

RECOMMENDATION

Compensation awards in respect of written terms of employment, pay slips and rest days



Presented to the Minister for Social Security on 11 December 2015

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SECTION 1 - INTRODUCTION

The Minister for Social Security (the ‘Minister’) directed the Employment Forum (the ‘Forum’) to consult on compensation awards in respect of written terms of employment, pay slips and rest days¹.

Where an employer does not meet certain of its obligations under the Employment (Jersey) Law 2003 (the ‘Employment Law’), there is currently a mechanism to impose a criminal penalty, including a fine, in each case. This is considered unwieldy and so the Forum was asked to consult on whether the Employment and Discrimination Tribunal (the ‘Tribunal’) should instead have the power to award compensation to an affected employee for failures relating to written terms of employment and payment of wages. The Forum was also asked to consult on introducing a power to award compensation to an affected employee for failures relating to statutory rest day entitlement.

The Forum issued a public consultation paper and has set out a summary of the comments received, as well as the other evidence that was taken into account, in support of this recommendation to the Minister.

¹ The Minister also directed the Forum to consult on the unfair dismissal qualifying period for employees working under short, fixed-term contracts. Details can be found on the website www.gov.je/Government/Consultations/Pages/UnfairDismissalQualifyingPeriodShortTerm.aspx

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SECTION 2 - BACKGROUND

Power to fine

Where an employer does not meet certain obligations under the Employment Law, there is currently a mechanism to impose a criminal penalty (including a fine) in each case. These include where the employer has failed to provide written terms of employment or has failed to provide an itemised pay statement.

The Tribunal has no power under the Employment Law to impose a criminal penalty in respect of matters described in the Law as offences. These are matters for the criminal law and must be heard before the Magistrate's Court or Royal Court.² The Attorney General has exclusive jurisdiction over the prosecution of offences in Jersey and the offences created under the Employment Law would be dealt with before the criminal courts of the Island.

Criminal proceedings are considered to be a cumbersome and expensive way to deal with matters such as this. The Attorney General would make a decision as to whether a criminal prosecution is in the public interest and may decide that to prosecute an employer for failing to provide written terms of employment or pay slips to one or two employees is not in the public interest.

The Forum's consultation paper³ provides details of the other powers and remedies that exist under the Employment Law in relation to detriment (Article 31) and automatically unfair dismissal (Article 68).

Minister's request to consult

The Forum was asked to consult on the Minister's proposal to replace two of the criminal offences and to introduce three new powers for the Tribunal to award compensation which would be paid to the employee.

The Minister emphasized to the Forum the importance of enabling employees to enforce their rights via the Tribunal in order to demonstrate fairness to the majority of employers who are complying with these important and basic rights for employees.

² See Royal Court appeal, case number 2008/82
[www.jerseylaw.je/judgments/unreported/Pages/\[2008\]JRC163.aspx](http://www.jerseylaw.je/judgments/unreported/Pages/[2008]JRC163.aspx)

³ www.gov.je/Government/Consultations/Pages/CompensationAwardsTermsOfEmployment.aspx

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Points (i) to (iii) below set out the three specific areas that the Forum was asked to consult upon, including the Minister's proposal to amend the Employment Law in each case and a summary of the position in the UK. More details can be found in the Forum's consultation paper, including a summary of the position in the Isle of Man and Guernsey.

i. Written terms of employment (Part 2 of the Employment Law)

Articles 7 and 8 of the Employment Law enable an employee to complain to the Tribunal if written terms of employment have not been provided, or where there is a question as to what the terms of employment should contain. The Tribunal may determine what particulars should have been included in the terms of employment (by confirming, amending or substituting the particulars). As a remedy, the Tribunal would then deem that the revised particulars have been given to the employee and the new terms of employment would apply as if the employer had given them to the employee. This may be perceived as an inadequate remedy, for example, where the complainant's employment has already ended. Complaints to the Tribunal about failures relating to terms of employment often accompany other complaints, such as unfair dismissal, payment of wages and holiday pay claims.

Article 9 of the Employment Law specifies that, where an employer fails to provide written terms of employment in accordance with the Law, or fails to notify an employee of changes to written terms, this is a criminal offence liable to a fine of level 4 (£5,000) on the standard scale. The Employment Law specifies that, on the issue of a summons, or on the arrest and charge of a person, in respect of such an offence, the Centenier responsible must notify the Tribunal. The Tribunal must then stay any proceedings that have been (or may be) started by the employee in respect of their written statement of employment particulars until the criminal proceedings have been concluded and the time available for an appeal has expired.

The Minister has proposed that the offence liable to a fine could be removed from the Employment Law and that an additional remedy should be available to the Tribunal; a power to award the employee fixed compensation of 2 weeks' pay (uncapped) where the employer has failed to provide written terms of employment in accordance with the Employment Law.

In the UK, most employees are entitled to receive - within two months of starting employment - a written statement of employment particulars setting out their main terms and conditions of employment. Any subsequent change to those terms and conditions must also be confirmed in writing. An employee can bring a claim to an

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employment tribunal if the employer has failed to issue a statement of written terms, or if the terms set out in the statement are inaccurate. If the claim is upheld, the employment tribunal can make a declaration specifying the correct terms.

