

# Recommendation

## COLLECTIVE REDUNDANCY



Issued by the Employment Forum on 30 September 2010

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# Recommendation

## COLLECTIVE REDUNDANCY



### Section 1 – Summary

At the direction of the Social Security Minister, the Employment Forum consulted on the provisions set out in the Employment (Amendment No. 5) (Jersey) Law 2010, relating to collective consultation in redundancy situations.

When the draft legislation was debated by the States on 1 April 2009, an amendment was approved that made a significant change to the concept of collective redundancy. The amendment reduced the number of proposed redundancies that would trigger the requirement for an employer to consult a trade union representative or elected staff representatives on behalf of employees who may be affected by proposals for redundancies.

The Minister asked the Forum to consider the effect of the amendment and the Forum presented its recommendations to the Social Security Minister in August 2009. Further to that recommendation, the Minister directed the Forum to consult publicly and to review the collective consultation provisions as a whole, given that the procedure was based on an expectation that collective consultation would apply only to genuinely collective, large scale redundancies.

Consultation was undertaken between 30 April and 18 June 2010. The Forum has prepared this recommendation to the Minister having taken into account the range of written responses received as well as comments received at a public workshop.

### Section 2 - Background

As part of Phase 2 of the employment legislation programme, the Employment Forum had consulted on the issues of redundancy and business transfers in 2006 and made a recommendation to the Social Security Minister on 16 February 2007<sup>1</sup>.

In addition to recommending that employees should be entitled to a statutory redundancy payment, the Forum recommended procedures that an employer must follow when proposing to make a specified number of redundancies. This included the requirement to consult collectively with trade union representatives or elected staff representatives on behalf of employees, and penalties if an employer fails to consult collectively.

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<sup>1</sup> For more details, see the Forum's consultation paper - [www.gov.je/Government/Consultations/Current/Pages/CollectiveRedundancy.aspx](http://www.gov.je/Government/Consultations/Current/Pages/CollectiveRedundancy.aspx)

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The Forum had recommended that employers should be required to consult collectively when proposing redundancies in a **non-unionised** workforce only when 21 or more redundancies are being proposed in a 90 day period.

The Forum had also recommended that, where the employer formally recognises a trade union or staff association, collective consultation requirements should be triggered where two or more redundancies are proposed in a 90 day period. This departs from the position in the UK where the threshold of 20 applies to unionised and non-unionised environments.

The duty to consult collectively means that an employer must consult a representative (or representatives), whether of a trade union, staff association or other elected employees, and give them the information that it would normally be required to give each individual who may be affected by the proposed redundancies. Where a trade union is not recognised by the employer in respect of the employees, the employer must make arrangements for staff representatives to be elected.

The Forum's proposal was considered to be an appropriate threshold on the basis that a larger employer is more likely to recognise and negotiate with a union and be accustomed to consulting with staff collectively. The threshold is also close to the UK threshold and the options provided by the EU Directive.

The UK chose to define 'collective redundancy' as a proposal for 20 or more redundancies at one establishment during a 90 day period, irrespective of how many people are normally employed in that establishment. This was one of two options set out in the EU Directive. The other EU option defines collective redundancy as, where the following numbers of redundancies are proposed *over a period of 30 days*:

- at least 10 in establishments normally employing more than 20 and less than 100 workers,
- at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers,
- at least 30 in establishments normally employing 300 workers or more.

The intention of the provisions in the UK and European Directive were aimed at large and heavily unionised workforces, of which there are few in Jersey.

The Forum had considered recommending a non-legalistic approach to collective consultation as it was mindful of the caution expressed by many respondents (not only employers) that collective consultation procedures set out in law would add unnecessary complexity given the adequacy of unfair dismissal as a disincentive to breach any individual consultation requirements.

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The requirement to consult collectively does not remove an employer's obligations to make redundancies fairly, so a dismissal on the grounds of redundancy may still be found to have been unfair by the Employment Tribunal if **individual** consultation has not also taken place.

Some of the consultation respondents believed that a statutory duty to consult collectively would be excessive for Jersey and that the example of the Isle of Man should be followed; providing for statutory redundancy payments with guidance relating to collective consultation, but not legislation.

