



**RECOMMENDATION OF THE
EMPLOYMENT FORUM
TO THE
EMPLOYMENT AND SOCIAL SECURITY
COMMITTEE
ON THE ISSUE OF
HOLIDAY ENTITLEMENT AND REST
DAYS**

This is the third Recommendation of the Employment Forum to the Employment and Social Security Committee, (“the Committee”) the first having been presented on enforcement issues in May 2001 and the second recommending provisions for unfair dismissal in December 2001.

Please note:

- i) that the use of the word he denotes the words he/she
- ii) that the term “employment legislation” is used in a broad sense to include industrial relations issues.

References to UK and EU legislation are taken from the Consultation paper issued by the Employment Forum in March 2001, prepared by Marian Bell, BA(Hons) LL.M.

Section 1 – BACKGROUND TO REQUIREMENT FOR THIS REPORT AND THE RÔLE OF THE FORUM.

- In 1997 the Committee took over responsibility for Industrial Relations from the former Industrial Relations Committee.
- In December 1998 the Committee produced a comprehensive publication, “Fair Play in the Workplace” (“Fair Play”), which was circulated island-wide in December 1998. The publication sought Islanders’ views as to whether or not change or improvement was needed in workplace practices to take the Island into the 21st century and beyond. Considerable discussion and research took place after the release of this document.
- In March 1999 the Committee took a Report and Proposition “ Minimum Wage” (P227 of 1998) to the States. The Report had resulted from research carried out during 1997 -8 and during the debate the States voted not only in favour of the introduction of a minimum wage policy but also the setting up of a consultative body known as the Employment Forum.
- In May 1999 a Law Drafting brief on the Minimum Wage was submitted by the Committee to the Law Draftsman. He advised that the Law would not be workable without the introduction of legislation providing protection to employees from unfair dismissal. Without such protection any employee who brought a claim for non-payment of the minimum wage against his employer could be dismissed by that employer and would have no protection against such a dismissal.
- In August 1999 the Employment Forum was established, as recommended in the minimum wage debate. The remit of the Employment Forum is to consult on a rate for the minimum wage and to monitor the minimum wage generally and to consult widely on the various issues raised in the Employment Legislation proposals. The Forum must report to the Committee with recommendations on the way in which the various issues consulted upon should be handled in the Island.
- In December 2000 the Employment & Social Security Committee took a Report and Proposition, “Employment Legislation”, P99/2000 to the States for debate. The Report contained proposals for the way in which a framework of legislation supported by the Jersey Advisory and Conciliation Service (JACS) and a Tribunal type enforcement body, might be introduced in the Island in two phases. The Committee recommended that the first phase should include legislation on issues pertinent to the introduction of the Minimum Wage, including provisions relating to statutory annual leave entitlement and rest days.

Section 2 - THE RESEARCH

Research on the topic of annual leave entitlement and rest days by the Employment Forum has followed two routes. Firstly, the Forum embarked upon a research programme examining the UK model and relevant issues/provisions coming from the European Community. Subsequently the Forum produced a paper which was used for consultation purposes amongst interested parties in the community.

The following paragraphs outline the key elements of the research carried out by the Forum.

1. The common law background

1.1. The contract of employment

In all common law jurisdictions, the primary source of the obligations and rights of an employer and an employee is the contract of employment. The contract represents the legally binding agreement made between the two parties to the contract. The terms of the contract consist of both:

- (a) “express” terms: those terms clearly agreed upon by both parties, whether verbally or in writing, and whether agreed either at the start of the relationship or later; and
- (b) “implied” terms: terms which the law, through the mechanism of judicial consideration over time, deem to be an essential ingredient of a particular employment relationship or all employment relationships.

Most modern contracts of employment contain express terms relating to working hours, including rest days and annual leave.

In the absence of any express terms, the “right” to rest days and annual leave may sometimes arise through implied terms: for example, where there is a long-standing and well-known custom and practice of not working weekends or allowing time off on the major Christian holidays (such as Christmas and Easter days), or “bank holidays”; or where the custom in a particular sector or industry is to have an annual shutdown or closure. However, the express contract terms may override such expectations by making it clear that these days are “normal” working days, or that such days may be taken only at management discretion. In any event, there may be no clear contractual entitlement to be paid for such breaks.

As with any breach of contract, if an employer fails to comply with the contract terms on rest days or holidays this could give rise to legal claims for damages (that is, monetary compensation) reflecting the loss caused by that breach.

1.2. “Duty of care”

As well as contractual duties, employers are of course also subject to common law duties towards their employees, including the duty to take reasonable steps to safeguard employees’ health and safety. A requirement to work such hours or periods of uninterrupted work which results in injury to an employee (physical or psychological) could give rise to a claim for damages on that basis.

1.3. Legislative “back-up”

While it is open to an employer and employee to agree whatever contract terms they choose relating to time off and annual leave, many jurisdictions provide that minimum standards must be met in these areas.