There is no free-standing right to compensation in the UK for a failure to give an accurate written statement of employment particulars or for failing to notify an employee of any changes. However, if an employee succeeds in another employment tribunal complaint, such as unfair dismissal or an unlawful deduction from wages, and at the time the claim was brought the employer was in breach of its duty to provide a written statement of employment particulars or written notification of any change, the tribunal must make an award equivalent to two weeks' pay and may, if it is just and equitable to do so, make an award of four weeks' pay. The value of a week's pay for these purposes is subject to the statutory limit (£475 from 6 April 2015). Where there are exceptional circumstances that would make an award unjust or inequitable the Tribunal is not obliged to make any financial award.

ii. Payment of wages (Part 5 of the Employment Law)

Article 53 of the Employment Law enables an employee to complain to the Tribunal if their employer has not provided them with an itemised pay statement, or where the pay statement does not comply with what is required by Article 51 of the Employment Law (for example, showing both gross and net pay). The remedies (Article 54) provide that the Tribunal may;

- a. Make a declaration that the employer has failed to give a pay statement, or that the pay statement does not comply with the Law
- b. Order that a pay statement be issued in a particular form and the particulars that must be contained within it
- c. Order the employer to repay to the employee any deduction from pay that was not detailed in the itemised pay statement.

In addition, Article 55 of the Employment Law provides that an employer who contravenes any of the provisions of Part 5 may incur a criminal penalty of a fine of up to £5,000 in respect of each offence.

The Minister has proposed that the offence for failure to provide a written, itemised payslip should be removed and that the Tribunal should have the power to award the employee fixed compensation of 2 weeks' pay (uncapped) where an employer has failed to give a pay statement in accordance with the Employment Law.

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Employers in the UK must provide every employee with an itemised pay statement showing the gross amount payable, detailing any deductions made and the net amount actually paid. A failure to give an itemised pay statement does not in itself give rise to any right to compensation, but where an employer has made un-notified deductions from an employee's pay in the 13 weeks prior to an employment tribunal complaint being lodged, then the tribunal may order the employee to be reimbursed either fully or in part.

iii. Minimum rest periods (Part 3 of the Employment Law)

Article 10 of the Employment Law provides that an employee is entitled to an unpaid rest period equivalent to 24 hours in each 7 day period, or 48 hours in a 14 day period in certain circumstances. No criminal offence or powers to award compensation are provided in relation to this entitlement. A Tribunal declaration that an employee must be afforded the opportunity to take a certain number of unpaid rest days is unlikely to be a deterrent or penalty for the employer. It is also unlikely to be of benefit to an employee if they are 'awarded' a number of unpaid rest days some months after the period in which the rest was due, or after employment has ended.

Where an employer has refused to permit, or prevents, an employee from exercising the right to take a weekly rest day, the Minister has proposed that the Tribunal should have the power to award fixed compensation of 2 weeks' pay, uncapped. The employee would be required to submit the claim within 13 weeks of the time when the rest should have been allowed, or any longer period if the complaint is submitted with another Tribunal complaint after employment has ended.

In the UK, workers and employees are entitled, in general, to an uninterrupted weekly rest period of 24 hours in each seven day period. This can, if the employer chooses, be averaged out over 2 weeks and an employer can either provide two rest periods of 24 hours each or one rest period of 48 hours. There are a wide range of exceptions to this right covering situations such as foreseeable surges in activity, working away from home, and work involving the need for continuity of service or production. There is also an exception for shift workers changing shifts or workers, such as cleaners, whose work may be split up over the course of a day. Collective or workforce agreements may also modify or exclude the right to a weekly rest period. Where one of these exceptions applies, the worker is entitled 'wherever possible' to be given an equivalent period of compensatory rest.

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In the UK, a complaint may be presented to an employment tribunal if an employer refuses to allow the taking of a rest period or fails to provide a period of compensatory rest. If the complaint is upheld, the tribunal can make a declaration to that effect and it can award compensation based on what is "just and equitable in all the circumstances" having regard to the employer's default and any losses sustained by the employee.

SECTION 3 – CONSULTATION

Method

The Forum consulted during the period 5 May to 17 June 2015 by issuing a consultation paper and survey to around 300 individuals, organisations and interested parties. Comments were received from the following respondents;

Employer	13
Employee	4
Employers' association	1
Trade union / staff association	1
Other	9
Blank	1
TOTAL	29

The employers and employees who responded were from a range of sectors including wholesale and retail, financial services, the public sector, transport, storage and communications and construction.

Some of the responses represent the views of a group rather than an individual respondent;

- The Jersey branch of the Chartered Institute of Personnel and Development (the 'CIPD Group, Jersey branch') is a professional body made up of 15 committee members representing a range of industries in the Island. The CIPD Group, Jersey branch, collated responses from 15 of its members, including via an online survey that asked questions that differed from the Forum's online survey. The responses collected by the CIPD Group, Jersey branch, have therefore been presented separately in this section.
- Prospect is a trade union that represents its Jersey membership in a range of sectors across the private and public sectors to promote and protect the

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interests of professionals at work. The response was submitted by Prospect's negotiator for Jersey.

