

Jersey Employment Forum consultation exercise on the levels of compensation awards for breaches of the Employment and Discrimination Laws

Introduction

The Minister for Social Security has directed the Employment Forum to conduct a consultation exercise to review the current levels of compensation awards available to the Employment and Discrimination Tribunal.

Compensation awards can be made in cases of a breach of an employee's statutory rights; unfair dismissal; and financial loss and hurt and distress in employment-related discrimination claims.

The Minister's direction includes a request that the Forum consider whether the current levels of awards act as an adequate deterrent to employers who fail to ensure their statutory responsibilities towards their employees and, if not, what level and type of sanction should be available in such cases.

The Forum has now moved to the public engagement part of the consultation and welcomes comments on this consultation exercise. Comments may be sent by email to the Secretary to the Forum at E.Forum@gov.je

The Forum will also invite representations from interested organisations during the course of the exercise. The consultation exercise will conclude on 12 January 2024, following which a report and recommendations will be made to the Minister for Social Security.

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Extract from Forum report on Zero Hour Contracts and employment protections

In its recent review of employment protections more generally¹, the Forum made the following comments in relation to the compensation regime for breaches of the Employment and Discrimination Laws.

"The Forum recognises that the levels of compensation provided for in the Employment and Discrimination Laws were set some considerable time ago. Anecdotal evidence suggests that these levels are now inadequate. As a result, the Forum recommends that a consultation be undertaken specifically to canvass views on amending the ranges and increasing the maxima of awards that may be made by the Tribunal.

(i) A breach of an employee's statutory rights

Consideration should be given to updating the current criteria relating to the ability of the Tribunal to make a financial award to an employee for a breach of certain statutory rights – for example, non-provision of a statement of terms and conditions, pay slips or the right not to suffer detriment. The current maximum of 4 weeks' pay appears not to be a sufficient

¹ Report R.70/2023: *The operation and regulation of Zero Hour Contracts in Jersey, together with a review of specific employment protections, P. 14 et seq.*

deterrent to prevent non-compliance by an employer with an employee's statutory rights. The current maximum should be reviewed as part of a separate consultation exercise.

(ii) Compensation for unfair dismissal

The Employment (Awards)(Jersey) Order 2009 provides for a scale of compensation for findings of unfair dismissal, which currently ranges from up to 4 weeks' pay to 26 weeks' pay depending on the length of service. The Forum recommends that the current lower end of the scale ranges be reviewed as part of a separate consultation exercise, with a view to increasing the starting point of the number of weeks' pay available as compensation for a finding of unfair dismissal.

Recompense for contractual loss (for example, pay in lieu of notice) is a maximum of £10,000, plus certain other amounts as prescribed in the Order, leading to an overall aggregate. The Forum recommends that, as part of a consultation exercise, views should be sought on increasing that element of the award, to bring it in line with the Petty Debts Court, which has jurisdiction to deal with claims with a value of up to £30,000.

(iii) Compensation for financial loss and hurt and distress in employment-related discrimination cases

While not an area that falls within the remit of the Forum, it notes that the Discrimination (Jersey) Law provides for compensation to be awarded by the Tribunal for financial loss and hurt and distress in employment-related complaints where a breach of a complainant's rights has been found (Article 42(1)(b) of the Discrimination Law). Currently, the maximum amount allowable is £10,000, of which £5,000 may be awarded for hurt or distress, for each complaint of discrimination in any one case.

This figure may not be of a sufficient level to encourage employers to take discrimination in the workplace sufficiently seriously. The Forum recommends that views be sought on increasing the maximum compensation amount, perhaps (again) by reference to the jurisdictional limit of the Petty Debts Court."

The current compensation award position in Jersey

The current position in respect of the range of compensation awards in Jersey is summarised below:

- For a breach of certain of an employee's statutory rights under the Employment (Jersey) Law 2003, the current maximum award is **4 weeks' pay**.
- For a claim for unfair dismissal, the statutory award is based on a sliding scale dependent upon on the claimant's length of service and is subject to a statutory maximum of **26 weeks' pay**.
- For a claim in employment-related discrimination cases, the maximum total award is **£10,000** (of which no more than £10,000 can be awarded for financial loss and £5,000 for hurt and distress).
- For all other claims over which the Tribunal has jurisdiction, such as contractual claims, the maximum award is **£10,000**.

