Consultation Paper
COLLECTIVE REDUNDANCY

APPENDIX 1

Report on the Collective Redundancy Provisions set out in the Draft Employment (Amendment No. 5) (Jersey) Law 200-

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Introduction

1. I have been asked to compile a report on the provisions of the draft Employment (Amendment No. 5) (Jersey) Law 200- dealing with the requirement on an employer to consult employee representatives when proposing to dismiss as redundant a certain number of employees at a single establishment. I understand that the context of the report is a debate as to whether the thresholds for consultation currently set out in the law are appropriate and whether the law as it stands strikes an appropriate balance between the rights of employees and the needs of employers.

2. Since the law is clearly based in very large measure on the UK provisions on collective redundancy consultation set out in the Trade Union and Labour Relations (Consolidation) Act 1992 I have set out in this report some of the legislative history of these measures and the context in which they were adopted. I have suggested that not every aspect of the UK law is a result of a careful and rational consideration of the best way to achieve key policy objectives and that in fact, the law has arrived at its current state after a long and often contentious process of compromise and adjustment. In no way do I put forward the UK provisions as an example to be followed. However I do suggest that on the subject of thresholds, 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.

3. In preparing what follows I have also had in mind the Employment (Jersey) Law 2003 and the approach taken by tribunals in both the UK and Jersey in relation to the fairness of dismissals for redundancy and the role consultation has to play in that respect.

4. I do not propose in this report to set out the details of the draft Employment (Amendment No. 5) (Jersey) Law which are fully explained in various documents issuing from the Employment Forum.

Background to the UK law

5. The UK law on this topic is currently set out in Ss 188-192 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the 1992 Act) – as amended. It is written so as to comply with the Collective Redundancies

Directive (the Directive) of 20 July 1998 (98/59/EC) which consolidated and replaced the earlier directive of 1975 (75/129/EEC).

6. At the time of the original directive, a number of proposals had been made by the European Commission for increased worker participation and representation but more general rules relating to consultation or employee representatives could not be agreed by the Member States. The measures on collective redundancy were regarded by the Commission as a first step to wider reform and it is a tribute to the doggedness of the Commission (and to the consistency of its political objectives) that a general directive on the information and consultation of employees was eventually passed in 2002 (Information and Consultation Directive (2002/14/EC).

7. The collective redundancy consultation provisions in the UK were first implemented as part of the then Labour Government's 'social contract' initiative in 1975. Although clearly influenced by the EC Directive, EC legislation had not at that stage reached the level of prominence that has in the UK today and relatively little attention was then paid as to whether the UK law fully met the requirements of the Directive. It is perhaps worth noting that in the mid 1970s the policy makers' chief concern was the decline of large-scale manufacturing as competition with the Far-East grew and increased mechanization took hold - all of which led to the potential of very large-scale redundancies in traditional heavy industry. Against this backdrop, UK industrial relations was in a notoriously parlous state and the cooperation of the union movement was seen as essential in controlling inflation and increasing production within the UK economy.

8. The collective redundancy rules formed part of the Governments attempts to make peace with the trade union movement and significantly, the UK law at that time only applied in relation to redundancies covering workers recognized by a trade union.

The 1975 Act

9. The provisions were first implemented in Part IV of the Employment Protection Act 1975. At that time the duty to consult only arose where the employer was proposing to dismiss as redundant an employee who was covered by trade union recognition. Significantly, there was no threshold per se as the duty could be applied in relation to even a single redundancy (S.99(1)). What mattered under the 1975 Act was not the number of redundancies but the fact that the employee concerned was covered by trade union recognition.

10. At that time – and indeed until the mid 90s – UK law made no provision for collective consultations in relation to redundancies among non-recognised groups no matter how many employees were involved.

11. Also significant was that this was a collective rather than an individual right in that the initial complaint to the tribunal had to be brought by the trade union and could not be brought by the individual employee (S.101(1)).