The Forum is aware that the Social Security Minister accepted the stringent provisions relating to collective consultation only on the basis that a high threshold was in place to trigger these additional requirements.

#### **The reduced threshold for collective consultation**

When the draft redundancy legislation came to be debated by the States on 1 April 2009, the States approved an amendment (as proposed by Deputy Geoff Southern). Part of the amendment provides that employers with a **non-unionised** workforce will be required to consult collectively when proposing 6 or more redundancies in a 90 day period. This is contrary to the Forum's recommendation and makes a major change to the definition of collective redundancy.

Following the debate, the Minister asked the Forum to consider the effect of the amendment and the Forum presented its recommendations to the Social Security Minister in August 2009, as summarised below.

The Forum had been advised that the Jersey Advisory and Conciliation Service and local law firms have noted the concern of some employers that the threshold of six proposed redundancies is far too low.

The Forum believed that this issue would polarise responses. In response to a September 2006 consultation, the UK's Department of Trade and Industry had noted that trade union respondents were seeking to abolish, or at least reduce, the requirement for 20 or more employees to be proposed for redundancy to trigger the requirement to consult collectively. However employers considered that the existing consultative obligations were too onerous on employers, particularly small business, and that the threshold should be raised from 20 to 50 proposed redundancies.

The Forum noted that much of the States debate had focussed on whether 21 is an appropriate number for Jersey given that Jersey has more small employers and fewer large employers than the UK. However, the threshold for collective consultation relates to practical arrangements for large scale redundancies and consultation on strategic rather than individual matters. The

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practicalities and complexity that the collective consultation provisions are intended to assist with do not apply in small scale redundancies; this is not a question of what threshold is appropriate for a small jurisdiction.

Where only six redundancies are proposed during a 90 day period, the Forum is concerned that it will be significantly more difficult for an employer to determine how those redundancies will affect the business and other staff, as well as whether further redundancies may be required in future.

This aspect of the amendment raises issues of concern in large, diverse private sector businesses, as well as in the public sector where there are a large number of employees across a number of unrelated business areas and yet all States Departments have the same employer. There could easily be a total of six proposed redundancies across various departments within a period of 90 days.

The amendment redefined collective redundancy; however did not refine the subsequent procedures and penalties accordingly. The Forum's recommendations would have been very different if it had been aware that the procedure would apply equally to small scale redundancies, particularly as the penalties for non compliance are potentially severe and costly, as currently drafted.

The Forum was concerned that this important aspect of the recommendation had been overturned, with no evidence or comparative information to justify why Jersey should be more restrictive than other jurisdictions in regard to collective consultation. The Forum was disappointed that an arbitrary figure replaced the Forum's carefully considered threshold, which was agreed upon by the Forum unanimously on the basis of all the information available, including best practice in other jurisdictions and European principles, as well as consideration of the views received through consultation.

Having considered the Forum's recommendations, the Social Security Minister decided to ask the Forum to consult further with the public on the collective redundancy consultation package as a whole.

### Section 3 – Consultation methods

Prior to consultation, the Forum commissioned a report from Mr Darren Newman, an employment lawyer and trainer. Excerpts from his report are quoted in this recommendation and the full report is available as an appendix to the Forum's consultation paper.<sup>2</sup>

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<sup>2</sup> [www.gov.je/Government/Consultations/Current/Pages/CollectiveRedundancy.aspx](http://www.gov.je/Government/Consultations/Current/Pages/CollectiveRedundancy.aspx)

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The Forum published its consultation paper on 30 April 2010. Copies were circulated to the Forum's consultation database of approximately 180 individuals, organisations and associations. The paper was also available on the States website.

The Forum held a public workshop on 9 June 2010 which was attended by a range of relevant stakeholders, some of whom also submitted a written response.

The Forum was pleased to receive a good range of responses and, in particular, that a number of the respondents have direct knowledge and UK practical experience of collective consultation in redundancy situations. Twenty one written responses were received from a range of respondents (listed at Appendix 1);

|   |   |
|---|---|
| 2 | Trade union/staff association                   |
| 1 | Advisory body                                   |
| 5 | Employer  |
| 1 | Employee  |
| 3 | Employers association/trade representative body |
| 2 | Legal   |
| 4 | Other   |
| 3 | Anonymous                                       |

#### Section 4 – Summary of responses and recommendations

##### Consulting with unionised and non-unionised employees

Respondents were asked how many proposed redundancies should trigger the requirement for an employer to consult collectively, both where a workforce is unionised and where it is not unionised.