Compensation awards in other jurisdictions

1) A breach of an employee's statutory rights

(i) The United Kingdom

- Employees should be given written terms of employment within two months of their employment commencing
- If an employer fails to provide terms, then the employee can bring a claim under Section 38 of the Employment Act 2002. The claim will only succeed if the employee is successful in another claim, such as unfair dismissal and the contract had not been issued before the claim had commenced
- The award for such claims is either two or four weeks' pay, depending on the severity of the failure to provide terms. If the contract was subsequently issued after the claim was submitted, the award will be capped at two weeks
- For a failure to provide payslips, Section 12(4) of the Employment Rights Act 1996 allows the Tribunal, in cases where deductions have been made from an employee's wage (where there is no payslip), to order the employer to repay to the employee a sum of up to the total amount of unnotified deductions
- For a breach of an employee's statutory rights, which has one or more aggravating features, an Employment Tribunal can award from a minimum of £100 to a maximum of £5,000 for the aggravating offence(s). This is designed to encourage employers to take steps to ensure their obligations to treat staff fairly and reduce deliberate and repeated breaches of the law

(ii) Ireland

- Failure to provide written terms of employment within two months can be punished by an award of up to 4 weeks' remuneration by way of compensation
- In relation to payment of wages, compensation of the net amount of the wages which would have been paid the previous week prior to the deduction/non-payment, or twice the net amount of wages that would have been paid to the employee in the week immediately preceding the deduction or payment

(iii) Isle of Man

- In relation to a failure to provide a written statement, where a statement is not issued or updated or is incomplete, the Employment Tribunal may, on receiving a complaint, award an employee up to 4 weeks' pay depending on the circumstances of the particular case
- In relation to a failure to provide wage slips, where no statement is issued the Employment Tribunal may award an employee up to 4 weeks' pay depending on the circumstances of the particular case
- In respect of unlawful deductions from wages, where an employer makes an unlawful deduction, the Employment Tribunal will order repayment of the amount of money that was unlawfully deducted, and may make an additional award of up to 4 weeks' pay to a worker depending on the circumstances of the particular case

(iv) Guernsey

- In respect of a failure to pay the minimum wage, the Tribunal can award the difference between the minimum wage and what has been paid to the employee during the period of underpayment
- In a complaint of a failure to allow access to records for a minimum wage employee, the Tribunal can award 80 times the minimum wage per offence
- The main claims which the Guernsey Tribunal can hear are claims for unfair dismissal, discrimination and breach of Guernsey's minimum wage regime. The Tribunal does not have jurisdiction in respect of contractual matters arising from an employment contract. Those matters are reserved to the Magistrate's Court or the Royal Court, depending on their value

2) Compensation for unfair dismissal

(i) The United Kingdom

- There are two elements to the UK compensation regime. The basic award is calculated by reference to age, full years of service and gross weekly wage. The maximum basic award for a claim of ordinary unfair dismissal is presently £19,290
- The compensatory award is calculated by reference to net loss of earnings and loss of benefits such as car allowance, pension and so on. The employee must have suffered a genuine loss and is required to show that they have done all they can to keep losses to a minimum.
- The maximum compensatory award for an ordinary unfair dismissal claim is presently £105,707 or one year's salary, whichever is lower

(i) Ireland

- The employee can receive up to two years' pay if the dismissal is held to be unfair
- The maximum compensation is two years' salary, which increases to a maximum of five years' pay if an employee is dismissed for making a protected disclosure
- The calculation of the award is based on the financial loss incurred by the employee as a result of the dismissal

(ii) Isle of Man

- The compensation regime in the Isle of Man, like the United Kingdom, is made up of two main elements (there is a third optional element)
- a basic award of one week's gross pay, capped at a maximum of £540 a week, for each completed year for which the employee has been continuously employed, up to the calculation date. The maximum number of years that can be taken into account is 26
- a compensatory award based on the employee's loss, including any expenses reasonably incurred in consequence of the dismissal and any other benefits including pensions that might reasonably have been expected but for the dismissal, The award must not exceed £56,000, except in health and safety or whistleblowing cases or a case where an employer refuses an order of re-employment made by the Tribunal
- a compensation for injury to feelings award, if the Tribunal thinks it just and equitable, up to a fixed maximum of £5,000

