

THE ATTACHED REPORT FORMS THE EMPLOYMENT FORUM'S RECOMMENDATION TO THE EMPLOYMENT & SOCIAL SECURITY COMMITTEE ("THE COMMITTEE") ON HOW AN ENFORCEMENT STRUCTURE TO ASSIST WITH THE IMPLEMENTATION OF THE ISLAND'S EMPLOYMENT LEGISLATION MIGHT BE ESTABLISHED.

It is the first such Recommendation to be submitted by the Forum

Please note:

- i) that the use of the word he denotes the words he/she
- ii) that the term "employment legislation" is used in a broad sense to include industrial relations issues.

Section 1 – BACKGROUND TO REQUIREMENT FOR THIS REPORT AND THE RÔLE OF THE FORUM.

- In 1997 the Committee took over responsibility for Industrial Relations from the former Industrial Relations Committee.
- In 1997 the Committee had already commissioned some research into the need for and the impact of a minimum wage policy in the Island. The result of that research was placed before the States in a Report and Proposition that was debated in March 1999 (P227 of 1998). During the debate the States voted not only in favour of the introduction of a minimum wage policy but also the setting up of a consultative body known as the Employment Forum. It also approved the establishment of an ACAS style advisory and conciliation service to be known as the Jersey Advisory and Conciliation Service (JACS) and an enforcement body such as a Tribunal.
- In December 1998 the Committee produced a comprehensive publication, "Fair Play in the Workplace" ("Fair Play"), which was circulated island-wide in December 1998. The publication sought Islanders' views as to whether or not change or improvement was needed in workplace practices to take the Island into the 21st century and beyond. Considerable discussion and research took place after the release of this document. The need for a dedicated forum to hear claims arising under employment legislation was voted as one of the top priorities. The need for a body to act as a Consultative group was also again referred to.
- In August 1999 the Employment Forum was established, as recommended in the minimum wage debate. The remit of the Employment Forum is to consult on a rate for the Minimum Wage and to monitor the minimum wage generally and consult widely on the various issues raised in the Employment Legislation proposals. The Forum must report to the Committee with recommendations on the way in which the various issues consulted upon should be handled in the Island.
- In December 2000 the Employment & Social Security Committee took a Report and Proposition, "Employment Legislation", P99 to the States for debate. The Report contained proposals for the way in which a framework of legislation supported by JACS and a Tribunal type service, as agreed in the Minimum Wage debate, might be introduced in the Island in two

phases. The Report again focused on the vital rôle to be played by JACS and the Enforcement Body in the new legal framework.

Section 2 - THE CONSULTATION PROCESS - AN OVERVIEW

Research for the enforcement project by the Employment Forum has followed two routes.

A: The first has involved research into and/or discussion with various bodies and institutions with particular knowledge of enforcement issues.

- i)** A study of the current structure of enforcement bodies in the Island was undertaken together with a study of the UK Employment Tribunal system. A comparative study was also made of the enforcement structures in some other jurisdictions, in particular the Isle of Man, Guernsey and New Zealand;
- ii)** Informal discussions were held with representatives of the States of Jersey Human Resources Department;
- iii)** The proposals of the Race Relations Working Party of the Legislation Committee were considered in relation to the enforcement of the Island's pending Race Relations Law;
- iv)** Comments were received from the Terms of Employment Officer; the Chairman of the Industrial Disputes Tribunal ; the Deputy Industrial Disputes Officer and the Bailiff;
- v)** A visit was paid to the Central London Employment Tribunal and discussions held with the Chairwoman and Regional Secretary of the Tribunal and advice was received from Mr Peter Syson - a former director of the ACAS Service and a current lay member of the Central London Employment Tribunal.

B. The Employment Forum survey

The second route consisted of the consultation meeting and survey carried out by the Employment Forum with representatives from organisations representing workplace interests in all sectors.

The Employment Forum has an extensive database of organisations representing both employers, employees and union groups. In October 2000 representatives of those organisations were invited to a presentation given by the Employment Forum on the topic of enforcement. A consultation document highlighting various issues and providing several options for consideration as to how an enforcement structure might be established was prepared and circulated to all those who attended the discussion.

The results of this consultation exercise were collated and considered. 23 organisations attended the workshop on 5th October 2000 and in total 14 written responses were received and the views expressed were added to those expressed at the workshop.

The meeting took the form of a Power Point presentation on the issues followed by a workshop, in which those present were divided into groups to discuss a particular issue of the presentation. A questionnaire was distributed and subsequent to the meeting, a summary of the views expressed at it were circulated to all those who had attended. In addition, copies of both the consultation document and questionnaire and the views of those present at the October 5th meeting were circulated to those organisations on the Employment Forum database, who had not attended the meeting on October 5th.

Responses to the questionnaire which highlighted the key issues to consider were requested by November 30th. This deadline was subsequently extended until mid January.

A SUMMARY OF THE ISSUES HIGHLIGHTED FOR CONSIDERATION IN THE CONSULTATION DOCUMENT¹.

The report produced to assist in the consultation process examined a number of areas deemed relevant for consideration prior to the establishing of any enforcement mechanism for industrial relations matters in the Island. Detailed below are the key points highlighted in the Consultation Document for consideration:

1. The Employment Tribunal system in the UK.

It was noted that the original intention, some thirty years ago, had been that Tribunals should provide a quick, non-legalistic and informal forum in which individuals could represent themselves when bringing claims under employment legislation arising from employment related disputes, without incurring legal costs. The existence of the Tribunals was intended to take away some of the workload dealt with by the main Court structure.

It is acknowledged however that in reality Employment Tribunals in the UK have become almost the same as Courts, with a large volume of case law and procedure to be adhered to. There is also a lot of bureaucracy attached to the way in which an application is filed for hearing. Tribunals themselves, have become over worked as cases have become more complex. The complexity of cases has meant that they last longer and cost more administratively.

