

Consultation Paper

COLLECTIVE REDUNDANCY



Issued by the Employment Forum on 30 April 2010

DEADLINE FOR RESPONSES – Friday 18 June 2010

PURPOSE OF CONSULTATION

The Social Security Minister has directed the Employment Forum to consult on the collective redundancy consultation provisions, as set out in the Employment (Amendment No. 5) (Jersey) Law 200- (yet to be enacted).

The main purpose of this consultation is to consider the appropriateness of the significant reduction in the number of proposed redundancies that would trigger the requirement for an employer to consult with staff representatives in collective redundancy situations and to determine whether the collective consultation procedures and penalties should be refined in accordance with that reduced threshold.

SUMMARY

Section 1 – Introduction

Section 2 – The Forum's 2007 Recommendation

Section 3 – The reduced threshold for collective consultation

Section 4 – Consultation questions

Interested parties are encouraged to send their responses to the questions in Section 4, as well as any general comments, to the Employment Forum. By Friday 18 June 2010, either by email, post or fax to;

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To ensure that your comments are clear, the Forum would prefer to receive typed responses. If you wish to receive an electronic copy of this paper, please contact the Secretary, or download it from the States website -

www.gov.je/Government/Consultations/Current

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Section 1 - Introduction

As part of Phase 2 of the employment legislation programme, the Employment Forum consulted on the issues of redundancy and business transfers in 2006 and made a recommendation to the Social Security Minister on 16 February 2007 (detailed further in Section 2).

Legalisation introducing protection for employees in redundancy situations was presented as an amendment to the Employment (Jersey) Law 2003 and the States adopted the Proposition on 1 April 2009, as amended by a further Proposition from Deputy Southern (detailed further in Section 3). The redundancy legislation has been awaiting Privy Council approval since April 2009.

Section 2 - The Forum's 2007 Recommendation

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 a trade union representative or elected staff representatives on behalf of employees, and penalties if an employer fails to consult collectively.

The Forum 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 law provides that 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 similar to the UK threshold and EU Directive, as well as being a recognised

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threshold (in terms of total number of employees) that is applied in the Employment Relations (Jersey) Law 2007.

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.

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 felt strongly 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 (rather than legislation) relating to collective consultation.

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.

Section 3 – The reduced threshold for collective consultation

The States approved an amendment (as proposed by Deputy Geoff Southern) to the draft redundancy legislation. Part of the amendment provides that employers with a **non-unionised** workforce will be required to consult

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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.

During the States debate of reduced threshold, the Social Security Minister stated; *"If Members adopt the amendment I may be forced to re-consult with the Employment Forum with a view to possibly amending the law before it comes into force."* 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, during training courses and seminars, the Jersey Advisory and Conciliation Service and local law firms had noted the concern of some employers that the threshold of six proposed redundancies is far too low.

The Forum was interested to note comments received by the UK's Department of Trade and Industry in response to a consultation dated September 2006. Trade union respondents had commented that the requirement for employers to consult only where they are proposing to make 20 or more employees redundant should be abolished, or at least reduced. 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 has no doubt that this is an issue that will polarise responses in this way, as with many employment legislation issues, and that employers, particularly small employers, will be very concerned about the reduced threshold.

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.

According to the 2008 manpower figures, 23% of companies in Jersey employ 6 or more employees and 6% of companies employ 21 or more employees. In contrast, 83% of employees in Jersey work for a company with 6 or more employees and 37% of employees work for a company with 21 or more employees.

However, the threshold relates to practical arrangements for large scale redundancies and consultation on strategic rather than individual matters. The 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.

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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. The following scenario demonstrates one particular concern of employers (*the report at Appendix 1 provides another example – see paragraphs 31-33*).

An employer with six employees decides to make three employees redundant to try to save his business and the three remaining jobs. This in itself will not trigger the collective consultation requirements and the employer has consulted each of the three employees individually so as not to fall foul of unfair dismissal legislation. The employer finds two months later, however, that the business must close, making his other three staff redundant within the “protected” period. Even if the employer consults those three employees individually, he has unintentionally failed to meet the collective consultation requirements for the total of six redundancies in 90 days and may be required to pay a protective award of up to 13 weeks wages for each of the six employees, on top of any other amounts owed.

The protective award is a penalty for the employers wrong doing; it is not intended to reflect that the employee has suffered a loss. The potential cost of these awards is likely to have detrimental effect on small employers, particularly as the protective award is not capped at £600 per week, as with statutory redundancy payments.

As noted by JACS, this aspect of the amendment also raises issues of concern in the public sector as 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. To ensure that the requirements of the law are not contravened, a States Department will have to ensure that collective consultation is undertaken in regard to every single proposed redundancy. This gives rise to difficulty in terms of the ‘pool’ for selection; whether the ‘pool’ for selecting an administration post for redundancy extends to all similar administration posts throughout the Public Sector.

The amendment has redefined collective redundancy; however it has not refined the subsequent procedures and penalties accordingly. The Forum would emphasize that its recommendations in relation to collective consultation would have been very different had it had been aware that the recommendations would apply equally to both large and small scale redundancies, particularly as the penalties for non compliance are potentially severe and costly, as currently drafted. The Forum would have considered the particular elements; the protected period, the details of the consultation

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process, the period in which the redundancies are proposed and the penalties, in reference to a small employer's more limited capacity for large scale consultation and collective matters.

The Forum is concerned that this important aspect of the recommendation was 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.