(iii) Guernsey

- If an Employment Tribunal finds in favour of the employee in a claim for unfair dismissal, the only remedy available is a cash award. The award is a maximum of six months' pay, where "pay" is defined as including any pecuniary benefits paid to the employee in cash under their employment contract

(3) Compensation for financial loss and hurt and distress in employment-related discrimination cases

(i) The United Kingdom

- Compensation claims in the UK are uncapped
- The first element is injury to feelings. An award for injury to feelings is to compensate for the hurt and distress an employee has suffered as a result of the discrimination. Financial awards for injury to feelings are determined based on what are called 'Vento bands'

There are three bands:

- Lower: £1,100 to £11,200
- Middle: £11,200 to £33,700
- Upper: £33,700 to £56,200
- In the most exceptional circumstances: more than £56,200
- Where a case should be valued will depend on a number of factors, including whether the discrimination was deliberate or accidental; how serious the discrimination was; how long it lasted; how the employer behaved after the discrimination; the effect on the employee; and whether, for example, the employee needed to see a GP as a result of the discrimination.
- The lower band is for 'less serious cases' where the act of discrimination is a one-off or isolated occurrence. UK case law suggests that discrimination is likely to sit in this band where it did not happen in a public place or in the presence of the employee
- The middle band applies to serious cases that do not fall under the upper band
- The upper band applies to the most serious cases, where, for example, there has been a lengthy campaign of deliberate discrimination and/or harassment. Where a one-off act of discrimination is particularly humiliating or serious and the victim suffers serious consequences as a result, an award in the higher band may be justified
- In the most exceptional cases (and this will usually be very rare) there can be an award of over £56,200
- The Employment Tribunal is also able to award aggravated damages in particularly egregious cases

(ii) Ireland

- In addition to other remedies available, an adjudicator can make a financial award for compensation to an employee of up to 2 years' pay or up to €40,000, whichever is the greater, for the effects of discrimination or harassment/sexual harassment or victimisation suffered by the employee

(iii) Isle of Man

- In terms of compensation for employment-related discrimination, the maximum amount that can be awarded is £56,000, plus a maximum of £5,000 for injury to feelings.

- Unlike in the UK the amount of compensation is capped because of concern about the level of some payouts in the UK in discrimination cases.
- The IoM conclusion on the consultation exercise on its Equality Act said:

“Under the Bill the maximum amount that may be awarded as compensation in cases of discrimination will be limited to the amount set by the Department of Economic Development under section 144 of the Employment Act 2006. This amount is currently £56,000. In the UK, awards of compensation are not subject to a statutory maximum because of the requirement to follow European Union case law which decided that capping compensation meant that victims of discrimination did not have an “effective remedy”.

(iv) Guernsey

- The Prevention of Discrimination Ordinance came into force on 1 October 2023
- The maximum award of compensation in respect of employment-related discrimination claims is up to six months' pay, or where the employee is paid on a weekly basis, up to one week's pay multiplied by 26, and
- an amount payable for injury to feelings, hurt or distress calculated by the Employment Tribunal in accordance with regulations prescribed by the Committee, up to a maximum of £10,000.

Options for change

As part of its considerations of these issues, the Forum wishes to obtain respondents' views on the appropriate levels at which each of these awards might be set in future. In each case, the *status quo* is one option, but the Forum has also identified potential revised award levels. These are set out below.

In addition, the Forum would be grateful to hear from respondents who may have views about other options not mentioned in this paper.

1) For a breach of most statutory rights

In most of the comparator jurisdictions compensation is worked out in weeks' pay, rather than a fixed monetary sum. Between two and four weeks appears to be the norm in other jurisdictions as well.

One option is to raise the ceiling from 4 to 8 weeks' pay. In addition, the 4 weeks' pay could be the floor, so that awards can be made between the minimum (4 weeks) and maximum (8 weeks).