12. The protective award itself (the remedy for failure to consult) was also structured differently from other employment law remedies. It 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'. This period was linked to the duration of the consultation period required by S.99(3) which was in turn determined by the number of redundancies being proposed.

13. Thus, when the employer was proposing to dismiss 100 or more employees the consultation period was 90 days, when the employer was proposing to dismiss 10 or more employees the consultation period was 60 days (reduced to 30 in October 1979) and when fewer than 10 employees were to be dismissed there was no fixed consultation period.

14. The protective award was therefore set at a maximum of 90 days where there were more than 100 redundancies, 60 days where there were more than 10 (reduced to 30 in October 1979) and a maximum of 28 days where there were fewer than 10.

15. 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.

The challenge from Europe

16. That remained the position until the UK's compliance with the collective redundancies directive was challenged by the EC commission in the European Court of Justice. By then the provisions had been consolidated into the 1992 Act, Ss 188-192. The subsequent decision of the ECJ was that the UK law was defective in several respects. Most importantly the UK was required to ensure that collective redundancies were the subject of consultation even where there was no recognised trade union. The Directive did not allow the UK to hide behind the fact that there were no national laws designating either unions or other bodies as employee representatives to avoid the need for representatives to be consulted. The ECJ also insisted that the definition of redundancy needed to be widened, that the quality of consultation required had to be improved and that provisions which allowed the employee to set off any protective award against sums paid under the contract of employment be removed.

17. A number of changes anticipating the ECJ decision had been made by the Trade Union Reform and Employment Rights Act 1993, but the key change was made after the decision in the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995. The most dramatic change was that the duty to consult was extended to cover redundancies in non-unionised environments. For this purpose the Act introduced provisions allowing for the election of employee representatives and gave the employer a choice as to whether to consult the union (if one was recognized) or elected representatives.

18. However as a result of being reluctantly forced to extend the provisions on consultation in this way the Government also took advantage of a provision in the directive allowing a minimum threshold of the number of redundancies before the duty to consult applied. Thus for the first time S.199 of the 1992 Act specified that the duty only applied where the employer contemplated at least 20 redundancies in a 90 day period – irrespective of whether the redundancies affected unionised or non unionised staff. The lower limit of protective awards was also removed to reflect the fact that consultation could no longer be required where fewer than 20 employees were being dismissed.

Reform under New Labour

19. When Labour returned to power in 1997 it took advantage of a reformed Directive on collective redundancies to amend the law still further via the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations, 1999.

20. This widened the scope of consultation further to cover 'affected employees' rather than just employees who are at risk of dismissal themselves and required employers who recognized a trade union to designate the union as representatives rather than have the choice of other elected representatives.

21. The Regulations also removed the 30 day limit on protective awards where between 20 and 99 employees are to be dismissed – although it did not alter the 30 day consultation period for such cases set out in S,188(1A).

Summary of the UK experience

22. It can be seen therefore that the law as it currently stands is the result of compromise, political change and legal challenge over a 30 year period. The need to comply with a European Directive has for much of that period conflicted with the political instincts of the UK Government and this fact has done much to shape the law. The use of representatives specifically elected by workers to be consulted by the employer in relation to redundancies is not something that has evolved organically as part of a coherent industrial

relations system. The concept was invented as a response to the ruling from the ECJ that required the designation of employee representatives which fell to be implemented by a Conservative Government openly hostile to the prospect of extending trade union representation or putting in place any mandatory framework for employee involvement. Most other European countries would fit the need for collective consultation into their own formal system of works councils or mandatory trade union recognition. The single purpose representatives provided for in the UK are a very British invention.

23. Changes since the change of Government in 1997 have been incremental rather than radical and it is fair to say that the current position does not reflect an ideal and coherent scheme for consultation under any political philosophy.