The main focus of the responses was that, no matter what the threshold is, the threshold should not be different for unionised and non-unionised employees. Fourteen of the 21 respondents agreed that the trigger point should be the same for unions and non unionised employees.

JACS *“see no justification in requiring a lower threshold (than where staff are not unionised) simply because a workforce is unionised.”*

The Chamber of Commerce said there *“should be no distinction between unionised and non-unionised in an effort to achieve consistency.”*

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The Employment Lawyers Association could see *“no rationale for having a different threshold for unionised and non unionised environments – such a provision discriminates against non-union members to no apparent purpose.”*

A law firm said *“We do not see any reason why a unionised workforce should have a different threshold...The more logical approach ...would be to have a lower threshold for a non-unionised workforce which does not have the support of, and access to, a union who it is expected would be involved in redundancy consultation from an early stage.”*

An anonymous respondent commented, *“There should be no difference between a unionised and non-unionised environment to ensure consistency across the board.”*

An employee commented that *“It seems sensible to follow the position of the UK and apply the same threshold to both unionised and non-unionised – why should it be different in Jersey?”*

This also came across strongly in the workshop. One attendee commented that a different figure for a unionised workforce brings two processes in one workplace and is complicated, particularly given that the only difference in the process is that representatives must be elected where the employees are not unionised. The point of the process is to have a trusted representative.

Seven respondents supported different thresholds for unionised and non-unionised employees. Staffside, for example, suggested a lower threshold of 1 or more proposed redundancies for unionised employees on the basis that, *“in a unionised workplace, reps will expect to be consulted as a matter of course, irrespective of numbers.”*

#### Recommendation 1

The Forum recommends that the number of proposed redundancies that will trigger the requirement to consult collectively should be the same for both unionised and non-unionised employees to avoid introducing unnecessary complexity.

#### The threshold for collective consultation

The Forum noted in its consultation paper that, as the States has already approved the reduced thresholds for consultation (as proposed by Deputy Southern), the Minister is not minded to seek to overturn that decision by recommending that a threshold of 21 is reinstated. The Forum was however surprised at the strength of feeling expressed by respondents that the system

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should not have been changed by the States and that the threshold of 21 proposed redundancies should be reinstated.

Twelve of the respondents supported the original threshold of 21 for non-unionised employees and 9 respondents supported a threshold of 21 for unionised employees. Only two respondents; Unite and the Jersey Motor Trades Federation, were in agreement with the thresholds as currently drafted (2 and 6).

Unite commented; *“It would be quite easy for a trade union to selfishly say a higher number than the proposed 6 in this non unionised situation in order to improve the incentive to join a trade union, where you would require a smaller number of redundancies requirement for an employer to consult collectively where a workforce is not unionised. However this would be the wrong position to take and would mean that many workers in smaller companies who are in the unenviable position of facing redundancy, would become further exposed when they are most in need of protection.”*

The Jersey Motor Trades Federation said that *“Given that 80% of businesses in Jersey employ 5 persons or less, the current threshold would appear realistic since where the workforce is smaller, the employer should be in a position to discuss redundancies with individuals and on an individual basis.”* The Forum notes however that this is not the purpose of collective consultation; employers are already required to consult employees individually when making redundancies.

The workshop revealed concerns that the reduced thresholds bring the potential for too many problems for small business trying, but failing, to follow the rules. There was agreement that a situation where there are 20 or more proposed redundancies is a more complex environment that warrants an appropriate process and a penalty.

