissal award and award for failure to comply with an order to re-employ. The respondent considers that the existing fixed scale award provides an incentive for longer serving employees to bring claims, makes sensible settlements difficult, and is likely to be discriminatory on the basis of age and sex.

OTHER COMMENTS

Some respondents provided other comments relating to issues that were beyond the Forum's remit in consulting upon this draft amendment:

1. A Law firm said that there should be an independent review of the Employment Tribunal before the power to reinstate an unfairly dismissed employee is introduced on the basis that the Tribunal has set an impossibly high procedural threshold for employers and no option for costs to be recovered by the employer.

2. That Law firm also stated that the Employment Forum must provide details of any Tribunal cases in which reinstatement or re-engagement may have been felt to be appropriate.

3. An employer stated that the Tribunal should be able to consider an award for costs against employees to penalise employees for pursuing malicious claims and causing their employer to incur legal fees defending the claim.

The Forum notes these three points for information only as they are beyond the scope of the Forum's recommendation on the draft Employment (Amendment No. 4) (Jersey) Law 200-.