A major review of Tribunal systems in the UK is currently underway in order to assess the situation. The survey, arranged through the Lord Chancellors department, has addressed many issues such as, the accessibility of Tribunals to users and the extent to which it is possible for users to act for themselves in Tribunals. It also asks people's views as to whether a simpler system is possible, and how it might be achieved and it deals with the organisation of the Tribunal system, its membership and training offered to those members.

The Employment Forum Consultation Document also drew attention to the new ACAS Arbitration scheme, which is due to be implemented in the UK in the spring of this year. This scheme has been brought about by Government recognition that Employment Tribunals are becoming too legalistic and the system overburdened with cases and an expensive demand on the public purse.

The scheme will enable ACAS² to develop a system whereby parties in dispute can opt for their case to be submitted to arbitration before a sole arbitrator rather than the case being heard before a panel of three at a full Tribunal hearing. The arbitration process will be arranged by ACAS and arbitrators will be appointed from the ACAS panel of independent arbitrators. Industrial relations experts, academics, retired trade unionists and retired personnel specialists have been recruited in readiness for the post of sole arbitrator. The Arbitrator's decision will be final and the parties must agree to be bound by it. Proceedings are intended to be investigative

¹ A Report for the Employment Forum on the Possible Structure of the Enforcement Body.

² ACAS is the Advisory Conciliation and Arbitration Service upon which JACS has been modelled.

rather than adversarial and arbitrators will not be expected to look at detailed case law or rely on precedent. They will be expected to look at the facts of the case and decide whether what happened was fair using their own knowledge of good practice and looking at the circumstances and experience of the employer organisation.

2. Currently available services offering advice on employment issues in Jersey

The Consultation document then looked at the various sources of advice on employment issues already available in the Island. The Citizen's Advice Bureau and the Industrial Relations Advisory Officer both currently offer such services. Less used but of importance are the Terms of Employment Officer, who is appointed under the Terms of Employment (Jersey) Regulations 2001² and the Industrial Disputes Officer who is appointed under the Industrial Disputes (Jersey) Law 1956 to assist with the management of collective disputes. It is possible that both these rôles will eventually disappear and be replaced, in part by JACS. This possibility was discussed in the consultation exercise.

3. Currently available enforcement procedures in the Island.

Collective disputes can be dealt with in accordance with the terms of the Industrial Disputes (Jersey) Law 1956. This law appoints an Industrial Disputes Officer, to whom any disputes can be referred. However in many cases the Law is not invoked for only if a dispute is referred to the Officer is he empowered to use his wider powers to try and settle it and, if unsuccessful, refer it to the Industrial Disputes Tribunal for arbitration.

Individual claims arising under current Jersey Employment Legislation are dealt with through the Petty Debts Court or the Royal Court³.

4. An Assessment Officer

Two new rôles were considered in relation to the new enforcement structure. The first was that of an assessment officer. It was suggested that an "assessment officer" could be appointed as a first point of call for anyone wishing to file a claim for hearing with the enforcement body. The assessment officer rôle would incorporate the administrative rôle performed by the staff of the Employment Tribunals in the UK and by the administrative officer in Guernsey who arranges the work of the Unfair Dismissal sole adjudicators.

However, it was suggested that the Assessment Officer might also be given the power to:

- "screen" applications and sift out those which he deemed vexatious or without foundation;
- suggest that the parties attend for conciliation at JACS, if they are prepared to do so and if it is felt that the services to be offered by JACS (ie advice, conciliation and mediation) might be beneficial;
- refer the case directly to the enforcement body for hearing.

² Regulations in force since 1992 and renewed every 3 years

³ Payment of Wages (Jersey) Law 1962; Termination of Contracts - Minimum Period of Notice (Jersey) Law 1974; Terms of Employment (Jersey) Regulations 2001

Under these proposals if a matter were referred to JACS and it proved impossible to resolve the JACS officers would need to refer the matter back to the assessment officer so that he could then refer it to the appropriate enforcement body for hearing.

It would be necessary to decide to which institution the rôle of the assessment officer would belong. It was suggested that he be a staff member of the enforcement body so as to retain the impartiality of JACS.

5. The Sole Adjudicator

The second new rôle was that of the sole adjudicator. Two concerns relating to the creation of such a post were addressed. First was the responsibility that may be placed on an individual, who may not be legally qualified, to decide the amount of an award that should be made to an individual and secondly the possible impact that forthcoming Human Rights legislation may have.

In addressing the first concern it was suggested that a sole adjudicator should be able to deal with all the issues addressed in Phase One of the employment law proposals for the award to be made in a proven case in all of these areas is likely to be a readily calculable, mathematical one. Based on current proposals the likely penalties and sanctions for Phase One employment issues likely to come before an adjudicator are as follows:

- It is already proposed that the penalty for unfair dismissal be based on a fixed multiplier of salary with an additional scaled payment for length of service.
- Any penalty in connection with a payment of wages issue is likely to be based on a calculation of the sums due with maybe a fine as a sanction, as is currently the case under the Payment of Wages Law;
- Similarly a breach of any Statement of Terms and Conditions provision is likely to involve a fixed penalty sanction and recommendations to help rectify the situation;
- Claims for unpaid notice period monies; minimum wage claims and issues relating to the non-payment of bonus and holiday pay should also be readily calculable and subject to a fixed penalty sanction.

It was suggested that if the body deciding such issues is not called upon to exercise any discretion as to the amount of the award but is expected only to make a decision as to the acceptance or rejection of the claim based on the facts, and then make an award based on set multipliers, it may not be necessary to have an enforcement “panel” of more than one person.

It was also pointed out that claims currently brought under the Island’s Payment of Wages and Minimum Periods of Notice legislation are already heard by only one adjudicator, the magistrate, and a proposal to increase the limit of the magistrates’ court jurisdiction for such claims to £10,000 was recently adopted. The present limit is £2,500 and claims of a higher value go to the Royal Court. The new level is due to be introduced shortly. Accordingly it would appear that the Island’s authorities have already seen fit to judge the competence of a sole adjudicator, albeit a legally qualified one, as being able to deal with claims up to £10,000

in monetary value and it is envisaged that the majority of claims arising as a result of the proposed Phase One legislation would not exceed this level.