Darren Newman had noted that, *“In so far as the rules of collective consultation have a purpose it is clear that they are intended to deal with issues that are best dealt with through consultation with representatives rather than the employees themselves... a lower threshold – at least for non-unionised workforces – could have negative consequences.”*

The report noted that *“in very large establishments it is perfectly possible, indeed likely, that six employees could be made redundant over a three month period without any link between individual situations which would allow meaningful consultation to take place...the requirement for the employer and employees to come up with a group of elected representatives who can represent this very varied group of employees sensibly seems rather onerous and bureaucratic... With a threshold of six there is a clear risk that the normal ebb and flow of employee numbers in large organisations will trigger a duty to*

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*consult that runs completely counter to the employer's culture and the expectations of employees."*

This was reflected in the written responses; a finance industry employer, for example, said that, *"A figure of 6 could easily be mistakenly missed if the organisation is large and split into many areas."*

A finance industry employer supported a figure of 21 commenting that *"[The Company] operates as one business of approximately 1,400 employees, across 3 jurisdictions in the U.K and Channel Islands, with several different business lines. It is therefore important for us to operate under consistent rules where ever possible. We support the assessments made in the Newman Report and believe the higher threshold is more appropriate for both small and large businesses."*

The CI Cooperative Society agreed with the threshold of 21 as it is *"less likely to affect smaller employers who are least likely to be able to handle the consultation process effectively."*

An anonymous respondent stated that, *"Employees are protected by the unfair dismissal law. Employers could do without the additional burden of procedures at a time when they are having to make redundancies to survive."*

There was some agreement at the workshop that if the number of proposed redundancies that would trigger the requirement to consult collectively cannot revert to 21, it should be a figure between 10 and 15.

A number of written responses supported different thresholds; three respondents supporting a trigger point of 10 and three respondents supporting a slightly higher figure between 12 and 15.

JACS, for example, prefer the 'EU option' of 10 proposed redundancies, stating that *"It is sufficiently high a number to make it less likely that it will adversely impact upon smaller organisations where individual employees are known to the employer and where individual consultation is logical, as well as excluding most "ordinary redundancies" that take place in the normal course of business – however it is high enough to require collective consultation where an employer takes a strategic decision to downsize."*

Staffside also support a threshold of 10, commenting that *"6 may impact too much on small/medium business & 10 redundancies was a figure mooted in the original EC Directive on the subject."*

Paul St John Turner suggested that *"12 would be a reasonable figure for Jersey and sufficiently high to avoid bringing small batches of isolated redundancies into the requirements."*

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*An anonymous respondent said, "A figure of 12 would avoid the detrimental implications to smaller employers and to promote the necessary meaningfulness of a consultation process. A lower threshold is likely to trigger the collective consultation requirement more frequently and in situations where there is not strategic/organizational restructures, where the purpose of collective consultation is more appropriate."*

Seymour Hotels supported a threshold of between 12 to 15 proposed redundancies, and noted that in a unionised workforce, the threshold could be varied by collective agreement.

*An anonymous respondent supported a threshold of 12 for both unionised and non-unionised employees "to promote consistency within the procedure and because such a threshold would be triggered in strategic/organisational developments when it is more important a Trade Union is involved."*

The Forum agrees that there is some merit in considering other thresholds, particularly given that during the States debate of the redundancy legislation, there appeared to be some political support for an intermediate option. The Forum however is concerned that the purpose of collective consultation must not be overlooked in an attempt to set a threshold that is more politically acceptable.

*The Employment Lawyers Association said that "If there has to be a trigger of this nature, we would suggest that it should be set at at least 20. Below this, we are not convinced that there can genuinely be said to be collective issues."*

*A law firm commented that "to impose collective consultation obligations upon an employer in a situation where only 6 non-unionised or 2 unionised employees may be dismissed appears to us to be at odds with the purpose of the legislation. Further, to go through the process of appointing employee representatives in respect of such small numbers, does not, in our view, provide those employees with any additional protections."*

#### Recommendation 2

Based on the consultation responses, the Forum recommends that the number of proposed redundancies that triggers the requirement to consult collectively is amended to 21, as originally drafted, for both unionised and non-unionised employees. The Forum appreciates that this would overturn a decision already taken by the States of Jersey, however this figure is strongly supported by the consultation responses.

The Forum believes that a threshold lower than 20 undermines the process of consulting with employees as a collective group and would represent a fundamental misunderstanding of the purpose of collective consultation. The

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point of collective consultation is to assist where large numbers of redundancies are being proposed so that strategic issues that will affect the employees as a group, rather than as individuals, can be discussed.

If the Minister does not agree to seek to reinstate the threshold of 21 proposed redundancies, the Forum notes that the consultation responses strongly supported the application of the same threshold for both unionised and non-unionised employees, and showed some support for a reduced threshold of 12 proposed redundancies.