- The response of the Jersey Advisory and Conciliation Service (JACS) was prepared by the Director of JACS following discussion with the members of the JACS Board⁴.
- One employers' association responded on behalf of its membership.

The Jersey Chamber of Commerce circulated the Forum's survey to its membership and encouraged employers to submit individual responses, rather than submitting a collated response on behalf of the membership.

Outcomes

This section gives an overview of the responses received. A selection of comments has been included in this section for illustration purposes. Where the respondent has agreed to be quoted anonymously, quotes are attributed to the respondent type and sector where available. A list of some of the additional comments is included in Appendix 1.

a) Removing the criminal penalties

The Forum asked respondents if the existing criminal penalties should be removed from the Employment Law in relation to the right to written terms of employment. Responses were equally split, 50 percent said that the criminal penalties should be removed and 50 percent said that they should not be removed.

The Forum also asked respondents if the existing criminal penalties should be removed from the Employment Law in relation to the right to itemised pay slips. Responses were almost as evenly split; 54 percent said that the criminal penalties should be removed and 46 percent said that they should not be removed.

Comments from respondents on these questions included the following;

"Should not be criminal offenses but rather handled under the discrimination and employment tribunal." (Anonymous employer, financial services)

⁴ Based on a tripartite structure, the JACS Board comprises representatives from a broad cross section and includes those with experience of representing employees, those with experience of representing employers and independent members. See the website www.jacs.org.je/about-jacs/jacs-constitution/

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“They are currently not easily enforceable and have an increased burden on the public purse if pursued through the Criminal Courts.” (JACS)

“The Employer should be sanctioned for these failures, compensation to the employee won’t necessarily stop the problem and a criminal sanction is a stronger deterrent.” (Anonymous employment lawyer)

According to the survey undertaken by the CIPD Group, Jersey branch, 66 percent of respondents said that the criminal penalties in relation to written terms of employment and pay slips should be removed from the Employment Law.

b) Introducing compensation for failures relating to written terms of employment and itemised pay slips

Respondents were asked if the Tribunal should be given the power to award compensation to an employee in relation to the right to written terms of employment and the right to itemised pay slips and, if so, whether this should be in addition to criminal penalties or instead of criminal penalties.

Written terms of employment

- 77 percent of respondents agreed that employee compensation should be available in relation to written terms of employment
- 58 percent of the respondents said that compensation should be available **instead of** criminal penalties and 42 percent said that compensation should be available **in addition to** criminal penalties.
- 85 percent of respondents to the survey undertaken by the CIPD Group, Jersey branch, said that compensation should be available in relation to written terms of employment

Comments from respondents included the following;

“Otherwise there is no rationale for having such statutory rights if there is no penalty or re-dress.” (JACS)

“The statement of initial employment particulars is clearly laid out in law and there should be no excuse why one cannot be produced.” (Bob King, Prospect)

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“Yes but only if the employee has suffered a loss and NOT instead of criminal sanction against the employer.” (Anonymous employment lawyer)

“This gives the Tribunal the ability to enact a consequence that benefits the employee and acts as a deterrent.” (Anonymous employer, wholesale and retail)

“Employers are too quick to dictate but sometimes do not keep to there side of the deal.” (Anonymous employee)

“Yes - I have seen so many cases in construction of employers still to this day not issuing employees with payslips or contracts. With the risk of fines being incurred, employers will be urged to issue written terms and payslips.” (Respondent to CIPD Group, Jersey branch)

Itemised pay slips

- 83 percent of respondents agreed that compensation should be available in relation to itemised pay slips.
- 59 percent of the respondents said that compensation should be available **instead of** criminal penalties and 41 percent said that compensation should be available **in addition to** criminal penalties.
- 85 percent of respondents to the survey undertaken by the CIPD Group, Jersey branch, said that compensation should be available in relation to itemised pay slips.

Comments from respondents included the following;

“It would be appropriate to impose a sanction to employers who do not act in accordance with the regulations. In this case a compensatory award to to the employee makes the most sense.” (Anonymous employer, financial services)

“An employee has a right to evidence of what they have been paid and for what when etc. This documentation may be required for tax returns and they (and the Comptroller) shouldn't be put a disadvantage by an employer's failure. Compensation should be award at the cost of the employer only, not from Public funds.” (Anonymous employee)

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“Empowering the Tribunal will make recourse more attainable for wronged employees.” (Anonymous employers’ association)

c) Introducing compensation for failures relating to rest days

Respondents were asked if the Tribunal should be given the power to award compensation to an employee where an employer refuses to permit, or prevents, the employee from exercising their entitlement to a weekly rest day. Of those who responded, 96 percent said that compensation should be available. Comments from respondents included;

“Care needed though- some employees voluntarily waive their right to a rest day and want to work 7 days a week- an employer will be nervous to allow this to happen if they think the employee can then claim compensation- it will be a question of proving at those behest was the waiver...tricky area of evidence.” (Anonymous employment lawyer)