6. Resource Issues

In deciding how big the panel of an enforcement body might be it was suggested that consideration needed to be given to manpower and recruitment issues. There are already many different tribunals and boards established in the Island including the Criminal Injuries Compensation Board; the Health and Safety Appeal Tribunal; the Social Security Tribunal and the Industrial Disputes Tribunal. It was noted however that each of these tribunals has an officer who effectively deals with issues at the initial level. The Social Security Tribunal has a determining officer; claims under the Criminal Injuries Compensation Board are initially dealt with by a single member of the board; the Industrial Disputes Officer deals with collective issues when they are first referred, and an enforcement officer deals with health and safety issues at first instance.

It has been suggested that it might be difficult to find sufficient “rounded personalities” who would be willing to sit upon three person panels to hear employment issues. Another view was that if JACS was successful and the majority of claims did not reach the hearing stage, those forming the panel might not gain sufficient experience to be fully effective.

Accordingly, it was suggested that thought would need to be given as to whether it was essential to have more than one person sitting on an enforcement panel. If only one person were to sit, at least for some issues, manpower requirements would be reduced. The sole adjudicator is not uncommon. For example, Guernsey only has one person sitting on unfair dismissal claims, the UK is advocating its new sole arbitrator scheme for unfair dismissal claims and in New Zealand the Employment Tribunal comprises only one panel member sitting. Indeed claims arising under the current Payment of Wages (Jersey) Law and the Minimum Periods of Notice Law when heard in the Petty Debts Court are only heard before a “sole adjudicator”, namely the magistrate as mentioned above.

In deciding whether to establish an Employment Tribunal of say three members or whether to start at least by using a sole adjudicator system it was suggested that an assessment ought to be made of the number of cases that are likely to be heard before the Tribunal. From this it will be possible to estimate the costs of running a panel of three versus a sole adjudicator.

It was also suggested that the administrative costs of informing all panel members of the hearing and of providing them with the paperwork and of the possibility of increased administrative cover to cope with the management of a larger panel should also not be ignored.

It was recognised that decisions would need to be taken as to whether panel members should be legally qualified and whether they should be paid or not. It may be possible to pay only the Chairperson or indeed pay none of the members and run the whole system on a voluntary basis. This will no doubt be dependent on the availability of suitably qualified people who are prepared to work voluntarily and the structure of the panel.

7. Enforcement Officers

It was suggested that many of the situations that are likely to give rise to complaints under both current and future employment legislation are situations that might readily be resolved if systems to regularly monitor and enforce the legislation were in place, such as checks relating to

- the issue of Statements of Terms and Conditions of Employment
- the issue of Pay Statements and
- the adherence to the Minimum Wage

By way of example enforcement officer rôles are to be found in New Zealand, Guernsey and the UK. In Guernsey the Industrial Relations Advisory officers have the authority to enter premises and ask, for example, to see an employer's contracts of employment, if they suspect that staff have not been issued with them. In the UK, as mentioned above, there are officers appointed to assist with the monitoring of the new Minimum Wage and in New Zealand Labour Inspectors³ are appointed to assist with the enforcement of various pieces of employment legislation.⁴ These inspectors are granted powers to require the production of various documents and power to question any employer about compliance with any of the Acts specified in the quoted legislation.⁵

Already there are enforcement officers appointed under the Health and Safety at Work (Jersey) Law 1989 and the Social Security (Jersey) Law 1974.

Accordingly it was suggested that enforcement officers might be appointed who would be responsible for the monitoring of employment issues such as the issue of Statements of Terms and Conditions of employment as required by law and the proper enforcement of payment of wages issues (including the Minimum Wage and the payment of bonuses and holiday entitlement when appropriate legislation is in place.)

It is envisaged that standards generally would rise if both employers and employees know that such matters are officially monitored. It was suggested that continuous and broad-based monitoring would not be regarded as authoritarian and biased in the same way as a system of on the spot "quick fix" resolution might be.

³ Article 223 of the Employment Relations Act 2000 - in force 1 Oct 2000 (previously provision for these inspectors was found in the Employment Contracts Act 1991 - section 143)

⁴ Equal Pay Act 1972; Holidays Act 1981; Minimum Wage Act 1983 and the Volunteers Employment Protection Act 1973 and the Wages Protection Act 1983

⁵ Article 229(1) of the Employment Relations Act 2000 - in force 1 Oct 2000 (previously provision was found in the Employment Contracts Act 1991 - s.144).

Section 3 : RESPONSE TO THE CONSULTATION DOCUMENT

A. General Comments

- When Fair Play in the Workplace was released for consultation, the ESSC advocated that Jersey needed a simple and straightforward framework of legislation. This theme has been echoed in the consultation on the enforcement issue. Overwhelmingly respondents want to see a fast and efficient disputes system, without a vast bureaucracy supporting it. There is a strong belief that almost more important than the issue of enforcement is the issue of education. It is repeatedly stated that if both employers and employees are aware of the contents of the legislation there should hopefully be little need for enforcement. It is stated that any system that is established needs to adhere to public policy objectives and therefore, be speedy and cost effective.
- Discussions with the Terms of Employment Officer revealed that in many cases, the employer is aware of the need for a statement of Terms of Employment to be issued but that such statements are not issued due to inadequate personnel administration.
- It is also perceived that the main requirement of any system will be to provide a “quick fix solution” for the many people who simply want a solution to their problem or complaint, that is going to be delivered without long delays. Many fear that the advisory and conciliation route to be offered by JACS followed by a hearing before a Tribunal will not answer that need. There is a view that some form of “quick fix” enforcement should be available.
- It was pointed out that Jersey’s particular needs should be considered. The Island is one that, for the time being at least, has very low unemployment figures. It is believed that most employers endeavour to follow good management practices and that the recommendations for minimum standards put forward by the Committee in its Employment Legislation proposals will in fact, once implemented, be below the standards that the majority of employers offer. The proposals themselves are intended to provide a legal safety net of minimum standards. It is hoped that the missing link to ensure that employees have protection against those employers who do not adhere to such standards will be provided by the introduction of the new legislation, in particular protection from unfair dismissal and an effective enforcement system.
- JACS is seen to play a **vital** rôle in the new system. Great faith is placed in the ability of JACS to provide an advisory and conciliatory service which, it is hoped, will help resolve at least 70-80% of all queries and disputes arising in connection with employment legislation. The majority view clearly favoured JACS’ rôle as being purely advisory and conciliatory. In order to retain the independence of the service it was felt inappropriate for the JACS officers to have any enforcement powers.