#### **The period in which redundancies are proposed**

The requirement to consult collectively with employee representatives was intended to be triggered when an employer proposes 21 or more redundancies within a 90 day period. Given that the thresholds were reduced to 6 proposed redundancies for non-unionised employees and 2 for unionised employees, respondents were asked whether the relevant period should continue to be 90 days.

Many who attended that workshop agreed that, if the thresholds must remain at 6 and 2, then the time period must be reduced from 90 days to 30 days. The attendees again supported consistency in the periods for unionised and non-unionised employees.

Twelve of the written responses also agreed that the period in which the redundancies are proposed should be reduced from 90 days to 30 days. Four respondents were of the view that the period should remain at 90 days, including a finance employer, Staff Side and Unite.

Unite commented that *“If the time scale was any shorter or indeed 30 days then it would reduce the opportunity to reach a resolution and in Unites opinion would lead to a greater number of Employment Tribunals, which in some cases may have been avoided if the collective consultation period was longer and had been allowed to run its course. In addition a minimum of 90 days is an appropriate amount of time because if it was less or indeed 30 then it may give employers an incentive to strategically space redundancies out beyond the 30 days in order to avoid their collective consultation requirements. Of course there is nothing to stop employers spacing redundancies out beyond 90 days either but this longer timeframe does make it harder for employers to do so and protects workers more in the process.”*

A law firm commented that, *“The relevant period must be short to prevent a situation where there is an inadvertent breach and, particularly in larger employers, to ensure that only a single redundancy situation is captured.”*

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An anonymous respondent said that, *“If the period is longer then collective consultation is likely to be triggered more frequently and this would detract from the meaningfulness of consultation.”*

An employee commented, *“90 days is a long time in a small business and the forum is right to be concerned that it will be significantly more difficult for an employer to determine how those redundancies will affect the business and may unintentionally fail to meet the requirements of collective consultation.”*

JACS commented that, *“in any organisation 2 or more (or 6 or more) employees could be made redundant over a 90 day period without any link between them. This could very easily be the case in large organisations (e.g. Public Sector or financial services) with a number of different operating departments. Collective consultation in the case of “unlinked redundancies” is likely to be very hard to achieve. Even finding the appropriate representatives in “unlinked redundancies” would be difficult in a non unionised organisation. Additionally, a protracted period could render an employer inadvertently liable for a series of protective award claims, placing additional stress and potential costs on a business that is possibly already vulnerable.”*

The Employment Lawyers Association said, *“If we are to have a low trigger for consultation, the “capture period” should be commensurately short in order to try and ensure that in any specific case only a single redundancy situation is captured.”*

### Recommendation 3

The Forum recommends that a 90 day ‘capture period’ should apply on the basis that the number of redundancies within that period should be increased to 21 or more to apply the requirements only in genuine collective redundancy situations.

The Forum considers that there was support amongst respondents that if the number of proposed redundancies remains as drafted (6 and 2), this would warrant the application of a shorter capture period of 30 days in which those redundancies are proposed.

### The protective award

Respondents were asked whether the maximum protective award (penalty) that may be awarded by the Tribunal where an employer has failed to comply with the consultation requirements should match the capture period referred to in the previous section, i.e. a ‘protected period’ of up to 30 or 90 days. Fifteen respondents agreed that the period and the maximum protective award should match. Five did not agree. Most of the workshop attendees also

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felt that whatever capture period is decided, the maximum penalty should match the period.

In opposition, Unite stated, *"We do not believe it accurately reflects the financial loss that a worker has suffered due to the punitive legal nature of a maximum protective award (penalty) and therefore fails to truly reflect the loss that workers due to no fault of their own have endured ... In addition a limit may give an employer the incentive to take a chance because it may be economically in their interests to do so."*

Paul St John Turner supported a capture period of 60 days and a protective award of up to 90 days, commenting that *"Whilst the award may have been conceived as a way of removing any benefit an employer may gain from not consulting, it should be set at 90 days to act as a deterrent both for breach of the requirements and in recognition of the potential damage to the employees."*

JACS commented that *"If the threshold must remain at 6, the potential to severely damage smaller organisations by a significant financial penalty is too great. If the period was to be reduced to 30 days, then that prospect is minimised."*

The written responses also revealed some general opposition to the concept of a protective award; The Employment Lawyers' Association stated that, *"Adopting a 90 day protective award structure would appear to us to be entirely draconian which risks importing EU and UK legislation without due regard for local requirements...In the event that it is deemed that a new protective award is essential (and we do not accept that it is), then we would suggest that an appropriate way of dealing with this would be through a maximum award of four weeks' pay, in line with the penalty applicable under Article 78B."* [This article provides a penalty for an employers' failure, or threatened failure, in reference to an employees' right to representation in disciplinary and grievance hearings.]

