

**RECOMMENDATION -
THERAPEUTIC WORK AND THE
EMPLOYMENT LAW**



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PURPOSE OF RECOMMENDATION

This recommendation is the outcome of the Employment Forum's consultation on the effect of the employment legislation on therapeutic work in Jersey. The purpose is to make a recommendation to the Social Security Minister as to whether any legislative change is required to ensure that therapeutic workers are not disadvantaged by the operation of the Employment (Jersey) Law 2003, and in particular the minimum wage.

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If you wish to receive an electronic copy of this recommendation, please contact the Secretary, or download it from the Forum's webpage -

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

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SECTION 1 - BACKGROUND

In October 2007, the States of Jersey adopted Deputy Ian Gorst's Proposition (P.141/2007) requesting the Minister for Social Security to take the following action:

1. Use his powers under Article 19 and 20 of the Employment (Jersey) Law 2003 to direct the Employment Forum to consult on whether the operation of the Employment (Jersey) Law 2003 prejudices Therapeutic Work Schemes, particularly in regard to the minimum wage; and
2. Bring forward for approval any appropriate amendments to the Employment Law based on his consideration of the Employment Forum's recommendations.

The Proposition acknowledged that this is a highly complex area which must balance concern for the protection of vulnerable workers against the particular requirements of individual therapeutic work schemes. It referred to concerns from the providers of therapeutic work schemes that the employment status of therapeutic workers is unclear.

SECTION 2 - THE SCHEMES

The Forum understands that the term 'therapeutic work' is used to describe a number of different arrangements whereby people who have difficulty functioning in the labour market are given the opportunity to undertake some form of work-like activity, for which they may receive payment, often whilst in receipt of benefits. The Employment Law has been viewed as potentially problematic for therapeutic work schemes because the basic criterion for determining whether anyone is entitled to the minimum wage and the protection of the Employment Law is simply - is he or she an employee?

A code of practice was developed with the intention of assisting employers and therapeutic work scheme providers to determine whether a therapeutic worker is a 'client' (who is exempt from the minimum wage provisions) or an 'employee' (who is entitled to the minimum wage or trainee rate, as well as the other protections of the Employment (Jersey) Law 2003). The intention of the code was 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.

There are a number of agencies in Jersey who are able to help and support disabled people find and maintain employment. These services are based within Social Security, Health and Social Services and the Voluntary sector. Each service has its own selection criteria and sometimes works with a specialist client group.

In order to make access easier for disabled people the key agencies have formed a partnership called Skills Solutions.

Skills Solutions

Skills solutions is a centralised supported employment service, set up to provide training and employment opportunities for disabled people, including people with mental health problems, neurological conditions, brain injuries learning disabilities and physical and sensory impairments.

Jersey Employment Trust

The Jersey Employment Trust (JET) is a cross-departmental initiative intended to develop vocational services for people with disabilities and special needs. The aim of the Trust is to offer training, skills development and support to promote the transition of individuals into open employment. The Trust's stated aim is to work with those who have a reasonable chance of employment.

Since 2005, the Trust has become more proactive in supporting people into open employment. Twenty four people with a learning disability and two people with autism have been supported into open employment.

In addition, 42 people with a learning disability and eight people with autism are either employed or undertaking employment training in the Trust's business units; garden maintenance, nursery, cycles, cleaning, woodwork, administration and catering.

Interwork - Le Geyt

Le Geyt Centre is an adult training centre for people with learning difficulties which is one of the many projects supported by Jersey Mencap. The intention of the Interwork scheme at Le Geyt is to improve training and employment opportunities and to prepare adults with learning disabilities to get into the workplace.

Education programmes are organised to answer the individual needs of adults attending the Centre; to enable people to choose from the work, training, leisure, recreational and educational opportunities offered by Le Geyt Centre and Highlands College and to provide the support necessary for them to take up these opportunities.

Les Amis

Les Amis is a charity associated with Jersey Mencap. Its main objective is to offer care and support in residential settings to adults with learning difficulties. Residents are helped to gain the necessary skills to participate and contribute to their local community as equal and valued members.

Of the 78 residents of Les Amis, many are not able to work, however some work in open employment, including supermarket, courier, and fulfilment work. Currently, five residents are in full time open employment, four have part time open employment and three undertake sheltered employment.