B. SUMMARY OF VIEWS IN RESPONSE TO THE ANSWERS TO THE QUESTIONS POSED IN THE QUESTIONNAIRE:

i) JACS

JACS was felt to be pivotal to the success of the new framework. It was felt that although the use of the services of JACS should not be compulsory there was a danger that the service would be sidelined if cases did not have to first pass through JACS.

ii) Assessment Officer

It was felt that there might be a danger of the JACS service being avoided if this post were created. It was generally felt that the function should be a clerical one and that the officer should not have any great powers of assessment as to the vexatious or fictitious nature of the claims submitted. If this were to be the case the assessment officer would have powers similar to the enforcement body. However it was felt that a clerical rôle did exist as clerk / administrator to the enforcement panel. The name Assessment Officer was not favoured for it gave the wrong emphasis to what was seen as a clerical rôle.

iii) Industrial Disputes Officer

There was generally not felt to be a future rôle for this officer for a combined Tribunal was envisaged. It was felt that the assessment officer and JACS personnel would assume the duties of the Industrial Disputes Officer.

iv) Sole Adjudicator

A sole adjudicator was generally favoured for the hearing of individual claims in order to keep the system simple. However it was felt that a right of appeal to a full panel of three should be available. Some felt that a sole adjudicator would be able to deal with matters more swiftly than a larger panel. Some felt that a larger panel would be needed for more complex cases and appeals.

v) Enforcement Officers

It was felt that enforcement officers might not be necessary if the rôle of assessment officer is established and if JACS were available. The rôle was regarded as probably expensive and unnecessary although some perceived a need for a monitoring role.

vi) Employment Tribunal

It was hoped that a simple system could be established and not one that would become overburdened as in the UK. On balance it was felt that there should be no lawyers on the panel but rather people with a knowledge of the law. It was generally felt that a sole adjudicator might deal with individual claims and a panel with collective claims. It was thought that the same panel could deal with collective and individual issues and that it would need some procedures to follow.

Section 4: ADDITIONAL EVIDENCE RECEIVED BY THE FORUM.

i) Guernsey and the Isle of Man

Guernsey has an Industrial Disputes Tribunal that is able to hear both collective claims and individual ones arising under the Island's employment legislation. The exception is that claims brought for unfair dismissal are not permitted to be heard before the Tribunal but are heard by a sole adjudicator. Guernsey deliberately established this rule to keep the hearing of such claims simple. Awards are based on a multiplier of three months salary. The Industrial Disputes Tribunal is not really used for individual claims as it is regarded as too weighty a body for such claims and the majority of cases are conciliated.

If an unfair dismissal claim is made the claimant first attends upon the secretary at the Industrial Relations division of the Board of Industry. That officer advises the Industrial Relation Advisory Officers of the claim. They then seek to conciliate in the matter and, if unsuccessful, the secretary is asked to convene a hearing and appoint an adjudicator. Adjudicators are not legally qualified.

The Isle of Man system is more reminiscent of the United Kingdom system in as much as there are detailed regulations dealing with the working of the Tribunal. Claims are first registered with the secretary to the Tribunal and that officer can then refer claims to the Industrial Relations Advisory Service. However under the Isle of Man system, as in Guernsey, there is no limitation on the amount of time that the service can take to try and conciliate a matter before it proceeds to a hearing. The secretary to the Tribunal will advise the Chairman of the Employment Tribunal that a case is pending but arrangements for the hearing of the case are not made until indication is given by the Industrial Relations Advisor that he cannot settle the matter. The Tribunal in the Isle of Man consists of three people, the Chairman being legally qualified. A chairman can only sit alone in a Directions hearing. However conciliation rates are high and of 60 claims filed in 2000 only 6 went to tribunal hearing.

ii) Increasing number of Tribunals

It has been suggested that appointing a panel of three to hear employment cases may not be either necessary or the most appropriate way to deal with claims. It is generally felt that a sole adjudicator will be able to deal with many cases at first instance.

However it has been suggested that particularly complex cases or, cases that have been appealed, may be heard before the Royal Court rather than establishing a panel of three. The Royal Court has been described as not dissimilar to an employment tribunal in as much as the Chairman is a legally qualified person who sits with two lay members.

It has also been suggested that a simpler court procedure might be involved, similar to the new judicial review system, whereby parties often do not appear before the court but are required to submit statements by way of evidence to the court.

It has also been suggested that a body such as the Youth Panel might be used as opposed to the Royal Court. Those who favour this approach felt that the Royal Court might still be too senior to deal with the claims and that a court at the magistrates level might be more appropriate. In the Youth Court the Chairman is the magistrate and there are then two other panel members.

iii) Synchronisation with the pending Race Relations Law

Consideration has been given to the need to develop a structure that can be flexible in its usage bearing in mind the resource issues described at page 8. The Forum had considered the earlier proposals of the Race Relations Working Group with regard to enforcement of the Race Relations law and noted that they were not dissimilar to the proposals for employment legislation. Accordingly discussions were held with the President of the Legislation Committee to see whether an amalgamated enforcement structure could be used and it is felt that both the clerical support needed for the enforcement body and also the adjudicators appointed to hear discrimination and employment issues could be a shared resource.

iv) Current legislation dealing with specific Public Sector work groups that may need amending.