The Forum notes that alternatives to a protective award were suggested, including Clear Concepts; *"If the award is designed as a penalty on the employer rather than compensation for the employee, then the appropriate sanction should be a fine perhaps on the same scale as that imposed for other employment infractions."*

Darren Newman had commented that *"The protective award itself (the remedy for failure to consult)...was conceived as a way of removing any benefit an employer may gain from not consulting by dismissing employees quickly and was therefore phrased as a duty to pay the employee for a 'protected period'."*

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The Forum considers that a fine or an award of four weeks pay is unlikely to provide an adequate deterrent. The employer could simply make a financial decision as to which option will be cheaper; either dismiss the employees without consulting and pay the fine (or four weeks' pay), or consult with employees and pay employees' wages during the consultation period.

According to Harvey's<sup>3</sup>, *“either the employer consults before dismissing any employees (so that they get their normal wages during that consultation period) or else, if he dismisses prematurely, he risks being condemned to pay them a broadly equivalent amount under a protective award.”*

The workshop and the written responses revealed that whilst there was recognition that the protective award is intended to be punitive rather than compensatory, there was general opposition to the prospect of a potentially large windfall for an employee, in addition to any redundancy payment owed, particularly given that an employer making large numbers of redundancies is likely to be struggling financially already.

The Forum is conscious that the consultation asked respondents if the protected period (and the maximum award) should match the 90 day period in which the redundancies are proposed; however there is no direct correlation in Jersey or UK legislation between the two periods and there is no reason why those two periods should match. Consultation must start at least 30 days before the first dismissal takes effect, but consultation does not have to occur during the 90 day capture in which the redundancies are proposed by the employer. It can be argued then that the **minimum** consultation period is therefore 30 days.

The IDS Handbook on Redundancy notes that, as originally drafted in the UK, the maximum protective award varied with the minimum period stipulated for consultation and both depended on the number of employees threatened with dismissal; in the following three tiers;

| Proposed redundancies | Consult        | Maximum protective award |
|-----------------------|----------------|--------------------------|
| Fewer than 10         | 'in good time' | 28 days                  |
| 10 to 99              | 60 days ahead  | 60 days <sup>4</sup>     |
| 100+                  | 90 days ahead  | 90 days                  |

As Darren Newman noted, *“when the UK envisioned collective consultation in relation to a small number of redundancies, it was anticipated that the consultation period would be shorter and that any protective award would also be limited.”*

<sup>3</sup> Harvey on Industrial Relations and Employment Law, E-2102, Issue 209

<sup>4</sup> Reduced to 30 days in advance and 30 days maximum protective award in 1979

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A protective award of up to 90 days' pay was only possible in cases where 100 or more employees were proposed for dismissal where consultation was required to start 90 days ahead of the proposed redundancies. There appears to have been a direct relationship between the minimum period for consultation and the maximum length of the protective award, and so it is reasonable to assume that the protective award should bear some resemblance to the number of days consultation lost.

Amendments in 1995 and 1999 in the UK resulted in a 90 day maximum protective award applying in all cases, despite a 30 day minimum consultation period applying where 20 to 99 employees are proposed for redundancy in a 90 day period. Courts and tribunals however tended to continue to apply a maximum award of 30 days' pay in cases where a minimum 30 day consultation period applied. The UK's Employment Appeal Tribunal (EAT) however ruled out a lower starting point for calculating the award, noting that the award is intended to be punitive rather than compensatory.

A protective award is calculated in terms of the employer's default and its seriousness. Although the Jersey Employment Tribunal is not bound to follow the judgments of UK employment tribunals, case law suggests that, **where there has been no consultation at all**, a tribunal should start at the maximum of 90 days' pay when calculating the award. The burden of proof is on the employer to show mitigating factors to justify a reduction. Although the tribunal has wide discretion, if there has been some consultation, a UK tribunal is compelled to reduce the compensation from the maximum.