“Take into account the context of the rest day and the services the employer provides. By way of an example, staffing in the hospital would have a negative impact on services as opposed to an employee in the finance industry. Also consider by the Tribunal whether the refusal to permit a rest day is a one-off or only due to a business emergency, role/sector dependant.” (Anonymous employer, charity)

“This is a statutory right that applies to everyone and could run the risk of 'abuse' if this entitlement were allowed to be lost over periods of time. However there may be legitimate exceptional/emergency circumstances where through not fault of the employer there maybe a requirement for employees to forgo their rest period. Therefore the JEDT should have the right to use their discretion if/when making such an award. This is as simple as Yes or No as different circumstances will need to be taken into account, and this is not the same as not receiving the pay slips and written statements (as above) which are always within the control of the employer.” (JACS)

The CIPD Group, Jersey branch, asked its members a different and more limited question; whether the Tribunal should have the power to award a fixed sum of 2 weeks’ uncapped pay as compensation where an employer refuses to permit, or prevents, an employee from exercising their entitlement to a weekly rest day. Sixty-one percent of these respondents agreed. The CIPD Group, Jersey branch, also reported that *“39% of our members who took part in the survey believe that*

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some of their staff wants to work 7 days and there need to be an amendment whereby an employee can choose to work longer hours without detriment to the employer.”

Comments on this issue from members of the CIPD Group, Jersey branch, including the following;

“Employees could easily manipulate employers by stating they want to work additional hours.” (Respondent to CIPD Group, Jersey branch)

“Employee who chooses to work 7 days should be able to sign a waiver, say that they are happy to work 7 days, especially seasonal staff.” (Respondent to CIPD Group, Jersey branch)

d) The level of compensation

Respondents were asked to indicate, if compensation was to be introduced in these three areas, what level the potential awards should be set at.

Written terms of employment – the most popular compensation level was up to four weeks’ pay at the Tribunal’s discretion. This option was preferred by 38 percent of the respondents.

Itemised pay slips - the most popular compensation level was a fixed sum for each failure, not based on a week’s pay, such as a fixed award of £500. This option was supported by 29 percent of the respondents. This was closely followed by up to four weeks’ pay at the Tribunal’s discretion with 25 percent of respondents supporting that option.

Rest days – the most popular compensation level was up to four weeks’ pay at the Tribunal’s discretion. This option was preferred by 32 percent of the respondents. Comments on the level of compensation in relation to rest days included the following;

“There should be a fixed compensatory amount along with the day’s pay lost. There should also be an order on the employer that, if breached, could result in a more serious penalty. If an employer can see that breaching is “cheaper” complying with the law the law will be ineffective (similar to a £50 parking fine when the cost of parking is £60).” (Bob King, Prospect)

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“1 days pay for each occasion proven to be a detriment.” (Anonymous HR professional)

“The problem here is that some employees may well have left the employer - so a monetary sum may be appropriate, however for others that remain in a business they may wish to take time off. Some employees may feel they 'need' to receive a monetary sum - even if time off would be of greater benefit to them from a welfare perspective. Many employers would want to ensure their employees were well rested and able to fulfil their roles.” (JACS)

A number of the respondents had suggested different award-making powers for failures in relation to these three rights, however none of the respondents described why it might be appropriate to set different award making powers in each case. The Forum will consider this further in Section 4.

JACS commented on the level of award as follows;

“The rationale for the 4 weeks cap is that this reflects the other 'punitive' awards in the legislation for other breaches ie flexible working etc.” (JACS)

The CIPD Group, Jersey branch, asked respondents whether compensation for failures relating to written terms of employment, pay slips and rest days should be fixed at 2 weeks' pay (uncapped) and 61 percent of respondents agreed in each case. It is not clear what (if any) other options for the level of compensation were offered to respondents. The CIPD Group, Jersey branch, presented the following suggestion;

“The members agree that the Tribunal should be awarded the power to award fixed compensation to an employee. Our members have suggested that 2 weeks could be detrimental to smaller employers and therefore ask for the Minister to consider 1 week's pay (uncapped) where an employer has failed to comply with the Employment Law in relation to both written terms of employment and Itemised pay statements.”

The Forum asked respondents whether any compensation should be capped; 72 percent said that compensation should be capped and 28 percent said that compensation should not be capped. Comments in support of a cap included the following;

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“It should not be made out to be a witch hunt - but a fair compensation for the lax in complying.” (Anonymous employee)

“A sensible and proportionate cap should be established in order to dissuade employers from breaching the Law, but also to ensure that employees (and their lawyers) are not perceived to have been given inordinate bargaining powers.” (Anonymous employers’ association)

“To consider the impact on not-for-profit organisations and small business that do not have an HR function or funds to seek independent employment law advice.” (Anonymous employer, charity)

The Forum notes that the requirements to provide written terms of employment and pay slips have been in place since 1962 and 1992 respectively and are straightforward to comply with. It is not clear what detailed advice might be needed to comply with these requirements. Model documents and advice are available from JACS at no charge.