There are some sectors in the Island that are already controlled by specific legislation such as Prison Officers, the Police, the Fire Service, the Civil Service and Teachers and Lecturers which results in their falling outside the remit of the Industrial Disputes (Jersey) Law 1956. It is currently believed that in order for collective issues arising in these sectors to be heard before a new employment panel changes to these laws would be necessary.

It has been suggested that the forces should perhaps remain outside of any new system as it is deemed important that discipline procedures should be available and respected in times of emergency. However it is thought that it might be reasonable for those rules regarding the civil service and the teachers and lecturers to be changed so as to allow these groups to use any panel convened for the hearing of collective issues.

v) Advice from Officers in post under the current system - Terms of Employment Officer; Chairman of the Industrial Disputes Tribunal; Deputy Industrial Disputes Officer and Industrial Relations Advisory Officer; Former Payment of Wages Advisers; CAB.

So far as individual complaints are concerned all those involved in assisting complainants such as the Industrial Relations Advisory Officer, the Citizens Advice Bureau and the former payment of wages advisors at the Employment and Social Security Department would all advocate the need for a swift solution to be provided for those seeking resolution to a straight forward problem. The transient nature of the work of so many of the Island's workforce means that a lengthy bureaucratic system will not assist individuals who require help that can be delivered quickly. However the Forum noted that it would always be necessary to allow both parties involved in any dispute a fair opportunity to express their views. It was felt that Human Rights Legislation will make this requirement paramount.

It is generally felt that the Terms of Employment Regulations are not very workable and that enforcement is not effective. Greater clarity relating to the administration of the law is needed

so that, for example, witnesses can be summonsed to give evidence. It was felt that the law itself is currently largely unused because employees tend to have left their job before coming to seek help or advice about a new job. It is only at that point that it transpires that no terms or conditions were ever issued to the employee. Accordingly it is too late for the Terms of Employment officer to assist with any omissions or queries relating to the Terms and Conditions statement and few have wanted to press for prosecution having left the job.

It was felt that the Industrial Disputes Law and Tribunal is not generally shown the respect that it might command. In Guernsey there is a very similar piece of legislation which works efficiently. The main difference between the Guernsey law and the Jersey law is that States members are precluded from holding the position of the Industrial Disputes Officer and Deputy. The Jersey Industrial Disputes Tribunal has sat only once in recent years. However, matters have been referred to the local Industrial Disputes Officer and Deputy on several occasions and it is felt that there is a need for the services of an individual who can help advise the parties involved in a potential collective dispute.

The current Industrial Disputes Tribunal is permitted to lay down its own procedural rules. At the time of the last hearing the tribunal were greatly assisted by the report presented by the Deputy Industrial Disputes Officer that had pulled together the views and evidence of both parties to the dispute. This report was made available to the Tribunal members, with the consent of the parties, before the hearing. Accordingly at the hearing itself the situation that existed between the parties was well understood by all those present and an informal atmosphere was generated. The view of the Chairman of the Tribunal is that the investigatory role carried out by the Industrial Disputes Officer was of great benefit to the Tribunal.

The Chairman also felt that it was beneficial that no legal representatives were present at the hearing as this again was conducive to the informality of the occasion. However if legal representation is not to be allowed then it is felt that a legally qualified Chairman who can direct proceedings and call for legal opinion to be shared by the parties on any issue is beneficial.

vi) Central London Employment Tribunal Visit

Tribunals sitting at the Central London Tribunal normally comprise three panel members. However in rural areas where resources are more of a concern Chairpersons very often sit on their own to hear issues. Chairpersons are in fact permitted under English law to hear the majority of claims whilst sitting on their own. It was generally advised that it is beneficial to the running of the case for a date to be fixed for hearing as soon as a claim is filed. If no date is fixed then the focus can be lost and the case take longer to resolve as the parties continue to discuss the issues without the impetus of a hearing to move matters forward.

It was noted that considerable administrative support is required to operate the Tribunal system.

Costs are generally not awarded in UK Tribunals. However awards can be made if it is felt that a claimant has been vexatious in bringing a claim or if there have been delays in complying with the Tribunal's orders or in the presentation of evidence. Currently the maximum such award is £500 although this is being reviewed.

Legal representation is allowed but a considerable number of applicants still represent themselves. In such cases the Chairman has the responsibility of ensuring that the hearing is conducted in such a fashion that both parties adequately understand the issues and are encouraged to present evidence accordingly.

vii) Human Rights Issues

In putting forward its recommendation to the Committee on enforcement issues the Forum has been aware of the need for compliance with the forthcoming human rights legislation. It is important to remember that the protections offered to the individual by virtue of this legislation have been available for many years through the Human Rights Convention itself. The presence of a Human Rights Law on the Island's statute books will simply mean that Islanders can enforce those rights directly in the local courts instead of having to take a case to the Strasbourg courts. A similar situation has resulted in the United Kingdom where the Human Rights Law came into effect in October 2000. The full impact of the legislation both in the UK and of its likely effect in Jersey is still being assessed.

However, the key issue to be addressed when establishing any enforcement structure is the right to a fair trial contained in Article six. This article grants everyone the right to a fair and public hearing within a reasonable time by an independent and impartial Tribunal. However it is possible to exclude the public from the hearing (but not the judgement) if it is considered necessary in order to protect national security or public order. If it is a criminal charge before the court everyone is presumed innocent until proven guilty and everyone has rights to defend themselves against the charge. In addition there is a right to an "equality of arms". This means that the parties involved in a claim should have an equal playing field in which their case is presented.

Human Rights Legislation will not prevent the possibility of a single judge or adjudicator sitting to hear any claims brought in law. It is a requisite condition that anybody sitting in judgement upon another agrees to dispense justice in an impartial manner. Accordingly it is not strictly necessary to have a panel of more than one sitting to hear a claim. However there should always be a right of appeal to a larger body if the initial hearing is before only one individual. If the person hearing a claim is not legally qualified it is believed that any Human Rights concerns can be allayed if a legally qualified clerk is assisting with proceedings.