Workwise

Workwise is part of the Work Zone at Social Security. The aim of Workwise is to help people, of any age, who have a special employment need to find suitable employment. Workwise can also arrange training opportunities and offer advice about any aspect of getting a job.

More information about Skills Solutions, supported employment and therapeutic work schemes can be found on the website.

www.gov.je/SocialSecurity/Employment/Employment+Services/Special+Needs.htm

SECTION 3 - OTHER JURISDICTIONS

Supported Employment in Guernsey

Interwork Services is the local brand name for Guernsey's Health and Social Services Department's supported employment service. The service exists for referred individuals with a disability. Currently Interwork Services comprises of

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- **Supported Employment Scheme** – financial resource to enable placement in open employment.
- **Collings Road** – (Sheltered) workshop – mental health congregate setting.
- **Jamaica Hall** – (Sheltered) workshop – learning disability congregate setting.
- **Individualised support packages** to support into and maintain in employment. The Supported Employment Model is used and the European Supported Employment Quality Standards are currently being introduced.
- **GROW Ltd Service Level agreement** for sponsorship
- **CLEAN-it** – Supported employees in a type of social enterprise.

The Supported Employment Scheme supports people with disabilities to secure and maintain gainful, paid employment through a five stage process: engagement, vocational profiling, job finding, employer engagement and on/off job support. The scheme also offers advice in the workplace, support with training and developing skills, assessment of adjustments that may be required, and financial support where appropriate.

To provide a person with the chance to become employed in the open labour market, an allowance can be paid to an employer according to the ability of the Supported Employee and the progress made during the period of employment. The percentage is agreed between the Department and the employer. Many different industries participate, including growing, banking, hospitality and cleaning.

Subsidies usually begin at 50 percent of the going rate and employees are reviewed regularly. The aim of the Scheme is to vary the allowance paid as the Supported Employee becomes more competent in carrying out the required tasks.

Subsidies may be long term if necessary and levels of support vary for each client, some receiving very little support. There is a mixture of full and part time workers, employees usually working over 20 hours each week. There are more than 100 people in open employment under this scheme who have various disabilities, including physical disabilities and sensory and long term mental health problems.

Guernsey is currently in the process of developing Supported Employment Services on the basis that traditional sheltered workshops contribute little to the integration of people with a disability into ordinary working life; they socially exclude service users from the community. Current best practice is to “job coach” service users while in real work, by offering skilled support. Evidence clearly shows that this is the most effective way of enabling disabled people to gain real employment.

United Kingdom

WORKSTEP is managed by Jobcentre Plus in the UK and provides a wide range of supported work opportunities that meet the differing needs of disabled people and reflect the demand of the local labour market. Supported employees work in jobs in mainstream employment or in supported factories and businesses.

The aim of WORKSTEP is to move away from the typical wage subsidy model of previous years and focus on appropriate job support and development opportunities. The programme places emphasis on helping people to progress to unsupported employment where this is the right option for them. Longer term support continues to be available for those who need it and is a major element of the programme. WORKSTEP participants will have a written contract of employment and receive at least the national minimum wage.

Isle of Man

As noted in Deputy Gorst’s Proposition, the Isle of Man’s minimum wage legislation excludes some therapeutic workers from the minimum wage by making the following provisions in the 2001 Minimum Wage Regulations excluding from the minimum wage a worker who is;

“...participating in a scheme, designed to provide him with training, work experience or temporary work, or to assist him in seeking or obtaining work, which is a scheme provided to him under arrangements by the Government.”

SECTION 4 - CONSULTATION METHOD

Deputy Gorst's Proposition referred to concerns raised by various organisations and individuals, however it did not provide details of those concerns; the problems being experienced, or how widespread they may be amongst the varying therapeutic schemes and provisions that exist in Jersey.

The Forum noted that it had included questions in two previous minimum wage consultations asking respondents to indicate whether any problems were being experienced in regard to therapeutic work as a result of the employment legislation and the therapeutic work code of practice¹, as well as asking employers whether they provide therapeutic work opportunities and whether they had used the code of practice. Little response was received at that time and there was no evidence to suggest if and how the Law and the code of practice should be changed.

The previous Social Security Minister, Senator Routier, requested that the Employment Forum consider and consult upon the proposition and the Forum decided it would need to find out more information and to consider any available options, as well as meet with any individuals or representatives of therapeutic schemes to discuss the issues in more detail. In October 2007, the Forum asked Deputy Gorst to invite the relevant stakeholders to discuss directly with the Forum.