One respondent commented in opposition to a cap, as follows;

“Why cap? If the employee is a high earner, the employer should compensate at that rate of pay, otherwise the claim wont be brought at higher levels and there is no real protection.” (Anonymous employment lawyer)

e) Other issues

A number of other issues, including the following two points, were raised by respondents to the consultation. Some additional comments from respondents on other issues are included in Appendix 1.

i) Time limit for Tribunal complaints

“The time frame for submitting an claim for a breach is suggested to be 13 week, we would suggest that this is in line with all of the other time frames for making a claim and therefore be reduced to 8 weeks.” (CIPD Group, Jersey branch)

The Forum’s consultation paper stated that, where an employer has refused to permit, or prevents, an employee from exercising the right to take a weekly rest day, the Minister had proposed that *“the employee would be required to submit the claim within 13 weeks of the time the rest should have been allowed, or any longer*

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period if the complaint is submitted with another Tribunal complaint after employment has ended.” The Forum notes that this differs from the other time limits for Tribunal complaints that are set out in the Employment Law.

ii) **Written terms of employment to be given within 8 weeks**

Article 3 of the Employment Law requires written terms of employment to be given to an employee within 4 weeks of the start of their employment. The CIPD Group, Jersey branch, reported in its conclusion that *“the members had particularly strong views that the written terms of employment should be given within 2 months of starting employment, the same as the UK.”* It does not appear that a specific question was asked on this point, however the report includes two comments on this time period from members of the CIPD Group, Jersey branch;

“I think we should follow UK legislation and give (especially smaller employers) a window of 2 months to get their house in order before fines can be made against them.”

“I think we should have two months to issue written terms of employment.”

While this is technically outside the remit of this consultation, the Forum notes that the responses appear to be suggesting that, if compensation is to be introduced in relation to these failures, it would be appropriate to allow employers a longer time frame in which to comply. The Forum was not directed to consult on the time period that is fixed under Article 3 of the Employment Law and so no comments on this issue were invited from the other respondents. The Forum therefore makes no recommendation.

As the CIPD Group, Jersey branch, has noted, employees in the UK are entitled to receive written terms of employment not later than eight weeks after the start of employment. In Guernsey and the Isle of Man, employees are entitled to receive written terms of employment not later than four weeks after the commencement of employment. Employers in Jersey have been required to provide written terms of employment within four weeks of an employee starting work since 1992 under the Terms of Employment (Jersey) Regulations, which were superseded by the Employment Law in 2005.

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SECTION 4 – RECOMMENDATION

The Forum has reflected on the Minister's proposed changes to the Employment Law and her reasons for proposing those changes. The Minister is concerned that the current mechanism to impose a criminal penalty is unwieldy, and she considers that it would be appropriate to enable employees to enforce their basic rights to written terms of employment, pay slips and rest days via the Tribunal. Having considered all of the responses, and specifically the reasons that were given for those responses, the Forum presents the following unanimous recommendations to the Minister:

a) Removing the criminal penalties

The consultation responses were split on whether the existing criminal penalties should be removed from the Employment Law in relation to the right to written terms of employment and pay slips. The Forum considered the reasons why each respondent felt that the criminal penalties should either be removed or retained. The Forum accepts the argument that the ultimate power of a criminal sanction is likely to be compelling for some employers. It is unlikely that fines would be imposed other than in extreme cases, such as where an employer has a long history of failure, is a repeat offender, or where a large number of employees are involved.

The Forum concluded that there was not sufficient evidence in the responses to justify a recommendation to remove the criminal penalties. The Forum therefore recommends that the existing criminal penalties in relation to written terms of employment and pay slips should be retained in the Employment Law.

b) Introducing compensation for failures relating to written terms of employment and itemised pay slips

The consultation responses were in favour of introducing compensation both for failures relating to the right to written terms of employment and for failures relating to the right to itemised pay slips. The Forum notes that the existence of criminal penalties has clearly not been compelling enough to ensure that all employers meet their obligations under the Employment Law. The Forum considers that the possibility of a complaint to the Tribunal is perhaps more immediate as it is relatively easy for an employee to take a complaint to the Tribunal. Compensation in addition to the existing powers may provide the additional deterrent that still appears to be required.

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The Forum recommends that the Employment Law should be amended to introduce a power for the Tribunal to award compensation to an employee for failures relating to the right to written terms of employment and the right to itemised pay slips. The Forum is of the view that these are fundamental, long-standing employment rights that are straightforward to comply with.

c) Introducing compensation for failures relating to rest days

The consultation responses were overwhelmingly in favour of the Tribunal being given the power to award compensation to an employee where an employer refuses to permit, or prevents, the employee from exercising their entitlement to a weekly rest day.

The Employment Law provides that an employee is entitled to take a rest day; employers are not required to ensure that an employee does not work on their rest day. The Forum noted concerns from some of the respondents that this entitlement can lead to difficulties where an employee has agreed to waive their rest day, but later claims that they did not agree. The Forum notes the comments from some employers and JACS that there will be legitimate circumstances, such as in an 'operational urgency' situation, in which an employee may be required to work during their rest period. It is therefore appropriate that the Tribunal has discretion in awarding any compensation. However, the Law makes provision so that employees can take sufficient rest from work and the compensation must be sufficient that employers feel compelled to ensure that they are meeting the requirements of the Employment Law.