Other issues that will need consideration when drafting the enforcement legislation are the Human Rights requirements that the law must be accurate, clear and easy to understand and that there should be a right to a hearing within a reasonable time and a right of access to a court or Tribunal. These latter two provisions will affect issues such as the amount of time in which an appeal must be brought and the fact that breaches of the law may arise if adjudication boards fail to organise their system so as to avoid delays for example by providing inadequate staff and resources to hear cases within a reasonable time.

Section 5 : THE RECOMMENDATION

I) THE STRUCTURE OF THE PROPOSED SYSTEM

The favoured option of those provided by the Employment Forum to the consultation group for consideration is shown in **Figure 1** below.

The Employment Forum believes that the recommendation which follows and which is proposed to the Committee not only takes into account the wishes expressed by the majority in the consultation exercise but also accommodates the advice both learnt and received by the Forum in its other research on the enforcement issue.

The Employment Forum would like to express at this stage that it recognises the need for a step by step approach when implementing the employment legislation proposed by the Committee. It believes that this step by step approach can also be employed with regards to the enforcement issue. It has therefore endeavoured to put forward a recommendation that is designed to work flexibly and is suited to the modern climate of industrial relations and business practice. It is a system that can be adapted as additional legislation in Phase 2 of the Employment Legislation framework is introduced and once the results of the trade union consultation are known (e.g. it may be decided that some discrimination matters should always be heard before a panel of three)

The Forum would suggest that the Committee should consider the results of the UK Tribunal review, if they are published in time, when reviewing this proposal.

THE RECOMMENDATION IS AS FOLLOWS:-

The proposed structure is contained in **Figure 2** and the notes below describe how the Forum envisages the structure working.

1. Filing a Claim

There should be a Process Officer who would be the first point of call for anyone wishing to file a claim brought under employment legislation. This Process Officer should not have any powers to screen vexatious or frivolous claims but if the parties have not already been to JACS the Officer will strongly suggest that they seek the advice and help of JACS.

The preferred route should always be that the parties first attend at JACS for advice and assistance with conciliation. However if a claim is to be filed for hearing it must be filed through the Process Officer and JACS will always refer a matter to the Process Officer if unable to settle a dispute.

Referral to JACS will not be compulsory for to make it so would take away the voluntary nature of the conciliation process.

The rôle will be an administrative one, hence the suggested title of Process Officer, and the post will belong to the enforcement body structure, not JACS.

2. Time limit for filing a claim

It is suggested that there be a time limit of two months in which to file a claim. The advice of the Law Draftsman should be sought with regards to the definition of the date at which time should start running but the Employment Forum would envisage the period starting either from the date of the grievance arising, if no internal procedures are invoked, **or** the date of the final decision taken in the course of any internal grievance or discipline procedures.

The Forum also suggests that the power to set a time limit for the hearing of claims be established in such a way that the suggested 2 month time limit can be reviewed and either extended or shortened as deemed appropriate once the system has been monitored for a while and so as to accommodate any changes deemed necessary as the legislation programme develops.

It will be the duty of both JACS and the Process Officer to advise claimants of the relevant time limit for actually filing a claim.

3. Setting a Date for Hearing

At the time of forwarding a matter to JACS the Process Officer will notify the Chairman of the arbitrators panel that a claim has been filed and, in agreement with the Chairman, will allocate both a date and the appropriate number of arbitrators to hear the matter.

If a claimant first attends at the Process Officer and is given a hearing date and subsequently attends at JACS it will be possible for JACS to apply, on behalf of the individual, for an extension of time before the matter is heard.

4. Panel of Arbitrators

A panel of arbitrators should be appointed to hear employment issues. The term arbitrator rather than adjudicator has been chosen to reflect the intention that the arbitrator's decision be final. It is envisaged that the remit of the panel will extend as additional employment legislation is introduced.

Sole arbitrator rôle - The hearing of employment issues should be divided in as much as issues relating to payment of wages, including the minimum wage; holiday entitlement and rest days and the issue of statements of terms and conditions would be heard before a sole arbitrator, subject to the value or perceived complexity of the claim. The value of any claim to be heard before a sole arbitrator should not exceed £10,000. This figure is the same as the revised limit for the jurisdiction of the magistrate's court which is to be introduced shortly.

Panel of three - Any claim exceeding £10,000 in value and any claim which would normally be dealt with before a sole arbitrator as described above but which is deemed to be of a complex nature should be heard before a panel of three arbitrators. In addition all unfair dismissal claims should automatically be listed for hearing before a panel of three arbitrators although the parties will be offered the option of a hearing before a sole arbitrator.

The Forum recommends that as additional legislation is introduced a decision will need to be taken as to the appropriate forum for a claim to be heard first. For example it may be decided

that discrimination claims should always be listed for hearing before a panel of three, like unfair dismissal claims, unless a sole arbitrator option is exercised. In contrast a redundancy claim, if simply a payment of wages issue, might be heard before a sole arbitrator depending on the value of the claim.

It is proposed that once a claim is filed it will be for the Chairman of the arbitrators panel to decide whether the claim is to be heard before a sole arbitrator or a panel of three on the basis of the guidelines established above.

Binding decisions - Decisions of either the sole arbitrator or the panel of three will be binding.

5. Hearings

It is felt that these will need to be in public in order to comply with Human Rights Legislation unless one of the qualifying grounds enabling the hearing to be held in private can be relied upon. However it is felt that all judgements should be made public.

6. Appeal process

The Forum advocates that appeals be granted on a point of law only. It is felt that the term should be defined to mean:

- a) the wrong application of principles;
- b) procedural impropriety ie the hearing was procedurally unfair;
- c) irrationality, ie the decision is so absurd that it cannot be allowed to stand.

The above principles are the basis upon which the Royal Court refuse decisions of existing tribunals within the Island and the Forum accordingly feels they should be applicable to the proposed structure for employment related issues.