There was considerable delay in these stakeholders making contact with the Forum. However, three of the main stakeholders agreed to meet the Forum during November and December 2008. They were Sue Moore, Jersey Mencap; Jocelyn Butterworth, Jersey Employment Trust; and Carl Blackmore, Les Amis.

Very detailed and informative discussions ensued and the Forum appreciated that the issues of concern are wider than simply the employment legislation and minimum wage. A number of issues were raised which the Forum consider to be beyond its remit as set out by the Employment (Jersey) Law 2003, in particular the concern that there are insufficient opportunities for training, work experience, sheltered schemes and open employment for employees with disabilities.

During its latest minimum wage review (conducted in July and August 2008), the Forum invited those on its consultation database to indicate if they wished to be involved in consultation on the matter of therapeutic work and employment legislation. Only two respondents indicated an interest and they were invited to comment on this draft recommendation prior to its release. Comments were received from one respondent.

¹ www.jacs.org.je/content/39/index.html

SECTION 5 - RECOMMENDATIONS

Option 1 – Therapeutic work exemption from the Minimum Wage

The Forum understands that when the Employment Law was first introduced, there were calls for therapeutic workers to be exempt from the minimum wage. It is likely that these were prompted initially by concerns that the budgets of organisations providing therapeutic work schemes would not extend to paying clients the minimum wage.

The Forum considers that it is unlikely to be appropriate to simply exclude all people who are being provided with training or work seeking assistance under a government provided scheme, as in the Isle of Man for example. It is anticipated that more detailed principles would be required to support an exemption, for example; the Social Security Minister would be required to approve each individual (or each scheme in some cases) as being exempt. There may be a mix of abilities within one scheme; some people undertaking what is effectively open employment and others in a more sheltered, training situation.

If an exemption were to be introduced, the specific scenarios in which it would apply would need very carefully considered so as not to cause injustice and detriment to those therapeutic workers who are capable of open employment.

The Forum understands that the Therapeutic Work code of practice was intended to remove the need for a complete exemption and to allow differentiation between clients and employees, depending on the degree of support being provided to each individual.

The code provides that if a person is deemed to be a client of a scheme by virtue of the fact that they are not “working” but are receiving a service, they are not classed as an employee and therefore not entitled to the minimum wage or the other protections of the Employment Law, including annual leave, rest days, pay slips and protection against unfair dismissal, as well as future rights, such as protection against discrimination in employment, and maternity and paternity rights.

The Forum considers that developments in schemes locally, particularly within the Jersey Employment Trust, have provided a greater distinction in terms of when a person is an “employee” who should be receiving at least the minimum wage and subject to the protections of the Employment Law, in contrast to when a person is a client who is accessing a service and receiving an allowance.

Guernsey is intending to introduce minimum wage legislation in the near future and it is not intended that therapeutic workers would be exempt; but rather that the definition of an “employee” will automatically exempt those who are not in open employment. It is not yet clear whether the introduction of a minimum wage in Guernsey will impact on the support offered by Interwork Services.

The stakeholders involved in this consultation did not advocate an exemption from the minimum wage. It is clear to the Forum that an exemption for all therapeutic workers is not appropriate, as some people, whilst continuing to fall within the remit of schemes such as JET, will be working in open employment, and therefore they should be entitled to the protection of the Employment Law, including the minimum wage. It is likely that it would be necessary to determine each individual on a case by case basis.

Option 2 - A Therapeutic Minimum Wage

The Forum considered whether it would be appropriate to introduce a lower minimum wage for people undertaking therapeutic or supported work.

The discussions with stakeholders confirmed that there were initially some losses of therapeutic work opportunities when the Employment Law came into force, which were considered to be caused by employers fearing that the workers may have to be paid the minimum wage and concerns about breaching the Employment Law. However, one of the stakeholders commented that similar concerns have not been raised for some time, and that the continuing lack of opportunities for work is unlikely to be caused by the minimum wage.

The Forum understands from the stakeholders that at the time of the Deputy's Proposition, two of them supported a lower minimum wage rate for therapeutic workers who were not in open employment. They felt that a lower wage would allow people to prove their worth at a low level of pay and could open up other opportunities for work in the future, particularly in the current economic climate.

A number of concerns have now been raised by the stakeholders however, including that a lower minimum wage is likely to lead to more reliance on social benefits, and that it may be considered by many to be exploitative and subject to abuse.