Within the European Union, all Member States are required, as a minimum, to have laws which adhere to the EC “Working Time” Directive (see below). In addition, the European Convention on Human Rights enshrines a person’s “right to respect for his private and family life”. It is arguable that not allowing an employee sufficient time off to enjoy a “normal” family life could breach this fundamental principle.

2. The European dimension

As members of the European Union, the UK is required to implement Directives adopted by the European Council. Many such Directives have been adopted in the area of employment law generally (as social policy measures), or as specific health and safety measures. Directives are binding on the Member States, and can in some circumstances give rise to directly enforceable rights for individuals.

2.1. The EC “Working Time” Directive

The Council of the European Union adopted a Directive on “certain aspects of the organisation of working time” in November 1993 (the UK abstaining from the vote). This was formally a health and safety measure, aimed at protecting workers against adverse effects on their health and safety caused by long working hours or working without adequate rest. It set down minimum standards relating to: workers’ maximum weekly working hours; night work and shift work; rest breaks and rest periods; and annual leave entitlement.

In 1994, the UK Government brought proceedings before the European Court of Justice challenging the legal basis of the Directive. However, in 1996 the Court dismissed the UK’s case.

The UK was therefore bound, under the EC Treaty, to bring forward legislation to implement the Directive, and the Working Time Regulations were therefore brought into effect in October 1998.

3. The UK working time regulations

3.1. The general framework

As noted above, the UK Working Time Regulations have been in force for over two-and-a-half years. They were amended in 1999 (to reflect some concerns which arose in their practical application), and further amendments will be needed by August 2003 because the Directive has itself recently been amended by the Council of the European Union.

The Working Time Regulations regulate a wide number of matters relating to working time, but for the purposes of this paper discussion is confined to weekly rest periods and paid annual leave.

On the one hand, the Regulations are very broad in their coverage, in that they apply all “workers” over the minimum school leaving age: a definition which covers not just those employed under a contract of employment, but also those who work under other forms of contract (for example, agency and temporary workers, casuals and freelancers). The genuinely self-employed, however, are not covered. Young workers – that is, those over compulsory school age but under 18 – are subject to extra rights and protections.

On the other hand, the Regulations do not currently apply to workers employed in the transport sector (including air, rail, road and water), those working in fishing or other work at sea, and doctors in training. (However, these exclusions are under review at the European level, and specific EC legislation covering these groups has either been adopted or is close to adoption.) The Regulations also do not apply to activities of specific services, such as the armed forces, the police or civil protection services, where these “inevitably conflict” with the Regulations.

3.2. Weekly rest days

3.2.1. The basic entitlement

The basic rule in the UK is that workers are entitled to an uninterrupted rest period of at least 24 hours in each seven-day period. However, an employer is allowed to average this out over a two-week period, so that workers may take two separate days off in a fortnight, or take a two-day rest-break a fortnight.

The Regulations set out detailed rules as to how the relevant seven-day or 14-day period is to be measured, including when it is deemed to begin.

3.2.2. Special cases

There are a large number of cases where the basic right to a weekly rest day (or equivalent) is excluded or modified. The right does not apply to:

- shift workers who are changing shift and cannot take the weekly rest period between the end of one shift and the start of the next;
- workers whose work is split up over the day (for example, cleaners);
- workers who work far from home, or who work at different places of work with some distance between them (so that, for example, they may want or need to work longer hours to complete the work);
- workers engaged in security and surveillance activities requiring a permanent presence to protect property or people (for example, security guards or caretakers);
- workers whose job requires continuity of service or production (including, for example, certain work in hospitals, residential institutions, prisons, docks, airports, media companies, postal services, public utilities and services, industries where work cannot be interrupted, and agriculture);
- workers subject to foreseeable surges of activity (that is, busy peak periods, such as in agriculture and tourism);
- workers' whose activities are affected by unforeseen emergencies, unavoidable exceptional events, or accidents.

In addition, employers and workers can vary or exclude the basic statutory right to rest days, via a collective or workforce agreement (which must satisfy certain criteria), the relevant terms of which must be incorporated into the individual worker's contract.

3.2.3. Young workers

Young workers are entitled to a 48-hours rest period in each seven-day period of work (with no scope for averaging this out over a longer period).

There are exceptions to this rule, but these are limited. The rest period may be interrupted where the work involved is split up over the day or of short duration; and it may be reduced to no less than 36 consecutive hours if this is justified by "technical or organisation reasons". (The detailed exceptions listed under "special cases" above, do not apply to young workers.)

3.3. Annual leave

3.3.1 The basic entitlement

The basic principle set down in UK Regulations is that all workers who have been continuously employed for 13 calendar weeks are entitled to at least four weeks' paid annual leave. (Prior to 23 November 1999 the entitlement was to three weeks' leave.) There are no exceptions to the annual leave entitlement.

