RECOMMENDATION

Redundancy and Business Transfers

Issued by the Employment Forum on 21 February 2007

This recommendation is the first of a series of recommendations that will be made by the Employment Forum to the Social Security Minister as part of Phase 2 of the employment legislation programme, which was approved by the States in 2000 (P.99/2000).

This recommendation is the outcome of the Forum's consideration of responses received during consultation undertaken with the public (from 14 June to 11 August 2006) about the proposal to introduce legislation in Jersey relating to redundancy and business transfers.

24 responses were received which included some very detailed comments and the Forum is very grateful to those who took the time to respond and give thorough reasons for their views.

SUMMARY

Section 1 – Introduction

Section 2 – Outlines provisions in other jurisdictions

Section 3 – Identifies relevant concepts in existing legislation

Section 4 – Summarises consultation previously undertaken

Section 5 – Consultation Responses (2006)

Section 6 – The Forum's Recommendations on Redundancy and Business Transfers

Additional copies of the recommendation can be obtained by emailing or telephoning Hannah Le Bail (h.lebail@gov.je or tel. 447204) and is available on the States website -

http://www.gov.je/Consultations

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SECTION 1 - Introduction

In 2000, the States approved the previous Committee's Proposition for "Employment Legislation". Of the two laws that formed Phase 1 of the programme, the Employment (Jersey) Law 2003 came into force on 1st July 2005 and the draft Employment Relations Law 200- awaits an appointed day.

In 2006, the Social Security Minister asked the Employment Forum to begin consulting on Phase 2 of the employment legislation programme and that consultation has resulted in the following recommendation on two of the issues to be considered as part of Phase 2; redundancy and business transfers.

The following report provides background information to the development of this recommendation, including provisions in other jurisdictions, consultation previously undertaken, relevant concepts in Jersey's existing employment legislation, followed by a summary of the consultation responses and reasons for the Forum's recommendations.

SECTION 2 - OTHER JURISDICTIONS

Details of relevant legislation in the UK, Isle of Man and Guernsey is provided below.

REDUNDANCY

THE UK

Redundancy is thought to have been the start of employment legislation in the UK with the introduction of the 1965 Redundancy Payments Act, which was originally funded largely by the Government. A redundancy payments scheme is now provided under the Employment Rights Act (1996) and an award is payable in addition to any other statutory or contractual entitlements that may be due to an employee.

The scheme applies to employees working under a contract of employment (whether written, verbal, unlimited, or fixed) including office holders and directors if they work under an employment contract. Self employed people, those defined as 'workers' and members of a partnership do not qualify.

The definition of "dismissal" is the same as that included in Jersey's Employment Law (see section 4 of this paper). To qualify for a redundancy payment, an employee must have been dismissed by their employer, rather than resigning and the reason for dismissal must be redundancy.

Right to a redundancy payment

In order to be entitled to a redundancy payment, an individual must be an employee (not a 'worker'), who is dismissed, where the principal reason for dismissal is redundancy and

who has the appropriate length of service to bring a claim. (See page 12 of this recommendation for the UK definitions of 'employee' and 'worker'.)

Qualifying criteria

There is a two year qualifying period for a redundancy payment. Initially, this matched the UK's qualifying period for protection against unfair dismissal, however that qualifying period was reduced to one year and the period for redundancy was not reduced accordingly. It does not matter how many hours per week employees have worked, as long as they have worked for two years or more since the age of 18.

Redundancy payments

Redundancy payments are calculated by reckoning backwards, counting the years of continuous employment (a concept which also applies in Jersey's Employment Law, see page 14 of this paper). Only employees over the age of 18 and under the age of 65 may claim a redundancy payment in the UK. Awards are banded by age within that range;

- Age 18 to 21, half a week's pay for each full year of continuous service
- Age 22 to 40, one week's pay for each full year of continuous service
- Age 41 to 65, one and a half week's pay for each full year of continuous service, however the amount payable between the ages of 64 and 65 is reduced by one twelfth for each month over the age of 64.

The UK had considered simplifying this scale so that employees of all ages between 18 and 65 would be entitled to one week's pay for a full year of continuous service, however there is a general rule within EC Directives that prevents employee protections being reduced as a result of the implementation of a directive, therefore the award would have had to be increased to 1.5 weeks pay per year of continuous service for employees of all ages, so the scale was not changed.

There is a cap on the week's pay that may be awarded which started at £40 in 1965 and has stagnated in terms of its value relative to average earnings. The cap is now only £290 per week and may not act as a disincentive to making employees redundant, especially for larger employers. This matches the cap on the maximum week's pay for unfair dismissal awards, however there is an additional compensatory element that may be paid for unfair dismissal (up to £58,400).

A maximum of 20 years service may be taken into account in calculating the award payable and it is thought that this was applied when redundancy was first introduced, as payments were largely funded by the Government at that time; however since moving responsibility to the employer, the policy has not been reviewed.

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Time limits

In the UK, a claim for a redundancy payment must be referred to a Tribunal within 6 months and a claim for unfair dismissal within 3 months.

Insolvency

When an employee is made redundant but the employer is insolvent and cannot pay compensation, the employee is paid from the National Insurance Fund via the Redundancy Payments Office and the amount is claimed back from the assets of the business, if there are any.

Offers of alternative work

In the UK, if an employee is redeployed to a similar or equivalent job, they are not usually entitled to receive a redundancy payment. However, a four week trial period of the alternative employment is allowed, after which a redundancy payment may still be claimed depending on the reasonableness of the employees' refusal to continue the job. The assessment of 'reasonableness' will depend on certain criteria, such as; the similarity of terms and conditions, location, and assessment of suitability for the alternative work being offered.

Collective consultation requirements

Collective consultation must begin at least:

- thirty days before the first dismissal in a case where between 20 and 99 redundancy dismissals are proposed within a period of ninety days or less

- ninety days before the first of the dismissals in a case where 100 or more redundancy dismissals are proposed within a period of ninety days or less.

Where less than 20 redundancies are proposed to take effect within a ninety day period, or more than 20 redundancies are proposed over a longer period, the UK law does not specify that collective consultation must take place.

Consultation must be undertaken in good time and with union representatives for any employees covered by union recognition, or if there are no union representatives, the employer must consult with other representatives of relevant employee groups within the organisation. These representatives will either have been given the authority to be consulted on behalf of others by the employees concerned, or will have been elected for the purpose and there is a specified method of electing such representatives.

In theory, the purpose of requiring consultation before making redundancies is to attempt to avoid the redundancies if possible, however, as redundancies are often inevitable, it is thought that in many cases the consultation process is undertaken as a mere formality.

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Where an employer fails to comply with the statutory requirement to consult on collective redundancies, a "protective award" may be payable depending on the seriousness of the employer's failure to consult. A protective award may be paid to an employee for the wrong done by the employer, not as compensation for the employee's loss. One week's pay may be awarded for each week of the ninety day protected period in which consultation should have been undertaken, but was not.

Time off to look for work

When an employee is under notice of redundancy, the employer should allow the employee reasonable time off. The UK's legislation does not specify what is reasonable since this will vary with the differing circumstances of employers and employees, for example, some employees might require only one interview, whereas others might need to make a number of appointments, or travel some distance.

Employees should be paid the appropriate hourly rate for the period of absence from work but an employer does not have to pay more than two-fifths of a week's pay, regardless of the length of time off allowed.

An employee can complain to an employment tribunal in cases where the employer refuses either to allow time off or to make the appropriate payment.

ISLE OF MAN

The 1990 Redundancy Payments Act provides the right to a redundancy payment, and there is a 2004 guide to that Law. The qualifying criteria and method of calculation for redundancy payments are very similar to the UK.

Right to a redundancy payment

As in the UK, to be entitled to a redundancy payment, an individual must be an employee, who is dismissed by reason of redundancy and who has the appropriate length of service to bring a claim.

Qualifying criteria

The qualifying periods are the same as the UK, two years for redundancy and one year for unfair dismissal. This difference is likely to be for the same reasons as the UK, that is, changes in unfair dismissal legislation not being reflected in the redundancy provisions.

Only employees who are contracted to work at least 8 hours per week qualify for a redundancy payment.

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Redundancy payments

The Isle of Man also caps the weekly earnings payable; however the cap is higher than the UK at £385 and is due to be increased to £420 when the Employment Bill comes into force. This matches the cap on the maximum week's pay for unfair dismissal awards.

There is no age related scale in the Isle of Man – until the age of 65 redundant employees are entitled to one week's pay for every full year of continuous service, however after the employees 64th birthday, the amount of the redundancy payment is reduced by one twelfth for each month over the age of 64

Time limits

In the Isle of Man a claim for a redundancy payment must be referred to a Tribunal within 12 months and a claim for unfair dismissal within 3 months.

Insolvency

There is a similar scheme to the UK in the Isle of Man. Where an employee claims that his employer is liable to pay to him a redundancy payment, and the employer is insolvent, the employee may apply to the Department of Health and Social Security. Subject to the qualifying period of continuous employment, the Department will pay the employee the relevant amount owed from the Insolvency Fund.

Offers of alternative work

The Isle of Man has similar provisions to the UK regarding reasonableness of refusal of a job offer, similarity of terms and conditions, location of any job offered, and a four week trial period.

Collective consultation requirements

The Isle of Man's redundancy law does not specify collective consultation requirements as in the UK; however the guidance advises that employers should consult recognised unions, employee representatives and employees about redundancies and that, where possible, a redundancy policy should be drawn up in advance, as failure to follow appropriate and reasonable procedures, including proper consultation with employees, can result in claims for unfair dismissal.

Time off to look for work

The Isle of Man has similar provisions to the UK in that employees are entitled to a reasonable amount of time off, with pay, to look for alternative work. A complaint may be made to the Employment Tribunal where an employer has unreasonably refused time off and employees may be awarded pay for the time that they were entitled to, up to a maximum of two fifths of a week's pay.

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GUERNSEY

There are no statutory provisions in Guernsey requiring employers to pay employees a redundancy payment or to notify employees that redundancies may occur. However, there may be a contractual agreement to provide redundancy pay and/or a specific notice of redundancy.

Under the Employment Protection (Guernsey) Law, 1998, an employee may make a complaint of unfair dismissal on the grounds of redundancy, subject to the relevant qualifying period *(Note - this is also the current situation in Jersey, the Isle of Man and the UK).* Whilst redundancy is a potentially fair reason for dismissal under the law, the dismissal may be unfair unless the redundancy itself is genuine and the employer's procedure for handling that redundancy is fair and reasonable.

An Adjudicator may admit as evidence the Code of Practice on Handling Redundancy in determining whether or not a genuine redundancy situation exists, whether or not any redundancy procedure was followed prior to dismissal and whether or not, given all the circumstances, an employer acted reasonably and fairly.

BUSINESS TRANSFERS

THE UK

Regulations to protect employees in business transfers have been in place since 1981. The latest Regulations, the Transfer of Undertakings (Protection of Employment) Regulations (commonly referred to as TUPE), were introduced in April 2006 and were created to implement the EC Acquired Rights Directive. *[Note that Jersey is not required to implement this Directive.]*

As in Jersey, the "continuity of employment" provisions already give some protection to employees, whereby if a trade, business or undertaking is transferred, the employee's period of employment is not interrupted, but is regarded as continuing under the new employer. This is important for employment rights that are based on an employee's length of service, such as protection against unfair dismissal.