The UK provisions have arisen due a series of amendments by different governments removing the lower tiers of the consultation requirements, as well as developing case law. There is an argument that if Jersey's minimum consultation period is just 30 days, a protective award of up to 13 weeks' pay might be disproportionate.

Having looked to the EU Directive relating to collective redundancies<sup>5</sup> for guidance, the Forum notes that it does not specify what penalties should apply for failure to consult collectively. The Directive simply states; "*Where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives **in good time** with a view to reaching an agreement.*"

The Forum agrees that a 13 week protective award is overly punitive, particularly as a starting point from which the Tribunal reduces the award (if

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<sup>5</sup> Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies

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this were to be the case in Jersey). However, the Forum believes that a 30 day protective award does not provide sufficient deterrent; an employer would only have to pay a maximum of 30 days' pay if they had totally failed to consult with employee representatives.

A protective award of up to 60 days might provide an appropriate intermediate solution, however the Forum is not able to support this with consultation responses due to the particular wording of the consultation question.

The Forum notes that the previous UK legislation provided a maximum award of up to 60 days' pay where an employer proposed to dismiss between 10 and 99 employees. Given that changes to UK legislation have been incremental, rather than being designed to provide a coherent scheme for consultation, the Forum sees no reason to apply the same 90 day maximum protective award as the UK.

#### Recommendation 4

The Forum recommends that the protective award must provide sufficient penalty on employers who fail or refuse to consult collectively with employee representatives, but must not provide a disproportionate penalty on employers who inadvertently fail to comply. The Forum is not able to recommend a maximum protective award of 30 or 90 days' pay and therefore recommends an intermediate option of up to 60 days' pay. Converting this to weeks to fit with existing employment legislation, the Forum recommends a protective award of up to 9 weeks' pay.

#### Capped award

Respondents were asked if weekly pay should be capped for the purpose of calculating a protective award. Under existing employment legislation, weekly pay will be capped for the purpose of redundancy payments (at average weekly earnings), but is not capped for other awards, such as unfair dismissal.

There was general consensus at the workshop was that weekly pay should not be capped for the purpose of the protective award. Written responses were split. Seven respondents did not agree with the cap, including a finance employer, JACS, Clear Concepts, Staff Side and Unite. Eleven respondents stated that weekly pay should be capped, including 3 employers, two employers' associations and a law firm.

Unite commented that, *"there may be instances when workers earn more than the proposed cap amount and they would obviously lose out again due to no fault of their own. The cap could be legally contestable because clearly the*

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*law would have been implemented in two different ways if a capped amount was allowed. Some workers would be getting their full weeks entitlements whilst others only up to the capped amount, which does not seem a fair interpretation of the law.”*

JACS commented that *“As the protective award is a penalty against the employer for failing to consult correctly (and probably thereby shortening the period during which the employee remains employed) it appears appropriate that the award should not be capped, thereby compensating the employee for the lost period of consultation.”*

On the other hand, Chamber commented that, *“redundancy payments are by way of compensation for job loss and not to rectify an employee's financial losses. It would be inappropriate for this to be an opportunity for high earners to receive more money.”*

The Employment Lawyers' Association noted that *“Under TULRA (and its associated caselaw) it is made clear that the protective award is punitive – it is not supposed to be compensatory. Dispensing with a cap would in our view simply lead to highly paid employees gaining a windfall payment.”*

A law firm said that *“Maintaining a protective award which is not subject to a cap will result in highly paid employees receiving a very high payment, often greatly in excess of their statutory redundancy payment.”*

An anonymous respondent commented that *“it would be inappropriate for this to be an opportunity for high earners to receive more money. It should be capped to promote some form of objective penalty as it is intended.”*

#### **Recommendation 5**

The Forum recommends that weekly pay should not be capped for the purpose of the protective award. Although the award is not intended to compensate employees for losses, the award is intended to penalise an employer for failure. Any penalty effect on the employer is lost if there is potentially a financial benefit for failure to comply with the required procedure.