3.3.2. Rules of the scheme

No distinction is made between part-time and full-time workers in respect of the statutory entitlement, but a "week's leave" means a period equivalent to the hours or days normally worked by the worker in a week. For example, a worker who works three days a week is entitled to 12 days' paid annual leave; a worker who works six days a week is entitled to 24 days' paid annual leave.

UK statutory annual leave is not additional to any other annual leave provided by the employer, and it can include bank and other public holiday periods. Contractual leave may be set off against the statutory entitlement, as long as the worker receives the minimum four weeks.

As with most contractual schemes, statutory leave entitlement is based on a “leave year”. Therefore, a worker who starts work part-way through the year, or leaves before the year is up, is entitled to a proportionate amount of leave. The leave must be taken during the specified leave year, and cannot be carried over (unless the employer and worker agree this).

Employers and workers are free to agree:

- when the “leave year” begins and ends;
- rules on applying for, and giving notice of, leave;
- any conditions as to when leave may be taken.

In practice, the above items are usually set out in the contract of employment. This could include, for example, rules as to when leave can or cannot be taken or when leave must be taken, or the conditions on which leave is taken. The only limitation is that entitlement cannot be withheld totally. If there are no agreed terms on these issues, the Regulations set out detailed “default” rules.

3.3.3. Holiday pay

Pay for statutory annual leave is calculated under a set formula, which recognises that there are various patterns of work and pay. In summary:

- For workers who work the same hours every week, a week’s holiday pay is the same as their normal basic weekly wage. (Overtime payments are not included unless overtime is a guaranteed part of the contract.)
- For workers who work the same hours every week, but whose pay varies with the amount of work done (for example, piece workers or workers paid commission or bonuses on sales or service), a week’s holiday pay is “average hourly rate” x “normal weekly working hours”. The average hourly rate is arrived at by dividing total pay for work done over the last 12 weeks, by total hours worked during the same period.
- For workers who have normal working hours, but whose working patterns and pay vary from one period to another (for example, shift workers), a week’s holiday pay is “average hourly rate” x “average weekly hours”. “Average weekly hours” is arrived at by dividing total hours worked in the last 12 weeks by 12; and the “average hourly rate” is as above.
- For workers who have no normal working hours (that is, hours and pay are in practice irregular), a week’s holiday pay is the total earned in the last 12 *paid* weeks of work, divided by 12.

Employers may operate a different calculation scheme to the one above, so long as workers do not receive less than the minimum amount provided by the Regulations. If a worker has a contractual right to holiday pay which is more generous than the statutory rules, these will continue to apply.

Statutory annual leave cannot be “bought out” by a payment in lieu, except where the employment ends during the leave year and leave is still due and untaken. Such a payment can be calculated in accordance with the contractual terms, or in accordance with the statutory formula. (The contract can also provide that if a worker has taken more leave than is due, the worker must compensate the employer by a payment or by doing additional work.)

3.4. Enforcement of rights

A worker who is denied entitlement to the statutory weekly rest period or paid annual leave, or who is not paid any amount due under the Regulations, may bring a complaint to an employment tribunal. There is a three-month time limit for a claim (although the tribunal has a discretion to extend this in limited circumstances).

In addition, a worker may complain to the employment tribunal if he or she was subjected to a detriment or dismissed for refusing to work when they were entitled to a weekly rest period, or refusing to forgo statutory annual leave. Dismissal of an employee on these grounds is treated as “automatically unfair”.

If the complaint is upheld, the tribunal must make a declaration to that effect, and may award compensation or outstanding pay to be paid by the employer to the worker where appropriate.

Section 3 - THE EMPLOYMENT AND SOCIAL SECURITY COMMITTEE PROPOSALS

1.1 The Background

As with other aspects of employment legislation being developed the Employment and Social Security Committee set out broad proposals regarding holiday entitlement and rest days. Their proposals were for weekly rest days and paid annual leave based on the principles outlined in the 1997 "Fair Play" consultation document: primarily the recognition of a need for minimum basic employment rights in the modern context to take the Island into the 21st Century.

This approach to the issues differed markedly from that taken in the UK where the provisions are designed primarily to meet the UK's obligations under the EC Working Time Directive, which is in turn adopted (at least formally) as a "health and safety" measure. The structure and content of the UK's law in this area is therefore subject to stringent requirements and limitations. It is fair to say, furthermore, that the purported "health and safety" focus of the UK Regulations has been widely criticised, not least because of the wide number and scope of the exceptions to the rules.

In contrast, the aim of the Committee's proposal was to introduce law which aimed to establish acceptable minimum standards and which at the same time easily understood and effective in implementation. Article 2(2) of The Terms of Employment (Jersey) Regulations 2001 already requires an employer to give details of an employee's holiday entitlement and normal working hours. It was proposed that the proposal of two weeks annual paid leave on a pro rata basis and one rest day per week would become the minimum legal requirement and would act as a default standard if the parties did not agree other better terms in the contract of employment.