The TUPE Regulations were devised to ensure that employees who are transferred with a business do not suffer any detrimental change to their contracts.

The new employer takes over;

- the contracts of all employees (they cannot pick and chose which employees to take on),
- all rights and obligations arising from the contracts or the employment relationship between the employee and previous employer (other than criminal liabilities, and occupational pensions which are treated differently on transfer),

- any collective agreements, and
- the recognition of any independent trade union.

Since their introduction in the UK, the TUPE Regulations have been the cause of some of the most difficult and intractable employment law problems, which have mainly focussed on whether a transfer has actually occurred, who should be transferred and changing terms and conditions.

Relevant transfers

The TUPE Regulations have mainly been of relevance in the service providing industries. The stability of certain sectors, such as catering, have relied upon them.

The Regulations apply to both the public and private sectors; an administrative reorganisation of public authorities is not a transfer, however the Government's practice has been for the process to be covered by TUPE through specific regulations.

TUPE also applies where a business is transferred outside of the UK, so long as it was situated in the UK immediately before the transfer.

Effects on contracts

When a business is transferred, the new employer takes over all existing terms and conditions of the employees who were employed immediately before the transfer, including all rights and obligations arising from their contracts of employment, but excluding criminal liabilities and some benefits under an occupational pension scheme.

Pensions

Pensions are treated differently than other terms and conditions in business transfers, whereby they are not automatically transferred. In most cases, it would be very difficult for a new employer to fulfil the exact pension provisions of the previous employer.

The UK's 2004 Pensions Act now provides a minimum safety net for pensions whereby, following a transfer, a new employer is not required to continue identical occupational pension arrangements for the transferred employees, however where the transferred employees were previously entitled to participate in an occupational pension scheme, the new employer must provide a minimum level of pension provision. This requires the new employer to match employee contributions, up to 6% of salary, into a stakeholder pension, or offer an equivalent alternative.

Before the 2004 Act, there was no pension protection, other than in the public sector where there was limited protection for pensions by policy, not statute.

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Changing terms and conditions

If the terms and conditions of employees who have been transferred are changed by the new employer, such changes will be void if the sole or principal reason for the change is the transfer itself. If terms and conditions are varied for a reason connected with the transfer, the variations will only be valid if the reason is an economic, technical or organisational reason (‘ETO’ reason) requiring changes in the workforce. This provision is intended to stop the new employer from making extensive changes to employees’ terms and conditions simply because they are new to the organisation. In practice, showing that a change is for an ETO reason is relatively easy, but showing that the reason requires “changes in the workforce” is much more difficult and reinforces the fact that changes to terms and conditions following a transfer are likely to found to be void.

The new employer is not prevented from renegotiating the employees terms and conditions, however any detrimental changes may be declared void by a tribunal or court, particularly if they occur at the same time as a transfer, or soon after, but may be declared void at any time in the future.

Employee information

An employer who is transferring his business to a new employer must provide a specified set of information, listed below, at least 2 weeks before the transfer, to help the new employer to understand the inherited rights, duties and obligations in relation to those employees who will be transferred;

1. The identity of the employees
2. Their ages
3. Information contained in their statements of employment particulars
4. Information relating to collective agreements which apply to those employees
5. Instances of any disciplinary action within the previous 2 years
6. Instances of any grievances raised by the employees in the previous 2 years
7. Instances of any legal actions taken by the employees against the former employer in the previous 2 years
8. Instances of potential legal actions that may be brought by those employees

Informing and consulting employees

Before a transfer takes place, the employer must provide various details to appropriate representatives of employees who will be affected by the transfer, including the proposed date of transfer and the reason for it. The employee representatives to be informed are broadly the same as those required for consultation on collective redundancies and again, there are provisions for the election of representatives where necessary.

Consultation with those representatives must be undertaken with a view to reaching some agreement on any measures to be taken in connection with the transfer. The employer must consider any representations made and reply to those representations.

There are also penalties for failing to inform or consult employees in the form of compensatory payment up to a maximum of 13 weeks pay, having regard to the seriousness of the employer's failure.

ISLE OF MAN

There is no legislation specifically to protect employees' contracts on the transfer of a business or undertaking

GUERNSEY

The Transfer of States Undertakings (Protection of Employment) (Guernsey) Law, 2001 only applies in circumstances where a States Department is being 'commercialised'. It was introduced for Guernsey Telecom, Guernsey Post and Guernsey Electricity. The Law can be amended to include any other similar transfer of States Departments to a commercialised organisation but it does not cover the private sector.

SECTION 3 – EXISTING CONCEPTS AND DEFINTIONS

This section sets out relevant definitions and provisions that are provided in existing legislation, mainly the Employment (Jersey) Law 2003, that are relevant to the development of legislation for redundancy and business transfers.

Employer and employee

On enactment of the Employment Relations Law, the definition of 'employ' provided in the Employment Law will be replaced by the definitions of "employer" and "employee" as provided by Article 2 of the draft Employment Relations Law, which is set out below. The intention is to keep the definitions consistent across all of Jersey's employment legislation.

The following replacement definition will **not** affect the category of persons to whom the Employment Law currently applies.

> *"(1) In this Law –*
> > *(a) "employer" means a person who employs another person; and*
> > *(b) "employee" means a person who is employed by an employer.*
>
> *(2) For the purposes of paragraph (1), a person is employed by another person if the first person works for the second person under a contract of service or apprenticeship with the second person.*

(3) For the purposes of paragraph (1), a person is also employed by another person if the first person enters into any other contract with the second person under which –

(a) the first person undertakes to do, or to perform personally, work or services for the second person; and

(b) the status of the second person is not that of a client or customer of any profession or trade or business undertaking that is carried on by the first person.

(4) It is immaterial whether a contract to which paragraph (2) or paragraph (3) refers is express or implied.

(5) If the contract is express, it is immaterial whether it is oral or in writing."

It should be noted that Jersey's definition of 'employee' covers a much wider category than the UK's definition of 'employee', as it also incorporates those that fall under the UK's definition of "worker".

A 'worker' in the UK is any individual person who works for an employer, whether under a contract of employment or not, who provides a personal service e.g. a casual worker, agency worker, or some freelance workers (but not genuinely self-employed people).

An 'employee' in the UK is an individual who has entered into a contract of service with the employer where two fundamental requirements must be met (although other features of the contract are also examined). It must be a relationship where the individual works under the direction and control of the employer, and there must be a mutual obligation in that the employer has some obligation to provide work to the employee and the employee has some obligation to accept work.

In the UK, all 'employees' are 'workers', but not all 'workers' meet the stricter criteria required to fall under the definition of 'employee'.

Redundancy

As stated in Section 2 in reference to Guernsey's redundancy provisions, an employee may make a complaint of unfair dismissal on the grounds of redundancy (subject to meeting the qualifying period). Article 2 of Jersey's Employment Law provides the following definition of redundancy which the Employment Tribunal may take into account when considering whether a dismissal was fair or unfair (and possibly automatically unfair):

" (1) For the purposes of this Law an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

(a) the fact that his employer has ceased or intends to cease –

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business –

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

(2) For the purposes of paragraph (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that paragraph would be satisfied without so treating them).

(3) In paragraph (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason."

When an employer terminates an employee's contract, this is classed as a dismissal under the Employment Law. For a dismissal to be deemed 'fair', the employer must have acted reasonably in the circumstances, for example, by considering whether:

- there is sufficient reason for dismissal on the grounds of capability, conduct, redundancy or some other substantial reason, or that the dismissal is necessary to comply with another law
- reasonable alternatives to dismissal were considered
- the dismissal is consistent with previous action by the employer and any disciplinary procedure
- the dismissal is fair, taking all relevant factors known at the time into account.

Even if the employer has grounds to dismiss the employee, the Tribunal will consider whether or not the employer's action was reasonable in relation to the size and administrative resources of the employer and any changes in the business before or after

the dismissal. The decision taken by the employer must be one that a reasonable employer would have made. What may be fair for one employer may not be fair for another, and the reason must have substantial merits.

Consultation requirements

As in the Isle of Man, there are already individual consultation requirements relating to unfair dismissal, whereby employers must be able to show that a fair process has been undertaken in selecting employees for redundancy. This applies no matter how many employees are being made redundant.

The employment market in Jersey is different from the UK in that 93% of employers employ 20 or fewer employees (75% employ 5 or fewer employees) and 38% of employees are employed by an employer with 20 or fewer employees.

Qualifying criteria

Locally, there is a 26 week qualifying period for unfair dismissal. Employees also qualify after serving two-thirds of a fixed term contract of 26 weeks or less, subject to having served at least 13 weeks of that contract. These qualifying periods were recommended by the Employment Forum in recognition of the fact that any qualifying period should be long enough to cover most probationary periods, but also that Jersey has a high proportion of seasonal and short term workers who service some of the Islands main industries. The Forum recommended that such employees should be afforded unfair dismissal protection if an equitable system was to be present.

Three aspects of the Employment Law apply only to employees whose normal hours of employment are more than 8 hours per week. These are; the right to be provided with a statement of employment terms and conditions, the right to be protected against unfair dismissal and, for the purpose of calculating the period of continuous employment, weeks are only counted where there is (or was) a contractual requirement to work 8 hours or more.

The 8 hour requirement does not apply to the rest of the Law, which means that provisions relating to weekly rest periods, annual leave, minimum wage, payment of wages, notice periods on termination of employment and access to the Tribunal are applicable to all employees, irrespective of the number of hours they actually work, or are contracted to work, per week.

Automatically unfair dismissal

In addition, the Employment Law provides that a claim for unfair dismissal may be **automatically** unfair (which means that the normal upper age limit and length of service requirements do not apply) where an employee claims to have been selected for redundancy unfairly in that the circumstances of the redundancy applied equally to other employees who have not been made redundant, **and** the employee was dismissed on

grounds relating to trade union membership or activity, because the employee had asserted a statutory right, or because the employee took action to receive the minimum wage.

The concept of redundancy also arises in relation to written statements of employment particulars, in that Article 3(2) of the Employment Law requires the employer to specify in terms and conditions of employment if there is a redundancy policy or procedure in place.

Local contractual redundancy policies vary greatly from no redundancy terms, to 4 weeks compensatory pay for each year of service. Some local companies operate a redundancy policy similar to that which their parent companies use in the UK, whereas others exclude the terms of their normal redundancy policy from the contracts of employees in Jersey. There is concern that employers who provide a high redundancy payment might consider reducing their employees' contractual entitlements in line with any statutory minimum payment that may be introduced.

For unfair dismissal awards in Jersey, there is a scale based on length of service, up to a maximum of 26 weeks pay, where the employee has more than 5 years service; there is no cap on the maximum week's pay.

Continuity of Employment

Article 58, paragraphs 2 to 6, of the Employment Law provide that employees have certain rights when a business or undertaking (commercial or non-commercial), or part of one, is transferred to a new owner.