If a lower rate were to be introduced, it would be necessary to consider at what point an employee should no longer receive the therapeutic rate. For example, the trainee rate may be paid for a maximum of one year, however one year may not be sufficient for a person to move from a therapeutic rate to the full minimum wage. In other cases one year may be too long, in which case the employee may suffer from the stigma and restriction of continuing to receive the therapeutic rate.

The Forum appreciated the concern that a fixed lower minimum wage rate would create a rigid structure, for example, a person's performance and skills may not have improved sufficiently to be working to the capability of the full minimum wage, however they may have progressed sufficiently that improvements should be reflected in their pay. A therapeutic wage would not allow this, unless a range of new therapeutic rates were introduced. The

Forum considers that this would introduce unnecessary complexity into the legislation.

There was clear appreciation of the potential disadvantages of a lower therapeutic wage amongst those consulted and the Forum considers that a therapeutic minimum wage is not appropriate. In a therapeutic situation it is more appropriate to have a mechanism for graduation of pay based on review and assessment of the person's capability and a therapeutic rate would not provide that.

Option 3 - A Wage Subsidy Scheme

Given that it is important in a therapeutic work situation to be able to graduate pay based on performance and to be able to pay the therapeutic worker the correct rate for the job, the stakeholders agreed that this is most easily achieved with a wage subsidy scheme.

The Forum is aware some progress will be made during 2009 with regard to the development of a wage subsidy scheme. The Social Security Department's 2009 business plan states that it will be participating in the development of a strategy to identify the allocation of additional funding which has been provided to improve the employment opportunities for individuals with learning difficulties. The Department has advised the Forum that it intends to be considering proposals for the basis of a wage subsidy scheme by the end of 2009.

The Forum recommends that the Social Security Department consults those operating the Supported Employment Scheme in Guernsey in the early stages of developing an appropriate scheme for Jersey. Guernsey's scheme is currently subject to strategic review, so this would be a good opportunity for Jersey to learn from Guernsey's successes and weaknesses.

Initial enquiries of the operators of the Guernsey scheme indicate that consideration should be given to the following; providing clear criteria and good management at the outset of a Supported Employment relationship; that 100 percent subsidies should be avoided if possible; that a time period for withdrawing the subsidy should be agreed with the employer in advance; and that the Supported Employee should have a contract directly with the employer, rather than the Health and Social Services Department or the supported employment service.

Despite two of the stakeholders previously supporting a lower minimum wage rate for therapeutic workers who are not in open employment, all three stakeholders are of the opinion that wage subsidies are a better option to explore, as employers may be more prepared to offer opportunities if there is more support, monitoring and sensible integration.

Recommendation

The Forum recommends that in view of -

- 1. proposals to introduce a wage subsidy scheme in the near future, and**
- 2. the complexities described in this paper in determining whether an individual has a right to employment protection (including the minimum wage) on a case by case basis,**

it is not desirable or appropriate to introduce an exemption from the minimum wage for therapeutic workers, or to introduce a lower therapeutic minimum wage at this time.

Other recommendations and comments

The Forum recommends that the Social Security Department should consider the disincentive effects of retained rights to out-dated benefits which limit the number of hours that a person can work due to earnings being limited to half the standard rate of benefit. The consultation revealed that fear of loss of benefit is preventing some therapeutic workers from achieving their full capacity for work.

The Forum noted that where therapeutic workers are not “employed” for the purpose of the Employment Law, employers might be encouraged to provide more therapeutic opportunities if therapeutic workers are excluded from an employers “headcount” for Regulation of Undertakings purposes.

The Forum considered whether it might be appropriate to impose an obligation on employers to employ a specified percentage of therapeutic workers depending on the size of their workforce. This is similar to positive discrimination moves in other jurisdictions and the Forum appreciates that the success and appropriateness of such a measure could rely heavily on the introduction of disability discrimination legislation in Jersey.

In the absence of a legal obligation to employ disabled workers, which the Forum appreciates is a complex issue, the Forum suggests that the States should aim to become an exemplary employer in regard to therapeutic work opportunities, to give impetus and set an example to other employers.

The Forum noted that all of the stakeholders emphasized that more placements and opportunities for open employment are needed for therapeutic workers; there was concern that most schemes already have full capacity and are only able to provide limited hours for those who are able to access the schemes.