However, as with all the proposed legislation, a step-by-step approach was suggested. Complex legislation with detail such as is to be found in the UK Working Time Directive legislation was not the Committee's desire and it was hoped that a simple framework of provisions dealing with the issues of paid holiday and rest day entitlement could be created. Under the proposal the onus was on both employers and employees to "make the system work" in the spirit in which it was intended. However the impact and workability of any such legislation would have to be monitored and if shown to be unsuccessful or unworkable in anyway then the provisions would need to be open to review.

Although the driving force behind the proposed legislation was the recognition that employees should, as a moral standard, be entitled to both paid holiday entitlement and rest days from work, there were other considerations which strengthened this moral approach. The Health and Safety issue was of importance for, as was pointed out in the Report and Proposition taken by the Employment and Social Security Committee to the States, nobody would work well if no break from work was permitted and tiredness could lead to accidents. Although Jersey already has Health and Safety Legislation, as in the UK, requiring employers to take reasonable steps to ensure the health and safety of their employees, it was felt that greater emphasis should be placed on the issue of breaks from work through the introduction of

legislation establishing minimum holiday and rest day entitlement. However, it should be pointed out that this proposal did not consider further the question of how many hours a person should be required to work during any particular period.

In addition consideration was given to the fact that Jersey was introducing its own Human Rights Law which could mean that individuals could seek redress for breach of their Human Rights contained in the European Convention on Human Rights in the local courts. As has been pointed out above there is a belief that an individual's right to private and family life may mean that individuals will be able to claim entitlement to some time off from work to spend with their families.

1.2 Young Workers

The Committee's proposal surrounding rest days and paid holidays was intended to apply to all workers who had attained the age of 16.

1.3 Holiday Entitlement.

The Employment and Social Security Committee recognised that in some other jurisdictions the allowances were greater than that being proposed. For example the UK entitlement was four weeks holiday per year. However the Committee felt that such provisions needed to be introduced gradually and it was hoped that the proposal, if adopted, would be regarded as minimum standards and that the majority of employers would, of their own volition, feel able to offer better terms. The UK, as has been pointed out above, increased its annual leave entitlement from three weeks to four after the Working Time Directive had been in place for a year. The Committee proposed that, if it was deemed appropriate in the future, Jersey too might wish to review whatever minimum holiday entitlement period is decided upon with a view to increasing it.

As in the UK, there is no Jersey law requiring employers to grant bank and public holidays as holiday. Nor is there any requirement to pay employees who are given such days as leave. In many industries of course, employees work on such days e.g. restaurants, hospitals, airlines, the services and in many industries such days are given as additional paid holiday to any holiday entitlement agreed in the contract of employment. The intention of the Committee's proposal was that the two weeks paid leave referred to a clear entitlement to take two weeks paid leave separate to any leave entitlement granted by the employer, paid or unpaid, in connection with public and bank holidays.

It was suggested that payment rates should be based, as in the UK, on the average weekly salary excluding overtime. It was proposed that formulae, like that operated in the UK should be adopted for calculation of the amount due to an individual.

No proposal were made by the Committee with regards to the length of time an employee should work before being entitled to take any holiday.

1.4 Weekly rest days

In contrast to the rather complex UK legislation described above the proposal for Jersey was simply that workers should be entitled to one rest day per week. The clear difference in the proposal with those that currently exist in the UK is that there was no intention to specify rest periods and shift breaks on a daily basis.

The Employment and Social Security Committee acknowledged that there would be a need for flexibility so far as rest days were concerned to accommodate, for example both part-time and shift workers and to allow for surplus of activity at peak times in the Island's different industries (e.g. Christmas or sales time in the retail industry; crop picking or sowing in the agricultural sector; peak week-ends in the tourism industry and Christmas time in the restaurant trade).

As in the UK it was proposed that the rest period of one day was for a 24 hour period of uninterrupted rest. Again as in the UK, it was proposed that this allowance might be averaged out over a two-week period so that the rest days could be taken as two separate days off in a fortnight or as a two day rest-break a fortnight.

The Committee wished to introduce legislation that was workable, so far as possible, to all. It did not wish to introduce provisions that become meaningless by virtue of the number of exceptions or derogations.

Note that, as in the UK, the proposed entitlement was to a rest day. This meant that employees would be given the right to a weekly rest day but they were not obliged to take it. Similarly, the employer would not have to make sure that employees were taking their rest day. However, if an employer wished to ensure that an employee takes his rest day and did not work on that day for another employer it would be up to the employer to make that expectation clear in the employee's contract of employment, agreed by the employee.

1. 5 Breach

Breach of any contract terms in connection with either holiday or rest day entitlement would bring an employer's grievance and discipline procedures into play. The services of JACS would be available to those who needed them and wished to use them. All claims arising would go for a hearing before the Employment Panel.

The dismissal of an employee for refusing to work when they were entitled to a weekly rest period, or refusing to forego statutory annual leave would be capable of being an automatic ground for an unfair dismissal claim. The individual would be "asserting a statutory right" in such circumstances.