"(2) If a trade or business or an undertaking is transferred from one person to another, the period of continuous employment of an employee in the trade or business or undertaking at the time of the transfer shall count as a period of employment with the transferee, and the transfer shall not break the continuity of the period of employment.

(3) If, on the death of an employer, the employee is taken into the employment of the personal representatives of the deceased, the employee's period of employment at the time of the death shall count as a period of employment with the employer's personal representatives and the death shall not break the continuity of the period of employment.

(4) If there is a change in the partners or personal representatives who employ any person, the employee's period of employment at the time of the change shall count as a period of employment with the partners or personal representatives after the change, and the change shall not break the continuity of the period of employment.

(5) *If an employee of a company is taken into the employment of another company which, at the time when the employee is taken into its employment is an associated company of the first-mentioned company, the employee's period of employment at that time shall count as a period of employment with the associated company and the change of employer shall not break the continuity of the period of employment.*

(6) *For the purposes of paragraph (5), a company is associated with another company if it is a subsidiary or a holding company of that other company, or if both companies are subsidiaries of the same holding company."*

Put simply, if a trade, business or undertaking is transferred from one person to another, or if there is a change in the partners or personal representatives who employ any person, then the employee's period of employment at the time of change counts as a continuous employment with the "new" employer.

The calculation of period of continuous employment is relevant for the notice period (or pay in lieu) that an employer is required to give an employee on termination of employment, and for the purposes of calculating whether an employee has the relevant length of service to qualify for protection against unfair dismissal (and the award that may be paid to an employee if that claim is successful).

Business Transfers

In Jersey, most business transfers will already be protected because share transfers are more common than 'whole' business transfers and are protected by common law; if the shares of the employer are bought, the existing contracts of employment will remain in force. Transfers of whole business are unusual in Jersey, particularly in the finance industry. It is thought that service providers would be most affected, for example when tendering for a new provider.

It is considered that locally, the protection of employees' contracts when businesses are transferred is likely to be more relevant to the Public than the Private sector. If a tender for a contract is lost, there are less likely to be other suitable jobs for the employees. When the local bus service provider was changed, the new service provider was under no obligation to take the employees of the former employer on the same terms and conditions.

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SECTION 4 – PREVIOUS CONSULTATION

Introduction

The previous Employment and Social Security Committee issued a consultation paper, "Fair Play in the Workplace", published in November 1998. This was the Committee's first consultation on employment legislation which was widely circulated and debated publicly.

Responses

The following information was gathered from that consultation;

Redundancy

81% of the respondents overall supported the right of workers to receive redundancy payments (90% of employees compared with 60% of employers).

73% of respondents favoured reasonable time off to look for new employment in redundancy situations (76% of employees compared with 66% of employers).

Business transfers

76% of respondents felt that employees' rights should be protected following the transfer of an undertaking (85% of employees compared with 58% of employers).

Conclusions

Having considered the responses received during that consultation, the previous Committee submitted a Report and Proposition to the States proposing the two Phased approach, which was debated in December 2000 (P.99/2000).

As well as approving that a minimum wage, protection against unfair dismissal and a process for the resolution of collective disputes, should be included in Phase 1, the States also approved the proposition to develop such further measures as may be necessary in Phase 2 to deal with the issues of -

a) redundancy, maternity, equal pay, equal opportunities and any issues regarding discrimination in the workplace;

b) flexible working and family friendly policies and the protection of employees involved in business mergers and acquisitions.

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Redundancy

On the matter of redundancy, it was suggested in P99/2000 that the notice periods provided in the 1974 Termination of Employment (Minimum Periods of Notice) Law, which have now been carried over to the 2003 Employment Law, are more generous than those in the UK in recognition of the fact that there are no redundancy provisions locally. For example, an employee with more than 15 years service would be entitled to 12 weeks pay in the UK and 16 weeks pay in Jersey.

The proposition noted that redundancy payments are usually made to an employee to compensate for the loss of job, not as a bonus payment for length of service. The need for automatic payment of redundancy awards was questioned because, at that time, demand for labour was high and there was no evidence of large numbers of redundancies in Jersey.

However, the proposition recognised that this situation might not continue and that genuine hardship can result when jobs are lost in industries where there is little or no further demand for those skills, e.g. due to economic decline, outsourcing, business rationalisations, increased competition, or population polices. It was therefore felt that provisions should be introduced to provide for employees who are made redundant.

The proposition suggested that redundancy payments should be based on a scale related to length of service, and that an insolvency fund would be necessary if a redundancy policy was introduced. The matter had been addressed by the States in 1993, but had not been progressed; it was thought that legislation to set up such a fund might be complex and difficult to administer.

In 1993, Senator Dick Shenton had lodged a proposition (P.35/1993) asking the States to accept responsibility for any contractual entitlements and termination of employment benefits on becoming redundant where an employer has been declared 'en desastre', so that employees are immediately paid any money owed to them to alleviate possible hardship.

That proposition was followed by a discussion paper from the previous Industrial Relations Committee (R.C.33/1993) seeking in principal approval from the States and views from the public on the proposal to establish a redundancy fund.

It was proposed that the fund should only compensate employees who had been employed in Jersey for 5 years or more (not self-employed), where redundancy has occurred because the employer is bankrupt and the job no longer exists.

The previous Social Security Committee carried out a feasibility study and alternative methods of funding an insolvency fund were discussed.

- Employee funded – the financial load is spread widely, but it would be hard to defend a decision not to pay someone from the fund when they have paid into it (e.g. those who don't have the required period of continuous employment)

- Employer funded - could be either a levy per employee, or the same levy for all employers. Is it fair for small businesses to have to pay the same charge as a large company? However, it was considered that large companies would be less likely to become insolvent.

- General revenue funding - depending on the economic climate, it might not be possible for the States to fund such a scheme. If an insolvency fund was funded by employers alone, the States (as the largest local employer) would pay a considerable proportion of the required funding (13% based on 2005 figures).

The discussion paper favoured the option of funding from a levy on employers and estimated the cost to employers and employees based on figures available at that time.

Following the same reasoning, but using the latest figures available, the size of the fund required is based on an estimated 40 employees per year being made redundant due to the employer's insolvency.

Over the period since the 1993 Report was presented to the States, the Désastre Section of the Viscount's Department estimates that, on average, 30 persons per year have been made redundant due to their employer becoming insolvent. This figure does not include other employees similarly affected by companies "winding-up" and other recognised insolvency proceedings where data would not be provided to the Viscount's Department, so an additional 10 persons have been estimated as being made redundant.

Taking the latest average earnings figure of around £500 per week, and estimating an average of 7 years continuous employment, each claimant could be entitled to a £3,500 redundancy payment. This would require the insolvency fund to have incoming contributions totalling £140,000 per year.

To meet estimated outgoings, the charge to each employer **per year** could be, either;

- £2.80 for each employee (total of 50,200 employees in Jersey), or
- £28 per employer, irrespective of number of employees (total of 5,000 employers).

It should be noted that in Jersey, collective redundancies tend to happen when there is a failure of a large employer, such as one operating in the construction or retail sectors.

Business Transfers

The previous Employment and Social Security Committee's 2000 Proposition recognised that, although there is no protection in Jersey to ensure that staff who are transferred with

a business do not suffer any detrimental change to their contracts, jurisdictions that have introduced legislation requiring new employers to continue the employment contracts of the transferred staff have created complex legislation resulting in lengthy and costly legal arguments.

During its early research on employment legislation, the previous Committee was advised by UK employment law specialists to avoid this type of legislation and the issue was not considered to be a high priority in 2000, as labour and skills were at a premium. However, it was recognised in P99 that, as with redundancy, the situation might change in the future and it was hoped to find a way of addressing the matter to suit the Island's needs.

The Committee believed that provision should be made to ensure that employers consult so far as is reasonably possible, and in good time before a transfer takes place, with employees who will be either effected by, or involved in, the transfer of a business. It was considered that the requirement to consult should also apply to any redundancy situation and the proposition stated that guidelines on good consultative practice should be provided, rather than placing procedures in legislation.

SECTION 5 – CONSULTATION RESPONSES (2006)

On 14 June 2006, the Forum issued a consultation paper, including a questionnaire, to all of those on its consultation database, currently 56 email consultees and 129 paper consultees.

24 responses were received from the following respondent types, representing an even spread across the possible types of respondent.

Employer 5
Employee 5
TGWU employee 3
Employer Association 3
Trade union/Employee Association 3
Law firm 2
Independent advisory body 3

An additional 155 consultation papers were received from members of the Transport and General Workers Union (TGWU) who had been provided with a photocopy of the TGWU's response to sign and return to the Forum. Having checked every copy, it was found that three had included their own responses to the questions (sometimes contrary to the pre-printed response). The three hand-written responses have been counted in the response total, however it should be noted that the three respondents answered only a small number of questions in Part 1 of the questionnaire.

Mr Corbel, TGWU Regional Industrial Organiser, explained that the reason for this 'initiative' is that the TGWU believes that each response will be counted as one individual

response, and that the TGWU views will be given more weight if individual members have submitted identical copy responses. The Forum wishes to emphasize that in considering consultation responses, it does not simply count all responses and accept the majority view. Members always take into account the respondent type, context of response and any additional comments explaining the reason for that response when preparing recommendations.

It is recognised that the TGWU represents a large proportion of the unionised workforce in Jersey and responses are therefore considered accordingly. Employer associations, such as the Chamber of Commerce, also respond to consultations as a representative of a large number of local employers. The Forum noted that three employer associations and three trade unions/staff associations responded, which provides a balance in terms of respondents who represent a large number of employers or employees.

The other 152 TGWU copy responses were discounted as they do not add any substance to the TGWU viewpoint which had been set out clearly, in great detail, in the original response, which will be taken as the representing the opinion of that union.

The Employment Forum was asked to assist the Chartered Institute of Personnel and Development in considering the consultation paper. Some comments from CIPD members were recorded during that meeting and have been considered in the preparation of this recommendation.

SECTION 6 – FORUM'S RECOMMENDATIONS

This section provides further details of the responses and comments received from the consultation respondents, followed by the Forum's recommendation on each issue.

REDUNDANCY

Right to a redundancy payment

All respondents said that employees in Jersey should have the right to redundancy payments, other than one 'TGWU employee' who was 'undecided'.

A utilities employer commented, *"The job market in Jersey has changed with the job vacancies and opportunities to move now less favourable than 10-15 years ago. Genuine hardship can result when jobs are lost in specialist areas where there is little or no demand for those skills elsewhere on the Island"*

- **The Forum recommends that employees should have the right to redundancy payments.**

RECOMMENDATION

Redundancy and Business Transfers

Definition of Employee

Responses on the matter of who should be entitled to a redundancy payment were split, employers tending to favour the narrower UK definition of “employee”, and union respondents favouring the existing, wider Jersey definition, which encompasses the UK definition of “worker”.

Taking into consideration the reasons for the respondent’s views, the Forum considered that if a category of workers fell outside the definition of “employee” (and therefore had no protection), employers might take advantage of such workers.