24. It is against this background that the impact of the Jersey Law can be examined.

Consultation where a union is recognized

25. I note that the Forum has no difficulty with the provision regarding the very low threshold for consultation when the workers affected are covered by trade union recognition. The comments of the Forum in relation to this matter chime well with the approach taken by UK law between 1975 and 1994 when any redundancy dismissals in relation to employees covered by union recognition triggered the duty to consult.

26. Against this, it is worth noting that the consultation period of 30 days was never used in the UK for such a small number of redundancies and only applied where at least 10 employees were to be dismissed. It could be argued 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 (see below for a further discussion of the protective award).

Consultation where a union is not recognized

27. As for the consultation requirements where there is no recognized union in place, this provision is clearly much more onerous than any that has been imposed in the UK. As set out above, when the UK was forced to extend consultation rights to non-recognised staff this was done only with the imposition of the 20 employee threshold.

28. Of course the approach taken in the UK need have no influence on Jersey's decision in terms of what is appropriate but a number of practical

difficulties arise in relation to collective consultation for such a small number of employees.

The impact on small employers

29. The low threshold will mean that very small employers will be covered by the duty to consult without having had any experience of collective consultation or negotiation. 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 (see below for a discussion of unfair dismissal). 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.

30. In particular this is the case where the employer knows the individual employees well. Suppose an employer owns a number of shops and proposes to close one of them which happens to employ six employees. 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 impact on large employers

31. Of course against this it can be argued that almost all new employment rights can be seen as imposing a particular burden on small employers. However, the low threshold for collective consultation can also be seen as inappropriate for very large employers. This is because 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.

32. Suppose, for example, a law firm with no recognized trade union operating from a single establishment in St Helier were to make one redundancy in the post room in April, make two commercial property lawyers

redundant in May and contract out its IT service in June making three IT assistants redundant as a result. Leaving aside the difficulty of establishing just when the duty to consult arises (see discussion below of redundancies spread out over time) it is very difficult to see how a collective consultation process could make sense in this sort of situation. The decisions to make redundancies may not even have been made by a central body within the business and 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.

33. 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.

34. 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 – although it should be noted that consulting representatives about the impending redundancies does not absolve the employer from the duty to consult the individual employees about their own situation quite apart from the issues being discussed at a collective level.

35. The subject matter of the consultation itself shows this quite clearly. The consultation must be about avoiding the dismissals, reducing their number or mitigating the consequences of the dismissals. The employer will also have to consult over the individual selection of employees from the pool and that will have to take place with the individual employees concerned. Collective consultation is therefore focused on what we might call the strategic rather than the individual issues that arise in relation to the redundancy exercise. It also allows a mechanism for holding the employer to account for the decisions it is taking when individuals being consulted may otherwise lose sight of the big picture because of their natural concern about what will happen to them.

36. Once again it is difficult to envisage meaningful consultations of this sort taking place when there are a very small number of redundancies. In such a situation there may not be major strategic issues to discuss and it may be difficult to separate matters affecting the employees as a group and matters affecting them as individuals. It is worth noting that the UK law on Transfer of Undertakings (Transfer of Undertakings (Protection of Employment) Regulations 2006 has an information and consultation provision that applies irrespective of the number of employees involved. Many

employers are baffled when told that they should be arranging for the election of employee representatives when only a very small number of employees are involved. A common response is to ask if the employer can simply talk directly to the employees themselves and employers are often surprised when advised that technically they cannot unless they get all of the affected individual employees to elect themselves as representatives first. There are a number of quite technical reasons why those provisions have not often been tested in the courts but it is undoubtedly the case that requiring collective consultation when there is no union in place and only a small number of affected employees causes inconvenience to employers and provides little real benefit to employees.

Seasonal work

37. A further consideration is the impact of this new law on seasonal work. The duty to consult arises when specified numbers of employees are dismissed for redundancy. In this context it should be remembered that the expiry of a fixed-term contract counts as a dismissal and the reason for the expiry might well be the diminished requirement for employees that would make the dismissal one for redundancy. If an employer allows six fixed term contracts to expire over the course of a 90 day period, therefore, the duty to consult could be triggered.