Sole arbitrator / Panel of three decisions - there should be an appeal on a point of law only to the Royal Court. The Forum is advised that there should be no breach of Human Rights legislation if the right of appeal from any decision of a sole arbitrator or panel of three is limited to an appeal based on a point of law defined as above.

It is not proposed to establish a separate Employment Appeal Tribunal as it is considered unnecessary in a jurisdiction the size of Jersey where appeal to the Royal Court will be possible.

7. Appointment of arbitrators (see Additional Comments)

It is recommended that twelve arbitrators be selected initially and that the allocation of cases be run on the basis of a rota system not dissimilar to the way in which the Jurats of the Royal Court are managed.

It is recommended that the Chairman of the arbitrators panel should be legally qualified as should anyone sitting as a sole arbitrator. It is recommended that in any case where a panel of three persons is called the Chairman should sit as an independent, and of the other panel members one should represent employee interests and the other employer interests.

The Forum recommends that six lawyers be appointed as arbitrators and that the other six members be appointed in such a way that three members represent employer interests and three employee interests.

It is recommended that a Chairman of the Panel be appointed to assist the Process Officer with the case management and the arbitrators rota.

It is recommended that an advertisement be placed in the Jersey Evening Post inviting those wishing to serve on the arbitration panel to express their interest. A similar notice should be sent to the Law Society.

It is recommended that the Law Draftsman advise on the best way of appointing arbitrators and on their reporting line.

The Forum believes that all arbitrators should be obliged to declare any interests which may prejudice a fair hearing although it is led to believe that such a requirement is an unwritten rule of judicial practice.

It is recommended that all arbitrators be paid a nominal rate for attendance and that the Chairman of the panel be paid at a higher rate in recognition of his additional administration duties.

8. Collective issues

It is proposed that the current Industrial Disputes Tribunal be disbanded and that all collective issues be heard before a panel of three arbitrators.

It is also proposed that the rôle of Industrial Disputes Officer be disbanded and that the work of that officer be undertaken by JACS and the Process Officer.

It is also suggested that a review of legislation affecting those Public Sector pay groups currently outside the remit of the Industrial Disputes (Jersey) Law 1956 be undertaken with a view to the laws being changed so that Collective Disputes involving Civil Servants, teachers, and lecturers might all be heard before an arbitration panel.

9. Representation and Costs

The Employment Forum recommends that legal representation should be allowed at hearings but not encouraged. However it believes that the parties should be allowed to be represented by a trade union representative or other companion .

The Forum also supports the view that the enforcement system is supposed to be non-legalistic and straightforward in its approach and therefore feels that those hearing complaints should take a practical view of matters and decide on the basis of what was reasonable in the circumstances as opposed to taking a purely legalistic view.

However, it believes that it may not be feasible to deny legal representation as a result of the requirements of Human Rights legislation. It is proposed that, as in the United Kingdom and Guernsey, costs of legal representation should not be awarded in any hearings, unless in

exceptional circumstances where costs should be recoverable eg if a claimant is thought to have brought a vexatious claim or if a party has failed to comply reasonably with any request of the arbitration panel or parties.

The Forum makes no recommendation as to whether there should be a limit to any costs recoverable. It suggests that the advice of the Law Draftsman be sought and the result of pending changes in the UK be considered on this point.

10. Panel Procedures

The Employment Forum accepts that in many cases a Tribunal panel might benefit from the ability to direct its own procedures. However it feels that basic procedural guidelines should be laid down such as the power of the arbitrator or the panel to

- a) subpoena witnesses
- b) take evidence on oath and administer oaths
- c) examine and cross examine witnesses
- d) call for discovery of documents
- e) receive oral and written evidence

It recommends that legislation should contain a provision allowing for officers /members /witness's to be paid (see 7 above).

11. Inspectors / Enforcement officers (see Additional Comments)

The Employment Forum does not feel able to put forward a recommendation at this stage on the issue of inspectors or enforcement officers as it does not feel sufficiently appraised as to the detailed plans of the Committee so far as enforcement and monitoring of the minimum wage is concerned. Accordingly the rôle has been referred to in outline only to show its possible place in the overall structure.

II) ADDITIONAL COMMENTS ON THE PROPOSALS:

a) Sole arbitrator

The proposals for the use of a sole arbitrator recognise that United Kingdom Tribunals, certainly in rural areas, would frequently use a Chairman sitting on his own to hear cases. It also addresses the need to consider resource requirements and should encourage a less bureaucratic system .

The sole arbitrator option reflects the use of sole adjudicators in Guernsey and their use in the proposed ACAS arbitration scheme to be introduced shortly in the United Kingdom. It also reflects New Zealand practice. It is believed that many might prefer the option of appearing before a sole arbitrator rather than a larger panel.

b) Structure of Panel

The Forum envisages that those appointed as arbitrators may have multiple functions. For example magistrates might well be appointed as legally qualified members of the panel and those appointed as arbitrators to deal with Race Relations issues in accordance with the proposals of the Race Relations Working Group or those who already sit on other Tribunals could be appointed to the arbitration panel. This practice would help ensure that people familiar with tribunal/panel procedures were available and used more regularly than if separate appointments were made to each Tribunal that exists. It would also seem to be a good use of resources.

c) Inspectors / Enforcement Officers

In taking the decision not to make a recommendation at this stage the Forum was mindful of the fact that Jersey is a small island jurisdiction and it would hope that, with a good education programme and a general awareness of JACS and the advice and help the service can offer, compliance with the minimum wage and the issue of terms and conditions of employment will be high.

However it was aware that:

- i. It has already been suggested in the Report that went before the States in connection with the minimum wage that there will be a rôle for compliance officers to ensure the smooth functioning of the minimum wage system.
- ii. The post of the Terms of Employment Officer under the Terms of Employment (Jersey) Regulations 2001 has the dual function of both assisting with the enforcement of the issue of terms and conditions of employment as well as advising on those terms and conditions. It is proposed by the Committee that these regulations be absorbed into the new employment law and that the rôle of the Terms of Employment Officer be possibly disbanded. However his functions would still need to be catered for and the Forum do not believe that it would be appropriate for JACS, an independent and impartial body, to take on the enforcement function although it could assume the advisory role.
- iii. That there was a call for better enforcement and monitoring of the Terms and Conditions of Employment Regulations at the time of the Fair Play in the Workplace survey.