An alternative would be to retain the ceiling at 4 weeks but, as in UK legislation, provide in addition for the award of monetary compensation for aggravating features of a breach of contract (in the UK the maximum is currently set at £5,000). In terms of an incentive for employers to behave properly, respondents might consider this a helpful tool.

This option assumes that the Tribunal would take advantage of such an aggravating provision, but in reality it might be used extremely sparingly. The vast majority of claims for breach of contract in Jersey relate to non-provision of written terms or wage slips. These might be considered “ordinary” claims rather than “aggravated” ones and remain subject overwhelmingly to compensation expressed in the form of X weeks’ pay.

2) Findings of unfair dismissal

Based on the current provisions of employment legislation in Jersey, one option for change would be to vary the current scale of compensation (based on length of service) and the current maximum of 26 weeks’ pay (in terms of a gross weekly wage figure) - the week’s gross pay reflecting what the employee was being paid immediately prior to their dismissal. Another option would be to replace the current award system in respect of findings of unfair dismissal with a mix of basic and compensatory awards, as is the case in the UK and other jurisdictions.

A basic award calculation could either be based on the length of service, or an entitlement to up to X weeks’ or years’ gross pay. A compensatory award might be based on an employee’s actual net loss, capped at a particular figure.

The Forum is interested to understand whether respondents consider that the remedies available to an employee who has been unfairly dismissed should be updated. In the case of a Tribunal direction for reinstatement or re-engagement under Article 77 of the Employment Law, a failure by an employer to comply fully with a direction of the Tribunal enables the Tribunal to make a compensation award (the level of which is prescribed by Ministerial Order) of up to 26 weeks’ pay.

If the employee is not reinstated or re-engaged following a Tribunal direction, then the employer is currently liable to pay an award of compensation for unfair dismissal AND an additional award of compensation of up to 26 weeks’ pay.

The same remedies exist for reservists whose rights the Tribunal decides have been infringed, under Article 55Y of the Law.

The Forum would be grateful for views as to whether these aspects of remedies for unfair dismissal should be reviewed.

3) Compensation awards for financial loss and for hurt and distress in employment-related discrimination cases

These compensation awards are typically expressed either in terms of weeks’ or months’ pay (for the financial loss element) and a monetary figure (for the hurt and distress caused). There are, however, examples where the financial loss element is expressed as a single monetary figure (for example, the Isle of Man).

It is important to note that, in the UK, awards for financial loss are uncapped. This has led the Isle of Man to impose an upper limit out of concern at the levels of some of the UK awards.

The Forum invites views as to whether, in a jurisdiction the size of Jersey’s, it is sensible to follow a similar path to the Isle of Man or Guernsey - in other words, to put a cap on the amount that can be awarded for financial loss.

In terms of compensation awards in this category, one option would be to retain the monetary element in awards for both financial loss and for hurt and distress, as at present, but increase them generally. So, for example, the compensation for financial loss might rise from £10,000 to a maximum of £30,000, and the amount for hurt and distress from £5,000 to a maximum of £10,000, the overall award not to exceed £30,000.

In a different option, the financial loss might be expressed in terms of months' pay, perhaps somewhere between Guernsey's figure of six months' pay and Ireland's two years' pay, and the legislation might provide an appropriate cap on that element. So, a solution for Jersey might be a maximum award of 12 months' pay, or £30,000, whichever is the greater sum, for financial loss and a sum of up to £10,000 for hurt and distress.

Respondents may wish to consider whether there is a case for the Tribunal, in addition, to be able to award a further sum in respect of "aggravating features" (as in the UK) in cases of employment-related discrimination claims.

4) The £10,000 limit

The Employment Tribunal is restricted to a maximum sum of £10,000 when considering claims for contractual breaches of an employee's rights, for example, notice pay or bonus claims. The Forum would be grateful for respondents' views on whether raising this maximum amount would be justified.

The Forum notes that the jurisdiction of the Petty Debts Court to hear claims is currently £30,000.

Conclusion

The options for change set out above are not exhaustive, nor are they meant to be. The Forum encourages contributions from respondents that cover a range of views. This consultation exercise will run until 12 January 2024.