The Forum recommends that the Employment Law should be amended to introduce a power for the Tribunal to award compensation to an employee where an employer **refuses to permit, or prevents**, the employee from exercising their entitlement to a weekly rest day. Compensation would not be available where an employee has simply not taken their rest day.

d) Level of compensation

The Minister had originally proposed that compensation of 2 weeks' pay, uncapped, should be introduced in each of the three areas; written terms of employment, pay slips and rest days. The consultation responses on the appropriate levels of compensation were spread widely across the options that were offered and few respondents gave reasons for their preferred levels of compensation.

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In relation to written terms of employment and rest days, the greatest support from respondents was given to 4 weeks' pay at the Tribunal's discretion. In relation to pay slips, the greatest support from respondents was given to a fixed sum of compensation for each failure, although 4 weeks' pay received almost as much support. A number of the respondents suggested different award-making powers for failures in each of three areas, but gave no reason why different awards might be appropriate. Having considered the consultation responses and each of the three provisions of the Employment Law, the Forum can see no reason why the compensation award should be different in any of the three cases. It is likely to be unnecessarily complex and confusing, particularly for employers, if different levels of compensation award are available.

The Forum recommends that the compensation award available to an employee in respect of each breach of the Employment Law should be **up to 4 weeks' pay in the Tribunal's discretion**. This will give enough flexibility for the Tribunal to consider what level of award is appropriate depending on the seriousness of the employer's failure in relation to the particular employee. If breaching the Law is cheaper than complying with the Law then the remedy will be ineffective.

The Forum believes that there are degrees of failure within each of these three areas (see the examples below) and considers that it would not be appropriate for the Tribunal to be forced to award a fixed sum that may be too high or too low given the circumstances.

1. Written terms of employment – an employer may have refused for many years to provide written terms to a large number of employees despite repeated requests, demonstrating a blatant disregard for the Employment Law. Alternatively, an employer may have provided a written statement to an employee but it fails to comply with one of the required particulars set out in the Law.
2. Itemised pay slips – failures might range from a wilful refusal to provide pay slips over a prolonged period which can have serious consequences for an employee (such as in relation to income tax), to a less serious failure relating to the contents of the pay slip (such as, the gross wage and deductions are shown, but the net wage is not).
3. Rest days — An employer might routinely require staff to work 7 days each week under threat of dismissal and despite repeated requests from exhausted staff for a rest day, or an employer might suspend the taking of

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any rest days for a limited period of time, for example, to provide cover for staff sickness for a 4 week period.

A number of the respondents commented that any compensation should reflect the losses suffered by the employee, one suggestion being a day's pay for each rest day lost. The Forum notes, however, that the compensation is intended to be punitive to compensate the employee appropriately for the employer's failure, rather than being required to reflect actual losses. In many cases, there are unlikely to be financial losses in relation to these three areas, for example, rest days are unpaid. The Forum notes that the calculation of losses would add to the complexity and evidential burden in a Tribunal hearing and could potentially increase the length of hearings.

The consultation respondents were in favour of a cap on the level of compensation. However, based on the comments received, the Forum is convinced that the compensation must be high enough to dissuade employers from breaching the Law. In addition, the Employment Law already provides that the Tribunal may award **uncapped** compensation of up to 4 weeks' pay in relation to a number of other rights, including the new family friendly rights, the right not to suffer a detriment and the right to representation in disciplinary and grievance hearings. The Forum recommends that the value of a week's pay in each case should not be capped.

e) Time limit for Tribunal complaints

The Minister had proposed a 13 week time limit for complaints about rest days to be submitted to the Tribunal. The Forum recognises that this would differ from the other time limits for Tribunal complaints that are set out in the Employment Law. The parts of the Employment Law that deal with Tribunal complaints relating to written terms of employment and pay slips already provide an eight week time limit. The Forum recommends that the Employment Law should set an eight week time limit for complaints to the Tribunal where an employer has refused to permit, or prevented, an employee from exercising their entitlement to a weekly rest day.

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Appendix 1 – Consultation questions and quoted responses

Respondents were asked to give reasons for their responses to many of the questions and a selection of the comments that were provided (that have not already been quoted in Section 3 of this recommendation) are quoted below.

1. Should the existing criminal penalties be removed from the Employment Law in relation to written terms of employment and/or itemised pay statements?

“In instances of serious breaches, recourse to criminal penalties should still be available.” (Anonymous employers’ association)

“The statement of initial employment particulars is clearly laid out in law and there should be no excuse why one cannot be produced. Employers should define those terms at appointment and the penalty is an enforcement tool for this basic requirement. Likewise for an itemised pay statement; a basic requirement where there is no genuine excuse for failing to provide one (excepting IT / process errors).” (Bob King, Prospect)

“Everyone should have the right to see their written terms of employment. Having everything itemised may require enhancements to payroll systems which could be costly.” (Anonymous employer, financial services)

“A breach of an employee's right should be viewed as a crime, to avoid either deliberately would only be done to avoid there being evidence of other more serious crimes.” (Anonymous employee)

“It is not necessary for this to be a criminal penalty.” (Anonymous employer, wholesale and retail)