It is likely that the majority of such claims would fall to be heard before a sole arbitrator in accordance with the provisions of the Employment Forum's Recommendation on Enforcement Issues. If a complaint was upheld before the Enforcement Panel it was intended that the arbitrator would be able to impose a fine on the employer (as is the case with breaches of the provisions of the current

Payment of Wages law) and make an award of compensation or outstanding pay to the employee, as appropriate.

SECTION 4 - THE CONSULTATION PROCESS

The consultation Document “Annual Leave and Weekly Rest Days - UK Law and a comparison with the proposed Jersey Law” was published in July 2001. The document provided information on the areas discussed in parts two and three of this paper and a questionnaire which interested parties could complete and return to the Department outlining their views was attached. The consultation document was distributed to all organisations on the Employment Forum database.

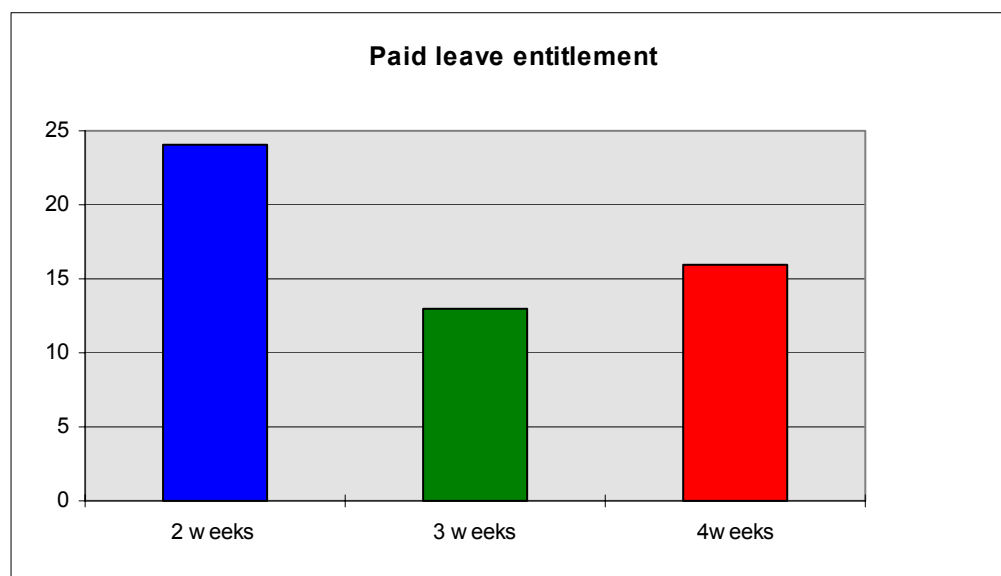
1.1 Responses to the Questionnaire

On receipt of the responses analysis was carried out to establish whether there were common themes or consensus views present in the community in relation to the Committee’s broad proposal. The following information was obtain

2. Leave entitlement

2.2 Paid leave entitlement

The responses received indicated that 55.8% of those consulted believed that 2 weeks annual paid leave was acceptable. The chart below summarises the views of all respondents:



From examination of the submissions it is clear that some respondents welcomed the introduction of a statutory 2 week entitlement provision but felt that it should be increased in time or that practice should allow for greater paid leave. Furthermore reference was made to the European Union and the UK systems. Some comments received are shown below:

“4 weeks - as UK and European Standard”

“We must be careful not to fall below best practice in the E.U”

“3 weeks absolute minimum, should aim for 4 weeks as in the E.U.”

“3 weeks going to 5 weeks and 1 extra day per year of service. 3 weeks in the first year”

A number of those who indicated that entitlement should be greater than 2 weeks felt that public and bank holidays should be included if their suggested periods of entitlement were to be adopted. No responses indicated that a worker should receive less than 2 weeks entitlement.

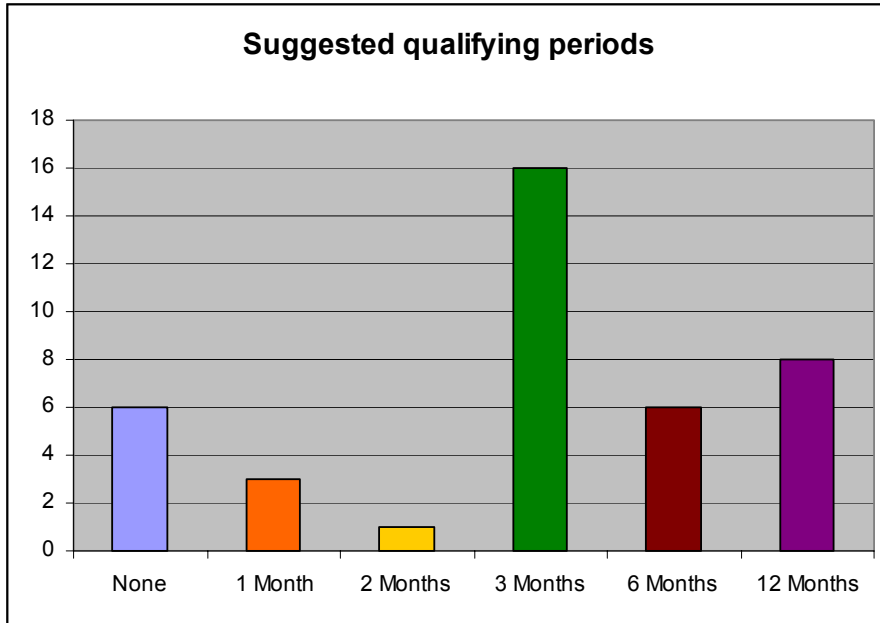
2.2 Inclusion of bank and public holidays