- iv. That in the UK a team of enforcement officers has been established to assist with the enforcement and monitoring of the minimum wage. These officers have power to issue enforcement notices and thereafter penalty notices with fines for each day of non-compliance. In addition there is an enforcement route open to the individual claiming non-receipt of the minimum wage through the Employment Tribunal System. Advice received confirms that the dual system is working well.
- v. There are enforcement officers working under current legislation in the Island as described above.
- vi. That there was a general view in the consultation carried out by the Employment Forum that there was a need for a system to deliver a quick solution to ‘straightforward’ issues.

d) Collective issues

The States Debate on the Committee’s proposals for employment legislation took place after the consultation through the Employment Forum on enforcement issues. During the States Debate it was agreed that the issues surrounding Trade Unions should be addressed in a report to be submitted to the States by the Committee. It was also agreed that minor amendments should be made to the Industrial Disputes Law in the hope of making it more workable. Although the trade union report is not yet out for consultation the Employment Forum still feels it appropriate to put forward the recommendation as shown in Figure 2 so far as collective issues are concerned. This recommendation reflects the general consensus of opinion received through the consultation survey as shown in Figure 1 that there should be only one body responsible for the hearing of both individual and collective claims. However, as stated previously, the Forum hopes that the structure it has proposed can be built, if necessary, in a step-by-step fashion thus recognising that both the rôle of the Industrial Disputes Tribunal and Officer might continue in the interim.

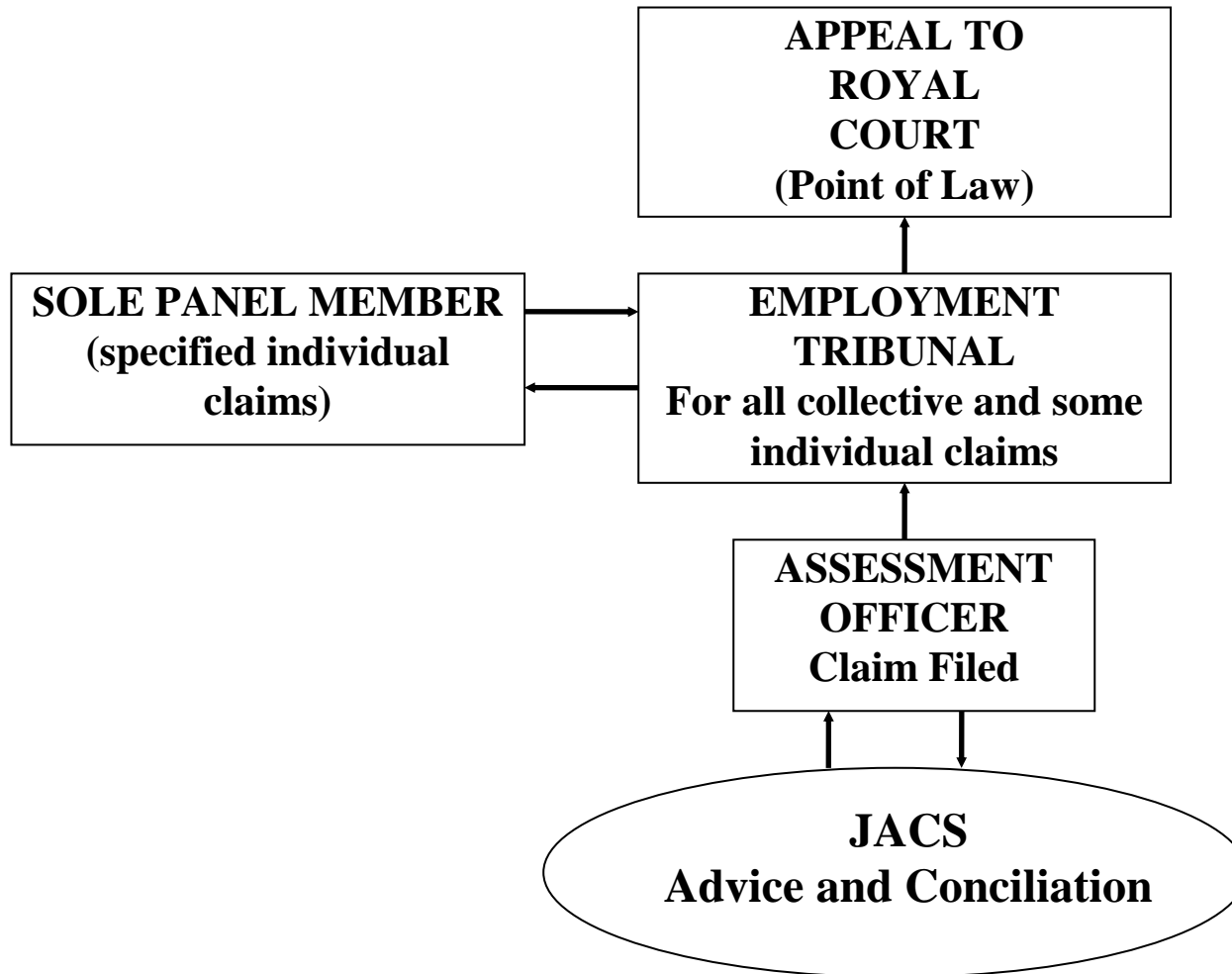
Thanks

The Employment Forum would like to express its thanks to all those who have assisted and given of their time in the consultation process that has led to this Recommendation being presented.

Enforcement Procedures -

FIGURE 1

Proposals: Have only one Tribunal for the hearing of collective and individual cases



COLLECTIVE AND INDIVIDUAL

PROPOSED ENFORCEMENT STRUCTURE (10-05-2001)

FIGURE 2