“The Law should however, consider employers that submit written terms of employment and the employee does not then return them. Whilst an employer has to submit this document within the first 4 weeks' service, there should be a requirement by the employee to return this document signed within 4 weeks' of receipt. Otherwise, the penalty is on the employer irrespective of whether a document has been issued but an employee can deny this at tribunal.” (Anonymous employer, charity)

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“Employment contractual relationships should be a private law matter between the parties and the State should not involve itself to the criminal standard which seems extremely onerous in all the circumstances. Why should the taxpayer, via the prosecution process, be liable for the costs of enforcing employment law anyway? If either party is not satisfied with an outcome, they still have recourse to the Courts via private law proceedings.” (Anonymous member of the public)

2. Should the Tribunal be given the power to award compensation to an employee whose employer has not complied with the Employment Law in relation to written terms of employment;

“How do you establish as an employer that you have complied but the employee has chosen not to return the document but complies with the terms of their employment, for example, working hours, duties etc.” (Anonymous employer, charity)

“The employer should own the award and if a regular offender be given a higher award.” (Anonymous employer, financial services)

“The employee shouldn't be taking on a job without written terms being agreed to.” (Anonymous employee)

“Employers are too quick to dictate but sometimes do not keep to there side of the deal.” (Anonymous employee)

“Empowering the Tribunal will make recourse more attainable for wronged employees.” (Anonymous employers' association)

“No £££ loss suffreed a declaration is sufficient.” (Anonymous HR professional)

“Any award should be final and without further appeal.” (Anonymous member of the public)

“It would be appropriate to impose a sanction to employers who do not act in accordance with the regulations. In this case a compensatory award to to the employee makes the most sense.” (Anonymous employer, financial services)

“Yes - I think we should have two months to issue written terms of employment”. (Respondent to CIPD Group, Jersey branch)

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"I believe this may encourage employers to provide written terms of employment to their employees. However, I do believe that more support could be given to small organisations, such as during manpower returns, reminders could be sent to employers to ensure they are complying with employment legislation, perhaps providing details of where to go for free support such as JACS, Citizens Advice, Jersey Business" (Respondent to CIPD Group, Jersey branch)

3. If you have answered yes to question 3, should the power to award compensation be available in addition to criminal penalties or instead of criminal penalties?

"The failure to provide terms should be decided by the tribunal; the failure to follow the tribunal order should be a matter for the criminal law under contempt proceedings." (Bob King, Prospect)

4. Should the Tribunal be given the power to award compensation to an employee whose employer has not complied with the law in relation to itemised pay statements;

"Employees should be entitled to understand their pay and have a record of it." (Anonymous employment lawyer)

"It is a basic requirement with no real reason why it cannot be produced." (Bob King, Prospect)

"Amending current payroll systems could be costly." (Anonymous employer, financial services)

"No ££ loss to be compensated - a simple decalarion/ruling is sufficient." (Anonymous HR professional)

"I believe this may encourage employers to provide itemised pay statements to their employees". Respondent to CIPD Group, Jersey branch)

5. If you have answered yes to question 5, should the power to award compensation be available in addition to criminal penalties or instead of criminal penalties?

"Again criminal sanction should be available for serious breaches." (Anonymous employer, financial services)

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“The Tribunal or the employee may not be able to establish through written evidence trails the documents have been issued.” (Anonymous employer, charity)

“The failure to provide an itemised statement should be decided by the tribunal; the failure to follow the tribunal order should be a matter for the criminal law under contempt proceedings.” (Bob King, Prospect)

“Yes, as failure to supply information to an individual employee in error may cost the employee financially while not being committed with criminal intent.” (Anonymous employee)

“It seems overly draconian to impose a criminal offense who fail to abide by the Employment law obligation.” (Anonymous employer, financial services)

6. Should the Tribunal be given the power to award compensation to an employee where an employer refuses to permit, or prevents, the employee from exercising their entitlement to a weekly rest day?

“Employee Health and Safety is paramount, and to give the Tribunal the ability to award compensation allows for a consistent and fair approach to a consistent set of rules.” (Anonymous employer, wholesale and retail)

“Rest periods are put in place for many reasons not least of all health and safety. To deny proper rest puts the employee and all other staff (possibly public) at risk and such risk is avoidable.” (Bob King, Prospect)

“Yes, but mitigating circumstance should be taken into account.” (Anonymous employer, financial services)

“In addition to this being a criminal act, however the employee must act reasonable if alternative options are made reasonably available to them. In addition an employee who works more than one job and would be working for an alternative employer on their rest day from another employer foregoes, to some extent, their entitlement Compensation should be award at the cost of the employer only, not from Public funds.” (Anonymous employee)

“Only if there is a low threshold of reasonableness for the employer to achieve AND only if a genuine detriment has been evidenced.” (Anonymous HR professional)

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"It would be appropriate to impose a sanction to employers who do not act in accordance with the regulations. In this case a compensatory award to to the employee makes the most sense." (Anonymous employer, financial services)

"No - Seasonal staff what to work extra hours and their days off as they work in different hotels on the island, which the employer might not know about already" (Respondent to CIPD Group, Jersey branch)

"There are many operational reasons why occasionally an employer may need employees to work and also some employees choose to work 7 days a week especially during the seasonal times". (Respondent to CIPD Group, Jersey branch)

"Many Seasonal staff wants to work 7 days as they have between 3 and 6 months unpaid months." (Respondent to CIPD Group, Jersey branch)

- 7. If compensation awards were to be introduced in relation to written terms of employment and/or pay slips (either instead of or in addition to criminal penalties) how might the compensation be calculated?**
Respondents were asked to tick any of the listed options that they considered to be appropriate (e.g. up to 4 weeks' pay) or to specify a different option.