97.7% of respondents felt that public and bank holidays should not count towards the two week holiday entitlement period. Few written comments were received. However, one employer highlighted that employees who work shifts and who are required to work on bank holidays are remunerated directly for work carried out on these days. They stated:

“The Company has employees who work shifts and often the Bank Holidays have already been calculated into the remuneration they receive for the job.”

2.3 Qualifying period

The majority of respondents (86%) felt that a qualifying period should be present in the new system. Not all respondents suggested a minimum qualifying period. However, the views of those that did have been summarised in the chart below:



2.4 “clocking-up” leave and probationary periods

The majority of respondents (67%) indicated that employees do “clock-up” leave entitlement whilst they are undergoing a probationary period. However it would seem that very few employees actually take leave during their probationary period. 72% have indicated that in practice staff do not take leave during this period.

2.5 Calculation of pay for statutory holidays

Generally respondents accepted that the provisions present in the UK System for the calculation paid annual leave entitlement would be acceptable in Jersey. 67% were in favour of following the UK model, with only 14% stating that it would not be workable (19% did no answer the question). Some comments on the method of calculation are recorded below.

“12 weeks is too short a period in which to “iron out” seasonal peaks and troughs. Averaging should be over a 26 week period.

“No statutory maximum calculation date is first day of period of leave”.

“Base period should be 26 weeks not 12”.

“Consideration should be given to the size of the business. Surely it is unreasonable that a small business could be put out of business if a large successful claim is made”.

“Each case must be on its individual merits”.

“Leave room for negotiation not legislation”.

3. Rest Day

3.1 Rest Day entitlement

The questionnaire advised that the Committee proposed one rest day of 24 continuous hours per week and respondents were asked whether they envisaged any particular problems arising in their industry with regard to this. 84% of respondents replied “No” to this question. 14% felt that this proposal may / could cause problems. From this 14% the following comments were received.

“This does not give sufficient rest to be either safe or acceptable and is obviously proposed by those who do not work long and or unsociable hours. It would be normal to have a rest say finishing work late afternoon, an evening a night a day and a further nights rest, before working again. I.e. 36 hours minimum”.

“Preferable 2 days i.e. five day week either both together or separate”.

“We always have operated a five day week. The word “minimum” should be added in front of “One day”

3.2 Specified time for rest days

The majority of respondents (67%) felt that there should not be a specified period established. 23% did not answer the question and only 9% felt that there should be a period specified.

The general mood seemed to indicate that a flexible system be put in place which manages effectively the particular needs of individuals and organisations. Some comments on this issue are copied below.

“Every business is different”

“Its all unnecessarily complicated”

“Normal working day off”

“To suit the industry and individual concerned”

“It would be important to ensure it is an “uninterrupted” 24 hours period. What would happen if an employee was called in to work for one hour? It may involve three hours of lost time and could negate all benefit of the rest day”.

“The Company does not believe there should be a specific time range for the 24 hour period. It should be left as simply 24 hours”.

“From normal starting time e.g. 8.00a.m. to 8.00a.m.”

3.3 Averaging out rest days

58% of respondents agreed that provision should be present to “average out” rest days. 28% stated that it was not appropriate and 14% did not answer the question.

Of those who did not answer the question it seems that they were thinking specifically about their industry / organisation. As such they believed the question was not appropriate to them.

The comments received on this issue appear to span a number of concerns. Whilst a number of comments clearly express the need for flexibility the view has also been taken that the purpose of “rest days” should not be lost. Health and Safety of employees was another issue which was mentioned. Comments on this matter are recorded below:

“Will vary from industry to industry”

“Its all unnecessarily complicated”

“Could cause confusion”

“My employees want time off at the weekends to be with their families”

“Subject to the individual industry and personal requirements”.

“It isn’t necessary in our industry. I also feel that 12 days of fulltime work is detrimental to health and performance at work. It should be kept to 24 hours in a week.”

“The company believes this would provide flexibility in arranging rest days, which would be of mutual benefit to employers and employees”.

“Should be a voluntary option through negotiations with the relevant trade unions”.