The TGWU favoured the Jersey definition in the interests of avoiding the UK problem of costs and delay in litigating to determine whether there is a contract of service with the necessary mutuality of obligation. JACS commented;

“Jersey’s definition has set the scene for defining the employment relationship – it would be confusing to adopt a different definition in redundancy legislation. Removes uncertainty, leaving only the truly self-employed outside of redundancy compensation.”

- **In the absence of a convincing reason why a narrower category of “employee” should be entitled to a redundancy payment than the “employees” who are already protected by the Employment Law, the Forum recommends that the existing Jersey definition should apply.**

Qualifying criteria

There was a wide range of responses to the question of what qualifying period would be appropriate for entitlement to a redundancy payment, even within each category of respondents. For example, the TGWU suggested a nil qualifying period, Amicus suggested 26 weeks and the Civil Service Staff Side suggested a one year qualifying period; “in *step with the States Guidelines for ‘Selection for Redundancy’”.* The Forum noted that the States very rarely has to make redundancies.

The TGWU suggested a nil qualifying period on the basis that redundancy is unrelated to performance and in a similar category to other ‘day one’ rights in the Employment Law. However, Forum members considered that redundancy is very often related to performance. When conducting a fair process for redundancy selections, an employer will usually take performance into account, along with length of service and any other criteria on which employees are to be scored in an objective selection process. Also, the Employment Law already provides for automatically unfair dismissal (with no qualifying period) in specified circumstances.

An independent advisory body noted that the 26 week qualifying period for unfair dismissal was introduced to protect seasonal workers, but redundancy is a separate issue and should be in line with the UK and the Isle of Man.

RECOMMENDATION

Redundancy and

Business Transfers

Having taken into consideration all of the responses, along with the additional comments provided, the Forum members felt that 26 weeks was too short a period and could see no justification why it should not be two years, as in the UK.

- **The Forum recommends a 2 year qualifying period.**

Fixed Term Contracts

Respondents were asked whether employees on fixed term contracts of 26 weeks or less should be entitled to a redundancy payment after having served two-thirds of that contract (as with the existing unfair dismissal provisions in the Employment Law).

The majority of respondents in all categories said that there should be no specific protection for employees on fixed term contracts of 26 weeks or less. The general view of respondents is well summed up by a quote from JACS

"Fixed term contracts of 26 weeks or less most usually apply to seasonal workers. Seasonal workers enter into their jobs knowing that the work is not permanent and in such circumstances there appears to be no justification for redundancy payments."

Amicus - "If an employee is on a fixed term arrangement, they have entered into a commitment with their employer to provide their services for a fixed duration. If the employer consequently breaks that agreement with the employee, this should be a contractual dispute with the employer entitling the employee to receive a payment equal to the balance of that duration."

The TGWU however responded that all employees should be eligible, irrespective of length of contract, on the basis that the shorter periods worked will be reflected in the award payable and the amount payable is likely to be small. The TGWU felt that, to exclude these employees would act as an incentive to employ workers on short contracts and terminate the contract before the period has expired.

Two employer associations suggested that it would not be equitable for fixed term employees to acquire more favourable rights compared to permanent staff who may have to wait two years.

- **The Forum recommends that provision should not be made to entitle employees on fixed term contracts of 26 weeks or less to redundancy payments. The qualifying period of 2 years should apply to all employees.**

RECOMMENDATION

Redundancy and Business Transfers

Weekly Hours Worked

The majority of respondents across the categories, other than union respondents and TGWU employees, agreed that only employees who work 8 hours or more per week should be eligible for redundancy payments. The reasons tended to be based on a requirement for consistency with existing statute and practice.

JACS – *"8 hours a week is a defined period for the purposes of written terms, unfair dismissal (and Social Security contributions). On that basis it is thought to be a logical minimum cut-off for statutory redundancy pay"*

For the same reasons as their response regarding short fixed term contracts, the TGWU said that all employees should be eligible, irrespective of hours worked, on the basis that the shorter periods worked will be reflected in the award payable and the amount payable is likely to be small.

A local law firm pointed out that staff working less than 8 hours per week are often employed on an ad hoc basis where social security contributions do not have to be paid. To include these employees would increase the burden on businesses (which might then be transferred to the customer) and it may not suit either party to introduce such entitlement to benefits.

- **Based on the provisions of existing statute and for consistency, the Forum recommends that only employees working 8 hours or more per week are eligible for redundancy pay.**

Amicus commented that this "may create an indirect discriminatory injustice to female members of staff who are more prevalent amongst the part-time workforce than men."

In the UK, the House of Lords held that the hours' thresholds for unfair dismissal and redundancy rights were not compatible with European sex discrimination law and the UK Act was amended in February 1995 to remove the hours' thresholds to give all workers the same protection, irrespective of their hours of work. The 8 hour threshold has not been questioned in relation to Jersey's unfair dismissal provisions and the Employment Law is human rights compliant.

- **The Forum recognises that sex discrimination legislation planned for the future might require the removal of the 8 hour threshold, however it is considered that consistency with existing legislation is more important at this time.**

Redundancy Payments

On the question of how many weeks pay per year of service should be awarded as a minimum statutory right, responses were split equally; 12 respondents suggesting one

week per year of service and the other 12 respondents (mainly union and employee respondents) saying 2, 3, 4, or another number of weeks pay per year of service.

Amicus referred to the islands of the Caribbean Community (CARICOM - a geo-political grouping of 13 countries), where employees receive 2 weeks redundancy pay per year of service for each of the first 10 years of service, rising to 3 weeks for each additional year.

The maximum suggestion of 4 weeks came from the TGWU, but they also stated that, at the least, there should be a non-regression provision so that any contractual entitlements must not be reduced if a lower statutory entitlement is provided.

In considering its recommendation, the Forum was mindful of the fact the purpose of redundancy payments is to provide a reasonable minimum payment sufficient to support the redundant employee whilst they look for further employment, as well as being a reasonable disincentive to make needless redundancies on the employers' part. It is not intended to be an award for length of service. There is the danger that if the redundancy payment is set too high, employers will not be able to afford to stay in business at all, and more jobs may be lost.

So, the Forum considered this question in conjunction with responses to the question on whether the award should be capped in some way. Based on the responses received (discussed on page 27), the Forum considered that an uncapped amount is straightforward and will reward all employees accordingly, proportionate to what they have earned.

The Forum was particularly mindful of the following comment from JACS;

"Compensation should relate to length of service and earnings level, not be restricted by any artificial barrier. However, if compensation is greater than 1 week's pay per year of service it may be necessary to introduce a cap."

- **The Forum recommends that the award should be one week's pay per year of service.**
- **However, if this recommendation is rejected and the legislation provides an award of more than one week's pay per year of service, the Forum recommends that there should be a cap on the award.**
- **One week's pay should be calculated as provided by the Employment Law.**
- **A non-regression clause should be provided to protect employees' existing contractual entitlements.**

RECOMMENDATION

Redundancy and Business Transfers

Award Scale

Respondents were asked if the number of weeks' pay awarded per year of service should be based on a scale relating to age, a scale relating to length of service, or a scale relating to both age and length of service, as in the UK?

Twice as many respondents stated that the scale should be related only to length of service, than those who stated that the scale should be related to both length of service and age.

It was suggested by a small number of respondents that there should be an increasing number of week's pay per year of service for employees in different age bands, as in the UK.

The TGWU felt that it would be retrogressive to relate the award to age.

Ogier - *"Relating payments to age is discriminatory on the grounds of age…It is notable that the UK is currently in the process of redesigning the redundancy payment scheme to take account of this."*

Another Law firm also agreed that although a discrimination law is not yet in force, a scale depending on age would be discriminatory; whereas length of service is age neutral.

- **The Forum recommends that the number of week's pay per year of service should be based on a scale relating only to length of service.**

- **The Forum recommends that length of service should accrue from the age of 16.**

- **The Forum recommends that the scale should end at 65, or at normal retirement age, to match the Employment Law. The Forum recognises that future age discrimination legislation might require the removal of the upper age limit in the calculation of awards; however it is considered that matching the existing legislation is important at this time to avoid confusion and inconsistency.**

- **The Forum recommends that the number of week's pay per year of service should be the same for any employee within that age range and should not vary for different age bands, as in the UK.**

RECOMMENDATION

Redundancy and Business Transfers

Number of Years Service

When calculating the redundancy payment owed to an employee, 11 respondents said that there should be a cap on the maximum number of year's service that may be taken into account, and further 11 respondents were unsure, or said that there should not be a cap.

Of the respondents who suggested that there should be a cap, 6 respondents suggested 20 years and 6 respondents suggested various other periods ranging between 10 and 49 years.

The following comments demonstrate the varying opinions on the matter;

An employer in the finance industry – *"an employer's ability to pay others/survive the business in the interest of others will diminish if the payment has no cap."*

Ogiers - giving long service employee's uncapped rights to redundancy payments would … give an incentive to employers to over-use "Last In First Out" approaches to redundancy; potentially distorting what should be a commercial and fair minded approach to such issues."

Amicus – *A cap will "undermine the scheme itself. When a scheme is based on the length of service and the salary for the position within the organisation the employee has achieved at the time of the announcement, to apply a cap to either criteria would be unjust and discriminate against long serving employees who had progressed to more responsible and better paid positions.*

- **The Forum recommends that there should not be a cap on the maximum number of year's service that may be taken into account when calculating a redundancy award, subject to the award being 1 week's pay per year of service.**

- **The Forum recommends that if it is decided that the legislation should provide for 2 week's pay per year of service, then the maximum number of year's service to be taken into account should be capped at 20 years.**

Award at Age 64

The question of whether the redundancy award should decrease in the final year of employment as the employee is approaching retirement age elicited varying responses. In the main, employers said that the award should decrease, and unions said that it should not.

The Forum is aware that the UK Government has decided to remove the lower and upper age limits in the redundancy scheme and the taper at age 64 because it is believed that,

as employees are living and working longer, these cannot be objectively and reasonably justified under the EU Employment Directive by a legitimate aim.

Two employer associations suggested that in the interests of keeping things simple, the sum should not be reduced for the sake of an extra one week's pay as compensation.

Other respondents suggested that it is necessary to reduce the award to ensure that a redundancy award is not higher than the wages and benefits that would otherwise have been paid to an employee on retirement. The Forum understands that this is common practice in public and private sector redundancy schemes.

JACS – "*An employee in the final year of work should not get greater redundancy compensation for that final year than he/she could earn by working in that year.*"

- **The Forum recommends that the award should decrease in the final year of employment (either 65, or at normal retirement age), calculated pro rata for the number of months until retirement, as consistency with existing legislation is considered to be more important until such a time as the Employment Law is reconsidered with the development of local age discrimination legislation.**

Capped Award

Responses to the question of whether there should be a cap on the redundancy award payable in Jersey question were split, 11 responding that there should be a cap and 11 respondents who were unsure or said that there should not be a cap. The following comments demonstrate the polarised views;

A local Hotelier – *"Some of the higher salaries in Jersey could result in real financial hardship for employers"*

States of Jersey – "*Should not disadvantage employees with longer service.*"

- **The Forum recommends that there should not be a cap on either the maximum week's pay per year of service, or the maximum award payable in total (subject to the earlier recommendation for the award to be 1 week's pay per year of service)**

Time Limits

On the matter of appropriate time limits in which an application for a redundancy payment must be made to the Jersey Employment Tribunal, responses varied across the respondent types. Employers, employees and law firms favoured 8 weeks, employer associations favoured 3 months, and unions favoured 6 months.