"The method should be based on actual or potential loss plus a fixed sum for each failure." (Bob King, Prospect)

"At the Tribunal's discretion, at least the amount that would required as a redundancy payment to the specific employee or four weeks' pay which ever the higher." (Anonymous employee)

"No compensation as I can't see how an error of employment law should mean compensation to an employee ?! A fine maybe but no compensation." (Anonymous employer, wholesale and retail)

"My suggestion would be to come in line with the UK at a capped amount for written terms. Payment of wages – looks like no right to compensation is the consensus way however they would need to get an itemized statement within x days." (HR Business Partner, Financial services)

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8. **If compensation awards were to be introduced in relation to rest days (either instead of or in addition to criminal penalties) how might the compensation be calculated?** *Respondents were asked to tick any of the listed options that they considered to be appropriate (e.g. up to 4 weeks' pay) or to specify a different option.*

"Pay at rate of the number of lost rest days." (Anonymous employment lawyer)

"At the Tribunal's discretion, at least the amount that would be required as a redundancy payment to the specific employee or four weeks' pay whichever is higher in addition to any reasonable costs incurred by the employee due to the failure." (Anonymous employee)

9. **If compensation awards were to be introduced (either instead of, or in addition to, criminal penalties) should any compensation be capped?**

"The compensation should equate to the employee's weekly pay eg 2 or 4 weeks at their actual pay, uncapped." (Anonymous employment lawyer)

"The compensation may be fixed but should be in addition to the recoupment of actual loss." (Bob King, Prospect)

"Should be the same rate as the fixed rate for Redundancy so there is consistency." (Anonymous employer, financial services)

"Tribunal should be able to address each case specifically." (Anonymous employee)

"Compensation should be based on the employee's wage. Compensation should be capped as both parties have a responsibility to each other. If the employer does not comply with current regulations the employee has a right to seek alternative employment." (Anonymous pensioner)

"Yes, as the breach is the same for all, it would be difficult to understand what an award without a cap could be. In these cases for consultation you either get the payslip, contract or rest break, or you do not. There is not a sliding scale." (Anonymous employer, wholesale and retail)

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10. If you have answered yes to question 15, what compensation cap should apply? *(A number of options were presented, e.g. same cap as redundancy pay (£670 per week). Respondents were also invited to suggest a different cap and to give reasons for their responses.)*

“£670 to week is a salary above a large majority of employees in the Island and this compensation payment would have a significant impact on a business.”
(Anonymous employer, charity)

“A test of reasonableness.” (Anonymous employee)

“By being zero in most instances -m a declaratiopn is suffivcient.” (Anonymous HR professional)

“It is not reasonable to compensate above the expectation of the wage.”
(Anonymous pensioner)

“If it is decided to have a cap (and I do not agree with that) it should be £5,000 maximum.” (Anonymous member of the public)

11. Are there any other options or issues that you would ask the Forum to consider in relation to the topic of this consultation?

“Why is the Forum even considering compensating employees. It would seem a complete waste of time and will provide further strain on smaller business. By all means levee fines or action if employers are not keeping to the law. Surely the tribunal has better things to consider.” (Anonymous employer, wholesale and retail)

“That claims are not frivolous and any award does not decimate the employers business and cause them to cease trading.” (Anonymous pensioner)

“The “obvious route” of putting all of these matters in the hands of the Tribunal may fail to take into account some of the implications of doing so, at a time when the States of Jersey is saying that business activity needs to be facilitated and red tape reduced. This proposal sounds like a “quick fix”: it sounds sensible and logical to move responsibility to the Tribunal. But without greater clarity on why the current system is failing and how certain businesses are continuing to “get away with it”, it does ring some alarm bells.” (Advocate Vicky Milner, Callington Chambers)

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“As the legislation grows and develops, with new heads of claim being constantly added, the sums that can be levied for breaches of the Law tot up. The overall impact of proceedings on a business can be significant.” (Advocate Vicky Milner, Callington Chambers)

“The Law should however, consider employers that submit written terms of employment and the employee does not then return them. Whilst an employer has to submit this document within the first 4 weeks' service, there should be a requirement by the employee to return this document signed within 4 weeks' of receipt. Otherwise, the penalty is on the employer irrespective of whether a document has been issued but an employee can deny this at tribunal.” (Anonymous employer, charity)

“The Law should state that where an employee identifies a breach, they should bring this to the employers attention within 4 weeks of identifying this. The employer is then given 4 weeks to remedy the breach before an employee can make a claim to the Tribunal. This would limit Tribunal claims and allow an employer to rectify any (if applicable) breach of the Law.” (Anonymous employer, charity)