“Should be by agreement in contracts of employment”.

“But no more than 2 weeks or the rest / health benefit is lost”.

3.4 Exclusion for certain categories of workers

65% of respondents did not feel that certain categories of workers should be excluded from rest day entitlement. However, some respondents did highlight the emergency / essential services as categories of workers who should be considered as “special” for the purposes of this proposal. In addition other sectors with particular needs were also mentioned (e.g. farm workers at certain time in a season).

19% did not respond to the question which results in only 16% of submissions indicating that special provision should be present for certain groups.

4. Conclusion

The questionnaire and supporting papers on the issue of holiday entitlement and rest days do not have appeared to have generated a great deal of debate. Perhaps an extract from one respondent summarises this well:

“In general this module is likely to prove one of the less controversial elements of the proposed new employment legislation”.

There is general support for statutory entitlement to paid annual leave. The proposed two week period is accepted as a minimum and any debate really surrounds the question as to whether the period should be greater. Only one response (from an employment agency) felt that their sector should be given special treatment in relation to holiday entitlement.

Clearly, respondents felt that public and bank holidays should be kept quite separate from annual leave entitlement. There is no evidence to suggest people would wish for bank and public holidays to be swallowed up in an employees annual leave entitlement if the proposed 2 weeks is adopted.

There is acceptance that statutory provision should be incorporated into legislation regarding rest days although a view is present that a provision is necessary to provide for flexibility in sectors which have unusual needs. The Health and Safety of workers in relation to rest days was another matter which some respondents felt was important to incorporate.

Section 5 - The RECOMMENDATION

The Employment Forum believes that the recommendation which follows and which is proposed to the Committee not only takes into account the wishes expressed by the majority in the consultation exercise but also accommodates the advice both learned and received by the Forum in its research on the issue of holiday entitlement and rest days. This recommendation is structured in two parts, the first part considers holiday entitlement and the second rest days.

The recommendation is as follows.

1. HOLIDAY ENTITLEMENT

The Forum proposes that provisions relating to paid annual leave entitlement should remain primarily the subject of agreement between an employer and their employee and that such terms should be clearly expressed in the contract of employment. Legislation should seek merely to impose a minimum standard for paid annual leave in Jersey. The Forum recommends that statutory provision be present which provides for employees and workers to be entitled to a minimum of two weeks paid annual leave each year. This recommendation not only meets with the proposal made by the Employment and Social Security Committee but also aligns with the views of the majority of respondents who took part in the consultation exercise. Where an employee or worker is not employed in an organisation for a complete year entitlement should be calculated on a pro-rata basis. A “year” for the purpose of holiday entitlement legislation should run in accordance with the terms and conditions detailed in an individual's contract of employment. However, should a contract be silent on this matter legislation should provide that a calendar year is to be used to determine entitlement. In the new legislation, nothing should prevent a contractual arrangement being made whereby leave entitlement shall cease to accrue during periods of maternity or sick leave. The Forum also suggests that employment legislation explicitly provide that annual leave must be taken during the specified leave year. Employees and workers should not, under the provisions of employment legislation, be able to “clock-up” entitlement over a year or more.

For the avoidance of doubt the Forum would wish to highlight that statutory annual leave should not be additional to any other annual leave provided by the employer. Contractual leave may be set off against the statutory entitlement, as long as the worker receives the minimum two weeks.

1.2 Who is covered

The Forum recommends that all employees and workers should enjoy the benefits of statutory provisions relating to paid leave. No particular profession, trade or group of worker or employee should be excluded from these provisions and no distinction should be made between part-time or full-time workers. Protection to two weeks paid annual leave should commence when a person has attained the age of 16 and no upper age limit should be incorporated into legislation.

The Forum is aware that the definition of “worker” and “employee” could play a critical role in establishing whether an individual is entitled to paid annual leave. It is not envisaged that sub-contractors or self-employed workers serving several contractors or clients should be covered under this legislation but the Forum would wish for protection to be granted to those who routinely work for one particular employer and a relationship similar to a master and servant has evolved. Advice from the Law Draftsman should be sought to ensure policy intent is met.

For the avoidance of doubt the Forum would wish to highlight that voluntary workers employed by charitable organisations or fund raising bodies should not be entitled to statutory paid holidays.

1.3 Public and Bank holidays

The question as to whether Public and Bank Holidays should be incorporated in the two week paid holiday period has been carefully considered by the Forum having regard to the UK system and the results of the consultation exercise. Whilst other jurisdictions have legal provision for public and bank holidays to be included in their statutory period of paid annual leave it is noted that entitlement to annual leave is generally for longer periods of time than recommended in this document (e.g. 4 weeks in the UK). Therefore, as a minimal standard of two weeks paid annual leave is proposed by the Forum it is not felt appropriate to include bank and public holidays.

Matters regarding time off and/or remuneration for work carried out during public or bank holidays should remain an issue which is agreed upon by the employee and employer and formalised in the contract of employment.