#### **Taking an Employment Tribunal complaint**

Respondents were asked if the law should clarify that a claim for a protective award may only be taken to the Tribunal by union representatives and elected staff representatives, rather than individuals.

Darren Newman had pointed out that, *“Under the UK provisions, a claim for a protective award must be lodged by the employee representatives rather than*

## Recommendation

### COLLECTIVE REDUNDANCY



*by the individual employees affected. Individuals can only claim where the employer has failed to designate representatives at all. It is not, therefore, open to an individual employee to challenge the quality of the consultation carried out unless the employee representatives choose to do so. Under the Jersey Law the position is different. A complaint may be presented by any of the affected employees or representatives. It is therefore much more likely that an employer who makes employees redundant will be challenged under this law because a single aggrieved employee may well simply add a claim for failure to consult to his or her claim for unfair dismissal.”*

The opportunity for employees to claim individually, rather than via a trade union or elected staff representative, was not based on a recommendation of the Forum and the Forum considers this to be an unintended and inappropriate outcome.

There was general consensus amongst workshop attendees that claims should only be taken by employee representatives (unless none were elected), as this is consistent with the collective, rather than individual, nature of the process.

Fourteen written responses agreed that claims should be taken only by employee representatives, not by individual employees. Three respondents felt that claims should be taken by individuals, including a finance employer who said; *“A claim should be taken to the Tribunal by an individual and be reviewed on a case by case basis.”* No other comments were received in support of claims being taken by individuals.

An anonymous respondent commented that limiting the right to take a claim to employee representatives *“will ensure claims are made properly with all parties aware of circumstances.”* Staffside and a finance employer both commented that this would reduce the likelihood of vexatious claims for protective awards.

JACS view is that *“claims for protective awards should be lodged by the employee representatives rather than by the individual employees affected with the proviso that individuals can claim where the employer has failed to designate representatives at all (as in the UK). This restriction would lessen the chance of a vexatious claim by a single individual.”*

Unite said that *“Clearly as a trade union Unite has a self interest here. Unite strongly believe that it is a trade unions role to collectively negotiate on behalf of its members and supports any legislation that backs our fight to do this on behalf of the workers Unite represents. Individuals have the opportunity to join a trade union where they can be collectively represented alongside their fellow workers if they so choose. As a trade union, Unite believe this is the best way for workers to collectively achieve their aspirations together.”*

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An anonymous respondent commented that *“If an individual brings the claim and is successful there is an implication that the other employees affected will be automatically eligible for such an award – without themselves bringing a claim. Furthermore, it would prevent employees bringing a claim for failure to consult simply in the hope of achieving a protective award.”*

The Employment Lawyers Association said that *“given the potentially draconian penalties that employers may face, it is our view that only representatives should be generally able to [bring] claims.”*

#### Recommendation 6

The Forum recommends that, as supported by most of the respondents, and on the basis that this process relates to collective rather than individual situations, the law should clarify that a claim for a protective award may only be taken to the Tribunal by union representatives and elected staff representatives, rather than individuals, other than where representatives have not been appointed, but should have been.

#### Other comments

The Employment Lawyers’ Association noted that the report accompanying the draft redundancy legislation to the States stated, *“there is no entitlement to a redundancy payment (as distinct from a protective award) in the event that an employee unreasonably refuses an offer of the same or other suitable employment,”* however this point does not appear in the legislation.

Having discussed this with the Social Security Department, the Forum has clarified that the relevant paragraphs were omitted by oversight. Now that the draft legislation has returned from Privy Council, an amendment will address this matter and will be proposed to the States by the Social Security Minister.

# Recommendation

## COLLECTIVE REDUNDANCY



### Appendix 1- Respondents

- 1 Jersey Advisory and Conciliation Service
- 2 Unite
- 3 Staff Side
- 4 Jersey Motor Trades Federation
- 5 Jersey Chamber of Commerce
- 6 Jersey Post
- 7 CI Co-operative Society
- 8 Clear Concepts
- 9 Seymour Hotels
- 10 Small Business Forum
- 11 Paul St. John Turner
- 12 Sam Le Breton
- 13 Jon Scott
- 14 Employment Lawyers Association
- 15 Law firm
- 16 Employee
- 17 Finance employer
- 18 Finance employer
- 19 Anonymous
- 20 Anonymous
- 21 Anonymous