38. The seasonal nature of much of the work in Jersey must make it likely that this situation would crop up on a regular basis. The law as it stands would therefore impose a considerable burden on employers whose workforce varies in size with the time of year. It may also be thought that the issues that make collective consultations desirable in relation to genuine downsizing exercises hardly apply in the context of seasonal variations of this sort. The original thresholds would have done much to mitigate this problem by confining collective consultation to situations that affect a large number of employees. The law as amended however will undoubtedly lead to considerable concern among employers who use fixed-term contracts to employ additional staff during the busier times of the year.

Redundancies spread over time

39. One important ambiguity in the 1992 Act, which is also carried over into the Jersey law, is what happens when two or more separate redundancy situations arise within the same 90 day period (see for instance the example involving the law firm above). It may be that the employer has proposed 20 or more redundancies but at first there were only projected to be 10 and the need for a further 10 only arose, say, a month later. There is no clear case law in the UK on this issue – but it would appear that the duty to consult is engaged. How such consultation can work in practice is very unclear,

however, because it may be that the first tranche of redundancies have already taken place and that consultation is already too late.

40. It would appear that this potential problem is much more likely to arise in Jersey as it would be easy for a total of six redundancies to take place over a 90 day period. It seems inevitable that the employment tribunal will be asked to grapple with a difficult legal issue arising from an ambiguity in the law.

41. In the UK this problem may in part have been avoided because of the limitation on who can bring a claim for a protective award. As will be seen from what follows, however, this is not a limitation that applies in Jersey

The remedy for a failure to consult

42. In essence the new Article 60H(6) of the 2003 Law which provides for the calculation of the protective award provides for punitive damages to be awarded of up to 13 weeks' pay for all employees dismissed by the employer and in relation to whom there has been a failure to consult. This is a substantial remedy slightly higher than unfair dismissal compensation for employees with between 2 and 3 years' service.

43. Under the UK provision 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.

44. 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.

45. The protective award is also unusual in that it can be extended by the tribunal to cover not just the claimant in the individual case, but also to other employees who have been made redundant. This means that it would be possible for one dismissed employee to challenge the consultation that has taken place (even if the representatives themselves are happy with it) with the potential result that a protective award will be made in respect of all employees dismissed by the employer even though they have not themselves made any complaint.

46. It can be seen therefore that the protective award is a very powerful remedy. A claim under these provisions has the potential to carry much higher

financial implications than any other claim currently provided for in Jersey employment law. Clearly, therefore, the extension of the remedy to cases involving as few as six redundancies where there is no union in place will have serious repercussions on the nature and number of tribunal claims brought, quite apart from its direct impact on employers.

Unfair Dismissal law

47. It is important to bear in mind that employees who are being made redundant are not left without legal protection in the absence of collective consultation provisions. As well as the right to a redundancy payment set out in the Amendment No 5 law, employees with sufficient service have the right not to be unfairly dismissed.

48. A good example is the case decided by the Jersey Employment Tribunal of **Cole v Airline Services (C.I.) Ltd (Case Number: 1210-121/08).** In that case an employer with some 50 members of staff engaged in a redundancy exercise leading to six redundancies including that of Mrs Cole. The employment tribunal was critical of several aspects of the procedure for selection adopted by the employer and in relation to consultation said this:

49. 'It is a long established principle of redundancy processes that there must be a consultation between employer and employee unless there are very exceptional circumstances. No such exceptional circumstances exist in this case. The purpose of consultancy is to have a face to face meeting about the situation. It gives an employer an opportunity to confirm that an employee had been provisionally selected for redundancy and why, and for the employee to respond with comments on his assessment for redundancy. In addition, the parties can talk over alternatives to redundancy, any other employment opportunities and generally discuss the situation. It must be remembered that in a redundancy an employee loses their position through no fault of their own. These meetings can be difficult for both parties especially as it is likely that they will not have a positive outcome – but they must not be avoided. It is at the very least, courteous to meet employees who are about to be made redundant and the Tribunal expects an employer to take the lead in setting up these meetings' (Paragraph 28).