The Forum noted that it has no mandate to revisit individual aspects of the recommendation, as Deputy Southern has done, without further public consultation on the package of provisions relating to the collective consultation process. 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 4 – Consultation

As a starting point for further consultation, and on the advice of the Minister, the Forum commissioned a report from an expert in this field. Mr Darren Newman provided a report, from which excerpts are quoted prior to each of the questions that follow and is attached in full at Appendix 1.

Mr Newman is an employment lawyer who regularly writes for leading employment law journals and is consultant editor for the IRS Employment Law Bulletin. He specialises in providing employment law training, bringing a practical approach to all employment law topics. He has provided training locally on Jersey's employment legislation, as well as to major UK Government departments, local authorities, public bodies and large commercial organisations.

The collective consultation threshold

The Forum had recommended that employers should be required to consult collectively when proposing redundancies, in a non-unionised workforce, when **21** or more redundancies are proposed in a **90 day** period. The amendment reduced the threshold from 21 to **6** proposed redundancies.

Whilst not advocating the UK provisions on collective consultation as an example to be followed, Darren Newman has stated on the subject of

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thresholds that *“there is a clear rationale for them being set at the level that they are in the UK and that a lower threshold – at least for non-unionised workforces – could have negative consequences.”*

In particular there will be an impact on small employers. The report notes that, *“small employers are already likely to struggle with the need to avoid dismissing employees unfairly and ensuring that the individuals are consulted about the situation... If this is extended to the need to consult with representatives as well as the individuals this is likely to be a considerable burden. Small employers are also likely to have a direct relationship with individual employees which will make the consultation of elected representatives seem artificial. It may even be disruptive as those employees who are not representatives may feel excluded from discussions in which they would otherwise expect to be taking an active part...In the absence of a trade union the employer will be obliged to invite the employees to hold an election for representatives to take part in the consultation process. Both employer and employee are likely in such a case to find the requirement absurd. It would make more sense to consult all six employees individually – and the law on unfair dismissal would require just that. It is hard to see how an additional requirement to consult representatives would result in either a fairer workplace or more effective management decisions - although it would provide an additional legal avenue for employees and the prospect of increased compensation.”*

The report also comments that the low threshold can be seen as inappropriate for large employers; *“the whole scheme of the Law assumes that the redundancies in question are part of a single project and therefore linked. However, 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.*

Of course such problems could also arise with a threshold of 21 – but they will be less frequent and are much more likely to at least involve an important strategic decision to downsize being taken by the employer. 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 consult that runs completely counter to the employer’s culture and the expectations of employees. 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.”

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The Forum is aware that, as the States has already approved the reduced threshold, the Minister would prefer not to simply seek to overturn that decision by recommending that the recommended threshold of 21 is reinstated. The Forum however feels that it is essential to ask the question as a starting point, before going on to consider the other aspects of the procedure in view of the revised threshold.

Question 1 - How many proposed redundancies should trigger the requirement for an employer to consult collectively where a workforce is not unionised?

6 (the current threshold, as amended)

21 (the threshold as previously recommended by the Forum)

Other, please specify _____

Please give reasons for your response

The period of consultation and protective award

The time frame for consultation and the protective award are directly related, in that the potential award of up to 13 weeks pay relates to an employers failure to consult during the 90 day protected period.

Darren Newman has 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’....It can be seen then that 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.”*

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Question 2 - Assuming that the threshold must remain at 6 for non-unionised employees, should the collective consultation requirements apply where an employer is proposing to dismiss 6 or more employees within a period of -

30 days?

90 days?

Other period, please specify _____

Please give reasons for your response

Question 3 - Should the maximum protective award (penalty) that may be awarded by the Tribunal where an employer has failed to comply with the consultation requirements match the period you have selected in Question 2?

Yes

No

If no, please give reasons for your response

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Question 4 - Should weekly pay be capped for the purpose of calculating the protective award? *(Note - weekly pay is capped for the purpose of redundancy payments at current average earnings - £620.)*

Yes

No

Please give reasons for your response

Unionised workforce

The law currently provides, as recommended by the Forum, that where employees are represented by a trade union or staff association that is recognised by the employer, collective consultation requirements should be triggered where two or more redundancies are proposed in a 90 day period.

Question 5 - How many proposed redundancies should trigger the requirement for an employer to consult collectively where a workforce is unionised?

2 (the current threshold, as amended)

6 (the threshold for non unionised employees)

21 (the threshold as previously drafted)

Other, please specify _____

Please give reasons for your response

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Darren Newman has commented that, *“if there are only 2 employees at risk of redundancy then consultations with the union could be carried out rather more quickly than 30 days and that the fixed period provided for is therefore excessive. In that context a protective award of up to 13 weeks’ pay can also be seen as punitive rather than simply compensating for the lost period of consultation.”*

Question 6 - Assuming that the threshold must remain at 2 for unionised employees, should the collective consultation requirements apply where an employer is proposing to dismiss 2 or more unionised employees within a period of -

30 days

90 days

Other period, please specify _____

Please give reasons for your response

Taking an Employment Tribunal complaint

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

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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 believes that this is an unintended and inappropriate outcome.

Question 7 - Should the law 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?

Yes

No

Please give reasons for your response

Question 8 - Do you have any other comments on this consultation paper?

The Forum would be grateful to receive your comments on any aspect of this consultation paper.

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Please send your comments to the Employment Forum, by **Friday 18 June 2010**, either by email, post or fax to;

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La Motte Street
St Helier
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*The Forum will be holding a public workshop giving interested parties the opportunity to discuss this issue. The Workshop will be held on **Wednesday 9 June 2010** at the Employment Tribunal premises, First floor, Trinity House, Bath Street. Please email K.Morel@gov.je if you wish to attend, or return the enclosed reply slip.*