The TGWU suggested a 12 month period on the basis that the shorter time period for unfair dismissal claims is due to the need for speedy justice, the rationale of which doesn't apply in redundancy because there is little factual dispute, and where there is a dispute, it is based on facts about the reduced need for employees to do the work, not capability, witness accounts, etc.

Amicus – "*It would be unreasonable to set a deadline as short as 8 weeks given that there may be factors beyond the employee's control which could conceivably delay submitting an application. A six month period is the duration used in the UK and we would be seeking parity simply on the grounds that it allows time for those employees who, knowing the situation within the company, wish to give the employer some time to meet their financial commitment before lodging their claim."*

Respondents who specified 8 weeks stated that the reason was for consistency of application with the Employment Law, which provides that an unfair dismissal claim must be referred to the Employment Tribunal within 8 weeks (and also allows for the period to be extended if the Tribunal determines that it is reasonable under Article 76(2)(b)).

- **In the absence of substantial evidence for a longer period, the Forum recommends an 8 week period in which applications must be made to the Employment Tribunal (with the possibility of an extension, where necessary, as currently provided by the Employment Law for unfair dismissal applications).**

Insolvency

All respondents, other than two law firms, agreed that there should be an insolvency fund to ensure that employees receive redundancy payments due to them. One of the reasons given for stating that there should not be an insolvency fund was;

Ogiers – "*The likely cost of an insolvency fund is likely to be disproportionate to any benefit from it; employees already have priority in desastré and this (in an Island with functionally full employment) should be sufficient."*

The TGWU cited International Labour Office Convention 173 for "The Protection of Worker's Claims (Employers Insolvency)", which, as well as guarantees of the employee's redundancy payment, requires protection of wages for at least 8 weeks prior to the insolvency or termination of employment; holiday pay and other paid absence due as a result of work performed in that period; and severance pay due on termination of employment. ILO Recommendation No. 180 also requires that consideration is given to providing for national insurance contributions, pensions contributions and other statutory or occupational social security schemes where failure to pay adversely affects workers' entitlements. This Convention has not been extended to the UK, nor does it apply to Jersey.

JACS made the following comment which suggests that the current protection is not sufficient -

JACS – "Employees of such businesses already have difficulty in obtaining their statutory or contractual notice. Without access to such a fund they would be unprotected."

- **The Forum recommends that an Insolvency fund should be created.**

Contributors to Fund

Responses varied quite widely across different respondent categories as to who should contribute to an insolvency fund, employers, employees, the States, or a combination of contributors. Many respondents supported the suggestion included in the consultation paper that had been proposed to the States in 1992 by Senator D. Shenton, which is discussed on page 17 of this recommendation).

The TGWU again referred to ILO Recommendation No. 180 which states that an insolvency fund should be administered in a way which ensures that it should be administratively, financially and legally independent of the employer. Workers' rights to claim from the fund should be unaffected if the employer has defaulted in its contributions.

JACS provided a sensible suggestion of how a fund might be set up;

"It is believed it is equitable for all employers and employees to contribute to this "safety net". Costs would be minimal if spread in this manner. Steps should be taken to avoid too much administration, For example, a levy of £1.50 per employee could be collected from both employer and employee in conjunction with the first Social Security Contribution Schedule of each calendar year. As the major employer, the States will contribute in any event – even though its employees are never likely to have a need to access to the fund."

The Forum recognises that further consideration will be required regarding the details of how the fund will be administered. If the fund grows substantially, but claims are not made against it, would contributions stop for a period, as suggested by Tim Langlois, an employee respondent? This could result in some employees benefiting from a fund they have never contributed to.

- **The Forum recommends that an insolvency fund should be funded by a combination of contributions from both employers and employees, with no States funding (other than as an employer itself) and that further consideration should be given to how the fund is to be administered**

RECOMMENDATION

Redundancy and

Business Transfers

Offers of alternative work

Respondents were asked, if an employer offers an employee suitable alternative work and the employee turns it down, should they still be entitled to a redundancy payment? 13 respondents said that an employee should not be entitled to a redundancy payment if they turn down suitable alternative work, and 6 respondents said that they should still be entitled.

The TGWU refer to French law of 1992 which provides that the dismissal of a worker for economic reasons can only take place in the event of workforce reductions if it is not possible to find alternative employment for the person concerned.

Responses to this question were tempered by the additional question of whether the employees "reasonableness" in refusing alternative work should be a factor in deciding whether they are entitled to a redundancy payment. 15 respondents thought that it should be a factor and 4 respondents thought that it should not (i.e. they should be entitled to a redundancy payment irrespective of their reasons for refusing alternative work).

JACS – "*Redeployment to an alternative role is a key feature in avoiding redundancy and should be encouraged…Unreasonable employers will otherwise offer unreasonable redeployment to avoid paying redundancy."*

Employer Association – Reasonableness of refusal *"is particularly relevant where companies have very generous redundancy provisions and employees would rather benefit from this compensation then accept suitable alternative work."*

The Forum has been advised that, in the UK, most employers do not seek to withhold redundancy payments on the grounds that an employee has unreasonably refused alternative work. The UK legislation is very complex and most employers do not rely on it. A comment from Amicus reflected this;

"*A suitable alternative work position is a judgement call, ultimately by the courts, and experience in the UK has caused numerous disputes over the definition. If the employee is willing to accept the change then that is a matter of agreement; they should not be forced into the role by virtue of the threat of loss of any payment."*

A local Hotelier said that a redundancy payment should be a compensatory payment for loss of work, not an opportunity for financial gain, so employees should be obliged to have good reasons for not accepting offers of suitable alternative work.

- **The Forum recommends that if an employee unreasonably refuses an offer of suitable alternative work, they should not be entitled to a redundancy payment.**

- **Employees should still be entitled to a redundancy payment if they have "reasonably" turned down suitable alternative work offered by the employer, which would be determined by the Tribunal.**

- **How "suitable" the alternative work is will depend on individual circumstances and might include consideration of –**

  - *whether it would be reasonable for the employee to undertake the new duties being offered (e.g. transferable skills, equivalent skill level)*
  - *If similar terms and conditions apply, including hours and location and remuneration*
  - *the employee's personal circumstances, e.g. health considerations*
  - *the actions of an employee as a result of him being given notice*

Trial Periods

Respondents were asked what might be an appropriate trial period in which an employee may try an alternative job, but refuse it and still be entitled to receive a redundancy payment. 11 respondents said 4 weeks, 2 respondents said 13 weeks and 5 suggested a different period.

The Forum considered some detailed comments in response to this question. A Law firm suggested 4-6 weeks, as it was considered that 4 weeks may not be long enough to know whether a new job is suitable, but 13 weeks is too long as the business will need to be able to progress promptly (given that it is has had to make redundancies). The TGWU suggested a 6 month trial period as equivalent to probation periods.

Ogiers suggested that a 4 week trial period is long enough *"for both employer and employee to assess the new position; any longer would potentially be disruptive to an employer's business."*

Amicus - *In the UK it is common practice for employees to receive 4 weeks followed by a further 4 weeks."*

- **The Forum recommends that, unless the new terms and conditions are identical to the previous terms and conditions, employees should be allowed a trial period (to include any retraining) of 4 weeks. The trial period may be reviewed and extended for a further 4 weeks, with both parties agreement in writing. Employee's redundancy pay rights would still be intact if they "reasonably" refuse the alternative employment at any time during the trial period.**

- **The Forum recommends that the concepts of "similar" and "reasonableness" (in relation to alternative work and trial periods) would be better dealt with in**

guidance than in legislation. The Forum considers that the Isle of Man's 'Guide to Redundancy' provides a useful framework in relation to offers of alternative employment in redundancy situations.

Consultation requirements

Respondents were asked if provision should be made (in addition to the existing consultation requirements for unfair dismissal purposes) requiring employers to conduct a consultation process when proposing redundancies. 14 respondents agreed that additional provision should be made requiring a consultation process when proposing redundancies. 7 disagreed, or were undecided.

Individual Consultation

15 respondents agreed that individual consultation should be undertaken with employees when proposing redundancies.

Ogiers – "For the purposes of unfair dismissal, fairness dictates that individual consultation be undertaken."

JACS – "*Consultation is vital in order to explore all opportunities to avoid redundancy. It also helps prevent "knee – jerk" redundancies as a response to a short term reduction in available work. Not to provide for consultation would be contrary to international good practice and EU labour law directives."*

Utilities employer – "Good practice – communication avoids guess work, bad feeling and fear factors. Also giving a warning is a prerequisite of the consultation process…To ensure a fair procedure, reasonableness should begin as far in advance as possible and before notice of dismissal is given – to inform on selection process that will be used."

The Employment (Jersey) Law 2003 Article 64 (4) (a) and (b) provides that "the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case".

- **The Forum recommends that individual consultation requirements of employers should remain as currently required for unfair dismissal purposes (to show that a fair process was undertaken). It is considered that the process is sufficient and does not require further legislation.**

RECOMMENDATION

Redundancy and Business Transfers

- **The Forum recommends that guidelines should clarify how this requirement applies in individual redundancy situations and notes that adequate provision may already exist in the JACS "A to Z of Work". This handbook for employers gives information on minimising and avoiding redundancies, criteria for selection, individual and collective consultation and best practice.**

Collective Consultation

15 respondents agreed that collective consultation should be undertaken. Some of the additional comments were;

Ogiers - *"Unless a collective agreement requires it or a union is otherwise specifically recognised for such purposes, no collective consultation requirements should be enacted. Such an approach will merely add undue complexity...Imposing collective consultation detracts from the voluntary nature of such arrangements. The presence of unfair dismissal as a remedy would seem to us more than adequate as a disincentive to breach any consultation requirements."*

TGWU – *"consultation with workers' representatives is a fundamental principle in international and EU Law…the EAT has also held in the UK that it may be an unfair dismissal to make a worker redundant without consulting her representatives."*

Amicus referred to Directive 2002/14/EC, which established a general framework for informing and consulting employees in the European Community. This Directive does not have to be enforced in Jersey. The Directive applies only to "undertakings" (meaning companies, partnerships or co-operatives) having 50 or more employees, or to "establishments" (meaning a branch or business unit) having 20 or more employees.

Although the international and EU law referred to does not extend to Jersey, the Forum is mindful that best practice dictates that employers should consult their employees or their representative at the earliest opportunity, by providing them with relevant information, with a view to reaching agreement on key issues, such as ways of avoiding redundancies, reducing the number of employees to be made redundant and mitigating the effects of redundancies. Where employees are already represented, or wish to be represented in this process, it would be unreasonable of an employer to fail to consult with those appropriate representatives.