50. The tribunal found the dismissal to be unfair and awarded Mrs Cole 26 weeks pay totalling £8,506.94 in accordance with the Employment (Awards) (Jersey) Order, 2005.

51. The question to be decided is whether in a case such as Mrs Coles' the requirements of the tribunal in relation to consultation and the remedy available for unfair dismissal are inadequate. It is perhaps worth noting that the fixed levels of compensation available for unfair dismissal in Jersey can in these circumstances lead to a more generous remedy than would be available

in the UK. In the UK, compensation is based primarily on loss and tribunals who find that the procedure adopted by the employer prior to dismissal was unfair will go on to consider the chances that the employee would still have been dismissed if a fair procedure was followed. Compensation is then reduced to reflect this so that if there is a 75 per cent chance that dismissal would have occurred in any event then compensation is reduced by 75 per cent to reflect this – see **Polkey v AE Dayton Services Ltd ([1998] ICR 142).**

52. This can result in very small awards where the employer is guilty of only a technical breach of a fair procedure including a 'nil award' where the tribunal believes that consultation for example would have made no difference to the outcome. In Jersey the situation is quite different and a full award based on the employee's length of service can be made even where the unfairness is purely procedural.

53. Had the employer in the Coles case been subjected to the law on collective consultation, it is almost inevitable that the complaint about unfair dismissal would have included a complaint about the way in which the employer consulted, or failed to consult, with representatives. This could have added a further 13 weeks' pay to Mrs Coles' compensation totalling an additional £4,253. It would also be expected that a similar sum would be awarded to her five colleagues who were also made redundant – albeit they did not bring unfair dismissal claims.

54. It could be argued that had the employer in that case been subject to the duty to consult representatives then that would have led to an overall fairer process with the result that Mrs Coles may not have been unfairly dismissed. However it could equally be argued that if the employer in that case was incapable of following the basic principles of fairness required by the tribunal in relation to an individual dismissal it is hardly likely that it would find it straightforward to comply with the requirement for the election and consultation of employee representatives in relation to the redundancy exercise.

Conclusion

55. In this report I have outlined a number of respects in which the reduced thresholds for collective redundancy consultation are likely to cause problems for both small and large employers. Of course all new employment law causes problems for employers. Employment law aims to limit management discretion and control the behaviour of employers and is in general unlikely to be welcomed by them. The key issue is whether the problems the law causes for employers are outweighed by the benefits the law gives to employees. This is an entirely political question and as such is outside the scope of this report.

56. However, as I think this report has shown, some of the problems caused by this law are unintended consequences of making a single amendment to an overall scheme of protection that had been carefully worked out and which was itself the result of considerable consultation with key stakeholders.

57. It is also important for the Law to be seen in the context of the overall employment law framework operated in Jersey. The employment tribunal is set up to deal with a relatively small caseload of individual cases where the limits on the amount of compensation available make the process relatively informal and keep delays to a minimum. Thought must be given to the impact this new law will have on the employment tribunal workload and the nature of the cases the tribunal will be asked to hear. The lower threshold for consultation will undoubtedly mean that a greater number of cases will be brought than would otherwise have been the case. These cases may involve multiple claimants and can certainly result in awards being made to multiple employees. This may well make them more difficult to settle and more likely to result in a full hearing. This has resource implication both for the tribunal and also for the Jersey Advisory and Conciliation Service.

58. I hope that this report will be of some use in considering what steps should now be taken. I will of course be happy to answer any queries about the above or assist further in any way I can.

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