JACS commented, "*Collective consultation (rather than simply with those "at risk") may well lead to innovative suggestions from others to help prevent redundancy – or volunteers for redundancy from those not at risk."*

The Forum notes that, in the UK, consultation must begin at least 30 days before the first dismissal is due to take effect. Only where there are 100 or more proposed redundancies must consultation begin at least 90 days beforehand.

RECOMMENDATION

Redundancy and Business Transfers

- **The Forum recommends that employers should be required to consult collectively where two conditions are met (as set out in the following two recommendations), and that consultation must begin at least 30 days before the first dismissal is due to take effect.**

Respondents were asked, if employers are to be required to consult collectively, whether that should depend on the number or the percentage of employees to be made redundant during a specified period.

As one employer association pointed out, the UK model requires collective consultation only when 20 or more employees are proposed to be made redundant (which would apply to 7% of Jersey employers).

Some respondents said that there should not be a minimum number of proposed redundancies for the collective consultation requirements to apply and others suggested a range of percentages or numbers of employees which should trigger those requirements (ranging from 1 to 20 redundancies, and 10-50% of employees.)

In the UK, there must be a proposal for 20 or more redundancies at one establishment during a **90** day period, or less, to trigger the requirement to consult collectively. The EC Directive applies where there is a proposal for 10 dismissals over a period of 30 days in establishments normally employing 20 to 100 workers, or at least 20 dismissals over a period of 90 days, irrespective of the number of workers normally employed in that establishment.

- **The Forum recommends that the requirement for employers to consult collectively when proposing redundancies should apply only where there are 21 or more proposed redundancies in a 90 day period.**

21 or more proposed redundancies is considered to be an appropriate threshold as it is similar to the UK (20 or more), and also matches the draft Employment Relations Law minimum number of employees whereby a union may apply to the Tribunal to enforce recognition for collective bargaining purposes.

- **The Forum also recommends that, where there is a recognised union or staff association (that is registered under the Employment Relations Law), collective consultation requirements should be triggered where there is proposed to be more than one redundancy in a 90 day period.**

Election of Employee Representatives

Respondents were asked, if there are no recognised union representatives, whether a process should be specified for the election of alternative employee representatives for the employer to consult with. If the Forum's two previous recommendations are accepted, this

process would only be necessary in circumstances where 21 or more redundancies are proposed to be made within a 90 day period.

Staff Side – *"A Spokesperson (chosen by the employees) is desirable in such situations acting as a central point of contact between Employer and Employee."*

TGWU – *"Those affected who are not union members should be permitted to nominate an independent union to consult on their behalf…any unions involved should be under a duty to consult in good faith on behalf of all employees, not just those in membership."*

- **The Forum recommends that employee representatives may be elected for the purpose of consulting about redundancies, or may be part of an existing elected consultative body.**

- **If to be elected specifically for this purpose, appropriate representatives should be identified via a balloting/staff nomination procedure to select representative employees from within the establishment, and may include representatives of unions or staff associations that are not recognised by the employer for collective bargaining purposes.**

- **If this process for identifying representatives fails, other representatives from outside the establishment may be nominated by the employees. JACS or another external overseer may be asked to assist in this process. What constitutes a 'failure' to identify representatives, the consequences of such a failure, and whom the 'other representatives' from outside the establishment may be, should be set out in guidelines.**

Protective Awards

The majority of respondents (14) agreed that a 'protective' award should be payable to employees if the employer breaches the specified consultation requirements.

JACS – *"Without this (protective) award, the consultation requirement would have no teeth."*

TGWU – "Any remedy should be aimed at deterring the employer from breaching its consultation obligations."

- **The Forum recommends that a protective award should be payable where the employer has failed to engage in meaningful consultation. The employer will be required to pay each affected employee one week's pay (as defined in the Employment Law) for each week of the protected period, up to 90 days.**

Time off to look for work

Respondents were asked whether the law should require employers to allow employees time off to look for alternative work and whether it should specify what is considered a reasonable amount of time off to allow.

18 respondents indicated that the law should require employers to allow employees time off work, including JACS – *"Alternative opportunities can often only be explored in working time*."

Two of the three respondents who said that time off should not be required by law, were Law firms, one of which suggested that this should not be a statutory requirement, but included in guidance that is not overly prescriptive, as time off may not be required in all circumstances depending on the nature of the business.

TGWU – *"Since the worker is being terminated through no fault of her own, every effort should be made to facilitate her redeployment in the workforce."*

- **The Forum recommends that the legislation, rather than guidelines, should require employers to allow redundant employees time off to look for work in order that employees may enforce that right.**

11 respondents indicated that the law should not specify what would be a reasonable amount of time, for reasons such as;

Utilities employer – the amount of time off allowed *"depends on length of service of individuals, attendance records, when dismissal will take effect. How easy or difficult it will be to find alternative job."*

Employer association – *"It should not be necessary to 'prescribe' a reasonable amount of time; this could lead to employees 'using' up their allocation of time regardless of need."*

Employee – "'*Reasonable' would cover all circumstances, perhaps it should be made clear in legislation whether this includes time to look for work and write CV's or just the attendance of interviews."*

Amicus – No period should be specified "circumstances can vary from case to case…the maximum amount of time should be provided"

Only a small number of respondents agreed that a "reasonable" period of time off should be specified in the law and the suggestions offered were; half a day per week, 2 days in total, 1 week and two-fifths of one week's pay (as in the UK).

RECOMMENDATION

Redundancy and
Business Transfers

- **The Forum recommends that the legislation should provide that an employee who is under notice of redundancy is entitled to a "reasonable" amount of time off, equivalent to at least 2 normal working days for that employee, with pay.**

- **The Forum recommends that a complaint to the Employment Tribunal against an employer who has unreasonably refused a request for paid time off should result in an award at least equal to the pay to which the employee would have been entitled, the total award to be at the Tribunal's discretion.**

- **The Forum recommends that any additional details should be provided in guidance, taking into account interview attendance and any other job seeking requirements, support and advice, which will vary depending on the circumstances, such as; methods of agreeing a mutually convenient arrangement for time off, whether days may be split or spread over a longer period, extended lunchtimes, etc.**

Additional Comments

Tribunal Award Limits

Two respondents (JACS and an employee) commented that the Jersey Employment Tribunal should have the power to award a redundancy payment in addition to any other amounts that may be awarded under the existing provisions of the Employment Law.

- **The Forum recommends that provision be made in the legislation for a redundancy payment to be awarded by the Tribunal, that is not limited by any other award payable for breaches of the existing employment legislation.**

Notifying a Competent Authority

The TGWU pointed out that ILO Convention 153, the Termination of Employment Convention, 1982, and the EC Collective Redundancies Directive (neither of which apply to Jersey) require an employer contemplating redundancies to notify "a competent authority", in writing, of any projected redundancies.

In the UK, there are specified circumstances in which employers have a statutory duty to notify the Secretary of State for Trade and Industry before the first dismissal takes effect:

• If between 20 and 99 employees may be made redundant, notification to the Secretary of State must be made at least 30 days before the first dismissal takes effect;

• If 100 or more employees may be redundant, notification must be made at least 90 days before the first dismissal takes effect.

The policy rationale in the UK is so that government agencies and the Jobcentre Plus Rapid Response Service can be alerted and prepared to take any appropriate measures to assist or retrain the employees in question.

The EC Directive states that the period provided *"shall be used by the competent public authority to seek solutions to the problems raised by the projected collective redundancies."*

- **The Forum recommends that an employer planning 21 or more redundancies should be required to notify a "competent authority" 30 days before the first dismissal is due to take effect, and should be required to provide relevant details, including; the reasons for the dismissals, the number of workers and period in which their dismissals are intended to take effect. The Forum suggests that the Social Security Minister would ascertain what the most appropriate authority might be.**

BUSINESS TRANSFERS

Protection of rights in business transfers

Only two respondents did not agree that an employee's rights should be protected following the transfer of ownership of a business.

Staff Side – "at the very least a period during which pay and conditions will be guaranteed. If the acquiring employer is aware of the requirements this will no doubt be incorporated into the agreed purchase price for the business."

- **The Forum recommends that employee's rights should be protected following the transfer of ownership of a business.**

Public and Private Sector transfers

Twenty respondents said that protection is needed in both sectors and one respondent said that protection is only needed in the private sector.

A local law firm said that if such legislation is provided, one group should not have better protection than the other.

JACS – *"Experience indicates it is an issue in both sectors."*

Staff Side *"Particularly in view of recent incorporations and possible future sales to the private sector."*

Amicus noted that Luxembourg previously had such a distinction, but this has now been removed.

- **The Forum recommends that the legislation should protect employees in both the public and private sectors.**

Small Business Exemptions

Seven respondents said that small businesses should be exempt and 10 said that they should not. Three were undecided.

Two respondents said that businesses with less than 10 employees should be exempt, and 7 respondents said that businesses with less than 5 employees should be exempt.

A range of useful comments were received in response to this question. A local law firm said that there should be no discrimination between the size of businesses and that it would be better to limit the amount of legislation, rather than have laws with lots of exceptions. The Forum would advocate the view that it is better to limit the complexity of legal provisions, in all aspects of this recommendation, and allow them to apply more widely.

Ogiers – "*Very small businesses are likely to be either family or owner run. Making it compulsory that any employees employed by the business should follow it when it is sold is likely to have the effect of making such businesses unsaleable."*

States of Jersey "Effect on employees is the same irrespective of size"

Employer Association – "…the States EDD wants to improve business growth and placing more regulatory requirements on how businesses do business may inhibit this. There may well be a reluctance to grow one's own business through other purchases if that means having to retain the rights and resources of that business...Small businesses under 5 or even 10 may find the requirements of such a law too restrictive."

Tim Langlois "*The majority of businesses in Jersey are small. It's all down to economies of scale – the large businesses it will cost more, the smaller less."*

Amicus – "Transferred engagements happen between smaller companies just as frequently as large companies and as a consequence this would create a potential loop hole for subsidiary structured organisations."

- **The Forum recommends that there should be no exemption for small businesses.**

RECOMMENDATION

Redundancy and Business Transfers

Transfers Outside Jersey

Nine respondents said that employees should be protected when a business is transferred outside Jersey, 5 said that contracts should not be protected in those circumstances and 6 were undecided.

The Forum recognised from the additional comments received that insufficient information had been provided about the implications of a yes or no response to this question. There were, however, some useful comments from those who already had some experience or knowledge of this issue:

Ogiers - *This would simply add needless complexity to an otherwise straightforward approach.*

States of Jersey – No – "Employment markets are different outside Jersey"

Employer Association – "Should an employer transfer business outside of Jersey, there should be provision to offer those roles transferred to the existing incumbents in the first instance. However, there should not be a requirement to have to pay relocation costs or additional expenses for those individuals who decide to transfer outside of Jersey – just the option to be offered a transfer."

Mr Walton suggested that protection is doubly necessary if the business is transferred to a different jurisdiction.

Staff Side – "Ideally yes, but it is difficult to envisage how this would be enforced in practice. Similarly, how do you protect Jersey employee rights where they work for large international organisations outside of Jersey?"

Amicus – "Wherever practicable terms and conditions should be protected no matter where the business base is relocated to. The world lives in a global economy with business becoming increasingly multinational. If the provisions were not protected then it would not take much effort for a base of operations to relocate out of Jersey to avoid the effects of this new protection."

The Forum considered that, as levels of protection in other jurisdictions are often more stringent than in Jersey, it is unlikely that employers would relocate out of Jersey simply to avoid local legislation. If transfers outside of Jersey were protected by the proposed legislation, it would increase complexity and uncertainty as to whether employee's contracts are governed by Jersey legislation and how this relates to differences between statutory protections in the two jurisdictions, such as, a greater entitlement to statutory leave in the new jurisdiction. It must be remembered that employees cannot be forced to transfer to the new employer; if they do not wish to transfer, the employees either become redundant, or resign when the business is relocated. Employees may of course wish to

accept or negotiate with the new employer a new package of terms appropriate to the new jurisdiction.

- **The Forum recommends that the legislation should not give employees the right to maintain their terms and conditions of employment if their job is transferred outside of Jersey.**

An "employee" member of the Forum recorded his dissent from this recommendation.

Terms and Conditions to Transfer

There was general agreement amongst respondents that employees should transfer on the contractual terms and conditions that are in place at the date of transfer. Respondents also suggested various other additional terms and conditions that they considered should transfer.

JACS – *"Any CONTRACTUAL terms and conditions should be automatically transferred. These would include Health insurance, company car, bonus scheme, etc if contractual. The only non-contractual terms and conditions that should be transferred are those relating to pension schemes."*

A local Law firm suggested that, except where arrangements have been made between the old and new employer, benefits provided via a third party that pertain directly to the original employer should not transfer (e.g. pension and insurance schemes), and neither should non-contractual policies procedures and benefits.

A local hotelier felt that *"All should be renegotiable where Economic, Technical or Organisational reasons apply."*

The States of Jersey said that discipline and grievance procedures and job descriptions very much depend on the new place of work and the circumstances of the transfer, so should not be transferred.

Employer association – *"any conditions that were originally 'contractual' should be automatically transferred however, there should be some flexibility for the new employer – particularly if they are having to amalgamate two different business models and may have to be making economies of scale."*

Finance industry employer – " employees would need to accept 'reasonable' changes as it would not be necessarily feasible for a new employer to replicate all terms in their exact form as they may discriminate against existing staff or cripple the business e.g. if hours/shifts were out of line."

Tim Langlois – "Full union recognition along with full bargaining rights. Once the Employment Relations Law is in place this should then be covered."

Staff Side – "Union recognition and any existing contractual terms."

The TGWU also agreed that trade union rights should be transferred.

In the UK, if a collective agreement is in place at the time of transfer which covers any of the employees who are transferring, then the agreement transfers and applies for the duration of its application. Where the previous employer recognised a union in respect of employees who are being transferred, and after the transfer the group of employees maintains an identity that is distinct from the new employers business, then the recognition applies between the union and the new employer. Where transferring employees' contracts of employment incorporate a collective agreement, then the contractual terms will transfer even if recognition doesn't.

The Guernsey Law (as described on page 10 of this recommendation) provides similar protections in regard to union recognition and the transfer of collective agreements, other than where they relate to pensions.

The EC Directive relating to transfers of undertakings provides that terms and conditions agreed in any **collective agreement** must be observed by the new employer on the same terms that were applicable before the transfer, or until a new collective agreement is in place. However, jurisdictions may limit the period in which those collectively agreed terms and conditions must be observed by the new employer for a period of no less than one year. The Forum does not intend to recommend such a limit.

- **The Forum recommends that all existing contractual terms and conditions should be automatically transferred, including any contractual terms incorporated into that contract via a collective agreement.**

- **The Forum recommends that where a collective agreement is in place at the time of transfer which covers any of the employees who are transferring, the agreement should transfer and apply, other than where it relates to pensions, for the duration of its application.**

- **The Forum recommends that where the old employer recognised a union in respect of employees who are being transferred, and after the transfer the group of employees maintains an identity that is distinct from the new employers business, then the recognition should apply between the union and the new employer.**

Pension Protection

Thirteen respondents across a range of categories said that there should be some protection for employees' pensions following a transfer. Five said that there should not be protection (including the 2 Law firms, an employer and 2 employer associations) and 3 respondents were undecided.

Ogiers commented that it is "*likely to be far too complicated and too expensive, especially when taking into account the relative benefit to the employee set against the likelihood of massive costs for the new employer.*"

JACS – *"Pension scheme provision is a complex area. A pension is a key part of the remuneration package and requires protection as part of a business transfer."*

Employer Association – Pensions are often contractual and form an important part of employees' total compensation. *"Pension funding can be quite complicated – those in final salary schemes are funded to much higher levels than in money purchase schemes because of actuarial requirements. Many companies have now closed their final salary schemes to new entrants and a new employer may find the funding equivalent too high in a money purchase scheme."*

Local hotelier – There should be no pension protection but *"advice should be sought for individuals to protect any contributions to date. Final salary pensions schemes in particular would be difficult to transfer and would likely put off anyone wishing to acquire the business."*

Amicus – *"…there is no reason for an employer not to recognise these commitments as one of the caveats during the sale negotiations. From 6 April 2005, employees who transfer on a business sale now have some protection of their pension rights. Under the Transfer of Employment (Pension Protection) Regulations 2005, where a transferring employer made contributions to an occupational pension scheme in respect of employees who are being transferred, the new employer will have to provide either an occupational money purchase or a stakeholder scheme to which it must make relevant contributions; or an occupational final salary scheme which either complies with the reference scheme test or with alternative requirements. The alternative requirements require members to be provided with benefits, the value of which is at least equal to 6 % of pensionable pay plus any contributions which the member himself makes. Employees cannot be required to contribute at more than 6 % of pensionable pay."*

- **The Forum understands that pension scheme provision is a complex subject, and considers that it is not qualified to make a recommendation on this point without the benefit of full consideration of the possible complications from a business perspective. The implications of making an uninformed recommendation on this issue are serious. It is therefore recommended that expert actuarial advice is sought on this matter prior to drafting the legislation.**

Type of Pension Scheme

Four respondents said that employers should be required to provide an identical pension scheme and 12 said that an alternative scheme would suffice.

If an alternative scheme were permissible, 6 respondents said that employers should be required to match the contribution level that had been provided by the former employer and 8 said that the employer should not be required to do so.

JACS – "The new employer should be obliged to make a contribution to an alternative pension scheme. The employer should match the employee's contribution to a maximum level. The 6% figure appears to be reasonable."

JEC – "You cannot force the new employer to maintain the existing pension provision if their own employees have a totally different system that is less substantive, inconsistencies arise."

Tim Langlois – "Utilities should be treated as a special case, especially if in States pension scheme. Offering an alternative scheme as a requirement is fair, but should this be a States Utility, all pension requirements must be matched. In other companies there could be some lee way."

A Finance industry employer said that the employer should not necessarily be required to match the previous contribution level and that consideration should be given to *"whether the individual is receiving other benefits in the new company than they were with the old company i.e. they can't cherry pick best terms & benefits from both employers."*

Staff Side said that employers should be required to match the contribution level, *"subject to whether the scheme is defined contribution or defined benefit and as a result of discussions with the actuary as to the adequacy and comparability of employer/ee contribution levels."*

The Guernsey Law provides that public servant's pension schemes, as provided in contracts or collective agreements do not transfer, but the new employer must provide something "broadly comparable". Failure to do so results in compensation to the employee based on actuarial advice regarding the loss sustained by the transferred employee.

- **The Forum recommends that (subject to obtaining actuarial advice in the drafting process) the law should give some protection of employee's pensions, but the level of contribution or type of scheme should not have to be identical to that which applied before the transfer.**

Following a transfer, should there be a time limit after which any agreed changes to terms and conditions are not void?

This question was included in the consultation because the UK provisions on this aspect of business transfers appear to have been intended to prevent employers from changing employees terms and conditions immediately after a transfer and as a result of the

transfer, rather than being intended to allow that any re-negotiated terms and conditions may be declared void by a tribunal at any time in the future.

It had been suggested that if Jersey wishes to allow changes to be agreed between the employer and employees at a future time after the transfer without the possibility of the changes being declared void, our law could provide a time limit, after which changes may not be declared void.

Ten respondents said that there should be a time limit after which agreed changes are not void, and 7 respondents said that there should not be a time limit.

JACS – "On acquiring a business, the new owner will most likely need to gain economic, technical or organisational advantages. As showing "changes in the workforce" appears difficult to substantiate, giving rise to the risk of changes being declared void, a time limit after which such changes will not be void appears sensible."

The States of Jersey said that there should be a 1 year time limit: *"You may have discrimination claims from an employer's existing employees who may be doing the same jobs on different terms. Encourage integration of transferred employees…Enables both transferred and existing staff to come to terms with the new situation; encourages integration at an early date."*

Amicus stated that "…a set period after which the employer had the right to agree a change of employment conditions with an employee without the terms being declared void would, in our view, place the employee at a disadvantage and leave vulnerable employees at risk of reduced employment conditions with no protection under the transfer provisions.

Ogiers – "*The UK approach arises entirely from the Acquired Rights Directive. There is simply no reason to repeat the mistakes inherent in this approach. There is no reason why employers and employees should not be able to agree changes to their terms and conditions under ordinary common law principles…the protection given by the common law and by the unfair dismissal regime contained in the Employment (Jersey) Law 2003 as entirely sufficient for these purposes. Adopting any provisions which prevent employers from changing employees' terms and conditions immediately after a transfer…will simply add ludicrous levels of complexity to provisions which are already likely to be extremely complex."*

Another local law firm suggested that there is no need for additional legislation; that there should be no other restrictions on changes to terms and conditions, other than those already under common law and the existing Employment Law. The respondent suggests that the new employer should have the same ability to change terms and conditions as the old employer did. Where changes are made to the employee's detriment and reasons aren't sufficient to be justified, employees can already bring breach of contact and/or constructive unfair dismissal.

RECOMMENDATION

Redundancy and

Business Transfers

- **The Forum recommends that there should not be a time limit after which any agreed changes to terms and conditions cannot be declared void. The Forum is advised that the position as set out by the two law firm respondents; that the common law situation combined with the protection provided by the Employment Law, is sufficient to protect employees, and that to introduce such a period would introduce excessive complexity.**

Employee Information

In the UK, an employer who is transferring his business to a new employer must provide a specified set of information, at least 2 weeks before the transfer, to help the new employer to understand the inherited rights, duties and obligations in relation to those employees who will be transferred.

A list of suggested information was provided in the consultation document and respondents were asked to indicate what information the old employer should have to give to the new employer before the transfer occurs, subject to the employees' agreement where required by the Data Protection Law. Points 1 to 8 are specified as required in the UK and points 9 to 12 were suggested by the Forum. The third column of the table indicates the number of respondents who agreed that the suggested details should be supplied to the new employer before the transfer occurs.

1.	The identity of the employees	16
2.	Their ages	17
3.	Information contained in their statements of employment particulars	18
4.	Information relating to collective agreements which apply to those employees	18
5.	Instances of any disciplinary action within the previous 2 years	12
6.	Instances of any grievances raised by the employees in the previous 2 years	10
7.	Instances of any legal actions taken by the employees against the former employer in the previous 2 years	15
8.	Instances of potential legal actions that may be brought by those employees	15
9.	Maternity leave taken or due	15
10.	Annual leave taken or due	16
11.	Employees educational or vocational qualifications	17
12.	Information relating to employees work permits / Regulation of Undertakings licensing information	18

RECOMMENDATION

Redundancy and Business Transfers

With the exception of instances of disciplinary and grievance action in the previous two years, the majority of respondents ticked all of the boxes. The additional comments provided proved to be more enlightening.

JACS – "*CURRENT disciplinary actions or grievances should be transferred, not "within the past 2 years", as they may have lapsed."*

A Law firm said that all of the suggested information about employees should be provided to the new employer as soon as possible, except for the identity of the employees, which should not be provided until the transfer has been confirmed, for example, 1 month before: *"This is an area which often previously caused difficulties in the UK, when an outgoing employer refused to provide an incoming employer with relevant information, to the detriment of the incoming employer and transferring employees."*

A Utilities company said that pension rights should be transferred *"to avoid negligent misstatement"* and Staff Side referred to salary. It is assumed that both of these would be included in the statement of employment particulars (point 3).

A local Hotelier said that all suggested information should be provided, plus job descriptions, training records, sickness history, performance appraisal information etc.

The States of Jersey said that discipline and grievance and legal actions should be provided only where they are current, and only information on maternity leave due to be taken should be provided.

Jersey Hospitality Association (JHA) – "*All available information should be provided; Performance records, history of sickness, contracts of employment"*

Another employer association suggested the same details as the JHA, plus training & development information.

Mr Walton suggested holidays, levels of pay hours of work and all conditions of service including pension entitlements.

In the UK, this matter was previously left open for negotiation between the two parties, however a relatively new TUPE Regulation requires the information in points 1 - 8 to be provided at least 14 days before the transfer, unless special circumstances allow notification to be delayed. The remedy for failure to meet this obligation is that the tribunal can award compensation to an amount it considers just and reasonable (the Regulations specify not generally less than £500 per employee) having regard to any loss sustained and any warranties or indemnities that may exist which would allow damages to be recovered from the old employer.

- **The Forum recommends that the employer should be required to provide all of the listed information (points 1 to 12) to the new employer at least 14 days before the transfer, with the following exceptions; points 5 and 6 should be limited to "current" action, not action within the previous 2 years, and points**

9 and 10 should be provided only where they are "<u>due to be taken</u>, or are owed".

- **The Forum recommends that any other information that the new employer wishes to be provided with before the transfer should be agreed between the two parties and shared at least 14 days before the transfer occurs, or within a time period agreed between the two parties.**

- **The Forum recommends that, where the old employer has failed to provide the required information in the time period, the Tribunal may award compensation to the new employer, such as it considers just and reasonable in the circumstances.**

Informing and Consulting Employees

12 respondents indicated that provisions for informing and consulting employees should be included in guidelines rather than legislation. 8 respondents did not agree, including 3 unions and 3 employees.

Both law firms who responded suggested that "over-regulation" should be avoided and that the law should not seek to be too prescriptive; guidance may be useful but it should not be legislation via the backdoor.

An Independent advisory body did not think it appropriate for employers to have to consult with employees in all situations, but suggested that guidelines would be useful.

Amicus – "Legislation should dictate timescales and some method of procedure for this to be followed, including the opportunity for employees to meet with the prospective buyer."

- **The Forum was minded to recommend that detailed information and consultation requirements of employers should be included in guidelines rather than legislation. However, in the interest of ensuring that employees are informed of business transfers and the potential consequences for their jobs, the following sections provide the Forum's recommendations for legislative provision.**

Information and Consultation Procedure

Fourteen respondents indicated that employers should be required to consult with employees before a transfer, 4 said that there not be a consultation requirement (including one employee, one employer association, one law firm and one independent advisory body).

Ogiers – *"Informing and consulting employees is in many ways more important than the transfer provisions, such a transfer should not come as a shock to employees."*

JACS – "Consultation is a fundamental principle of good employment relations. There should be a requirement to consult at the stage between a decision being taken to transfer an undertaking and the planned date of transfer."

A local Hotelier said that to legislate for consultation may put a transfer at risk and that an employer should have the opportunity to justify any reasons for not consulting.

The Jersey Hospitality Association suggested a code of practice and that best practice should be followed, rather than law because consultation is impractical and each sale of a business is different. Making this Law could put the transfer at risk.

Employer Association – *"It is important to maintain good employee relations and to treat employees fairly and with respect. There is often a lot of uncertainty and concern when business transfers occur and it would be beneficial for employees to understand what the transfer means and how it affects them to avoid future concerns. However, Jersey is a small community and we are concerned that possible deals could be frustrated by having open consultation and the confidentialities surrounding this. Consultation should certainly take place once a binding agreement has been reached by both businesses."*

- **The Forum recommends that employers should be required to inform and consult employees "in good time" before a transfer occurs, meaning, as soon as reasonably practical after a binding business transfer agreement has been reached between the old and new employers.**

A utilities company provided the following comment regarding the information that should be given to employees in consultation – *"The fact that a transfer is to take place (and when, approximately), and the reason for it (but not obliged to justify the transfer or discuss its merits). Explanation of the legal effect in relation to employment contracts, collective agreements and statutory rights, the impact on pay and benefits, and any relocation plans and measures to take in relation to the transfer."*

Amicus – "Key information about the employer should be provided so that the employees know who they will be working for, with a full breakdown of their history and the future key objectives of this new company. Additionally if there are to be changes to the management structure or potential job losses the employees can be alerted to this situation and respond accordingly.

- **The Forum recommends that the legislation should require employers to inform the employees who will be affected by the transfer (or appropriate representatives of such employees) of the following information;**
  - **The date or proposed date of the transfer**

- **The reasons for the transfer**
- **The legal, economic and social implications of the transfer for the employees**
- **Any measures envisaged in relation to the employees.**

- **The Forum also recommends that a model procedure should be provided in the guidelines, elaborating on those legal requirements.**

The Forum considered whether the consultation procedure required when a business is being transferred should be the same as that recommended by the Forum when collective redundancies are being proposed. The responses indicated that, although simplicity and consistency is desirable wherever possible, respondents had recognised that the two situations can be very different and may require a different procedure to be undertaken.

JACS – "*Standardisation of procedures assists all parties, although due to the need for confidentiality during the initial stages leading up to the decision to transfer an undertaking, the timing of consultation (compared to redundancy situations) may well be different."*

Two employer associations said that there should be more flexibility in the timing and the process when consulting on business transfers than for collective redundancies.

An independent advisory body said that there should not be the same consultation procedure as for collective redundancies because they *"are particularly sensitive and should be handled appropriately."*

JEC - many of the UK requirements in relation to appropriate representatives, elections protections and failure to comply are as for collective redundancy consultation.

The Forum recognises that where a business transfer agreement has been reached, the purpose of consulting employees (or their representatives) differs from the purpose of consulting employees about collective redundancies. Where collective redundancies are planned, employers must undertake collective consultation with employees to include suggestions for alternative solutions to redundancies. However, consultation regarding business transfers is intended to provide employees with sufficient information regarding measures that will be taken by the old or new employer as a result of the transfer, with a view to reaching agreement to those measures with the affected employees, rather than agreement to the transfer itself.

- **The Forum recommends that the legislation should require employers to consult with "appropriate representatives" of affected employees; the provisions for the election of appropriate representatives (in cases where there is no recognised trade union) to be the same as those recommended by the Forum in relation to collective redundancies.**

RECOMMENDATION

Redundancy and Business Transfers

- **The Forum recommends that this should apply irrespective of the number of employees likely to be affected by the business transfer, and must not necessarily occur at least 30 days before the transfer takes place.**
- **The Forum recommends that where an employer has failed to comply with the recommended information and consultation requirements, employees may be awarded compensation up to a maximum of 90 days pay, having regard to the seriousness of the employers' failure to comply. The Tribunal should also have the power to consider whether the old or new employer is liable (or whether jointly liable) for the failure to inform employee representatives of measures envisaged with regard to the transfer.**

Additional Comments

Sale of Jersey Telecom

Tim Langlois, an employee, provided the following additional comment – *"No utility company should even be considered for sale until all of the above becomes statutory law…I hope the Forum will back these views and indeed go public on supporting these points."*

- The Forum wishes to clarify that it is not within its remit, as set out in the Employment (Jersey) Law 2003 and terms of reference, to publicly support or oppose individual employers, employees or organisations in matters relating to employment legislation. The Forum is an independent body that is required to consult with the public on specific aspects of employment legislation, in particular the minimum wage, at the direction of the Social Security Minister. To publicly comment any issue outside of that remit would be potentially damaging to the reputation of the Forum as a balanced, non-political and independent body.

Complexity

Many of the respondents commented on the complexity of UK legislation and a desire for Jersey's legislation to be as simple as possible.

Ogiers *"have some doubts as to whether a TUPE style provision is required at all in Jersey...its likely complexity will defeat any benefits which might accrue to employees by posing large legal and organisational costs upon employers."*

A local Hotelier would "recommend that every effort is made to avoid the confusion created by TUPE in the UK. A balance needs to be found between protection for the individual and allowing businesses to operate effectively and respond to market demands."

Employer Association – *"It is important that businesses of every size can grow and develop without too many restrictions but having a balance between protecting employee rights and allowing businesses appropriate flexibility when buying another business."*

RECOMMENDATION

Redundancy and Business Transfers

A Finance industry employer said that *"we should be careful not to over complicate the law…best guess numbers are circa 40 per annum…wouldn't want to see a law that was as complex as the UK TUPE law as this will place large administrative and cost burdens on employers, that may deflect any good will / best practise that they would have ordinarily adopted anyway."*

- In the process of consultation and the preparation of this recommendation, the Forum intended to avoid the complexities of similar legislation in the UK, simplifying provisions wherever possible and providing guidance instead of legislation where appropriate. Whilst it is recognised that Jersey is a small jurisdiction and that there are concerns about overloading employers with complex legislation, the desire to protect employees with appropriate rights that are enforceable, has resulted in recommendations for more legislation than had originally been envisaged. The Forum considers that the Jersey Employment Tribunal is an appropriate body to deal with disputes on these matters.

Thanks

The Forum extends it's thanks to Darren Newman for his clear and concise training on the issues of redundancy and business transfers, which gave the Forum a firm basis from which to prepare for the consultation process.

The Forum wishes to thank Billy Doyle, a former member of the Forum, for his input in the early stages of developing the consultation paper on this matter, and Wendy Lambert, for her advice on specific aspects of the recommendation regarding business transfers.

The Forum also wishes to thank everyone who took the time to give their views during the consultation process. The detailed responses received on these complex issues have been invaluable in the Forum's consideration of their recommendations for proposed legislation regarding redundancy and business transfers.