1.4 Calculation of pay during periods of annual leave

The method of calculating the sum paid to workers in respect of periods of annual leave has been carefully considered by the Forum. Members are mindful that complex pay structures are present in the Island and that it is desirable to keep any formula as simple as possible. The Forum therefore recommends that the primary component which should be used is the **basic pay** of a worker or employee. The following methods should be used to establish entitlement:

- For workers who work the same hours every week and receive the same pay, a week’s holiday pay is the same as their normal basic monthly or weekly wage (divided appropriately for those workers and employees who are paid on a monthly basis). Additional elements of income such as overtime and commission payments should not included.
- For workers whose working patterns and pay vary from one period to another (e.g. agricultural workers and some involved in the hospitality industry), a week’s holiday pay should be averaged out over the previous twelve month period in order that the mean average weekly rate of pay can be established. This weekly rate should then be payable to workers and employees when they take a weeks leave. If necessary the weekly rate should be broken down further (e.g. if a

worker is taking only two days off in a week) by dividing the weekly rate with the number of days they normally work in each week (which cannot under the recommendation below be greater than six days). The Forum are of the opinion that such a formula would account for the changing work patterns (e.g. seasonal peaks and increased customer demand) in certain industries and sectors and provide for a fair and equitable system. In cases where workers or employees have not, or will not be employed for twelve consecutive months (e.g. those workers hired on short fixed term contracts) the period of the contract should be used to determine the weekly average wage.

The Forum would further recommend that two provisos be present in legislation regarding the calculation of paid leave entitlement.

- The above provides for a minimum standard and as such any employer should be able to operate an alternative system as long as the monetary value of paid annual leave is at least equal to the minimum wage payable in respect of the period in question.
- Under no circumstances must any calculation result in an employee or worker receiving less than the value of the statutory minimum wage (or trainee wage if appropriate). As such the means by which basic pay is established will need to mirror the provisions present in the Minimum Wage Law.

1.5 Qualifying period

As a result of the consultation exercise the Forum has become aware that practice in the Island generally allows for employees to “clock-up” annual leave entitlement from day one of their employment with a new employer. The Forum would not wish to see incorporated into legislation a system which could have a detrimental effect on the workforce of the Island and therefore does not recommend that a qualifying period be present in legislation. However, the Forum is also aware that many organisations have provisions for probationary periods incorporated into contracts of employment and believe that legislation in Jersey should not remove the ability of organisations to effectively run their Human Resource policies. As such the Forum is of the opinion that whilst leave entitlement should be “clocked-up” from day one nothing should remove the right of an employer to operate a reasonable probationary period system which may stop an employee or worker from taking annual leave entitlement early on in the employment relationship.

1.6 Therapeutic and special needs employment

The Forum are aware that some people work in organisations under therapeutic or rehabilitation programmes. The circumstances under which such people are placed within organisations can be quite different and the Forum would not wish to recommend a proposal which could discourage employers from assisting with States strategies on the rehabilitation of people with special needs. However, the Forum are also of the opinion that no genuine worker or employee should be disadvantaged simply by the fact that they do have some additional needs. The Forum does not

believe it is in a position to make a firm recommendation on the treatment of such workers in relation to leave entitlement but suggests that every consideration should be given to ensuring that such people are not debarred from enjoying the benefits of statutory protection for minimal standards in the work place.

1.7 Agency and similar workers

It is clear from the consultation exercise that some organisations envisage a number of potential problems with an inflexible system of annual leave entitlement. Organisations providing agency workers to various industries and sectors in particular foresee difficulties in operating holiday entitlement provisions. For example, it is common practice for an individual worker to be registered with a number of agencies and move between them to gain assignments for say one to four weeks. In essence, in such situations workers will service contracts of a very short duration before moving to a “new” contract and a new employer. The administrative burden which could be placed upon such employers cannot be underestimated.

Having carefully considered all the issues raised during the consultation exercise the Forum would recommend that an individual worker or employee may waive their right to the payment of wages during periods of statutory holidays on the basis that they are remunerated on a weekly / monthly basis a sum which accounts for paid annual leave. Workers and employees should still be entitled (by Law) to two weeks annual leave (if necessary on a pro rata basis) but would be responsible for managing their own financial affairs. In such case there would be a requirement on the employer to clearly indicate on the workers contract of employment or other appropriate document as allowed under the Terms of Employment Regulations 2001 the hourly rate and the additional component of income which represents their annual leave entitlement.

1.8 Adjustments when employment is terminated

The Forum believe it is necessary to afford both parties to the employment relationship a degree of protection if arrangements for paid annual leave are to be fair and just. If an employee or worker terminates their employment (or their employment is terminated) they should be entitled to be paid the value of any untaken leave (as calculated on a pro-rata basis using the formula above) at the time they leave that employment. Alternatively, an employer should have a statutory right to recover the value of any leave taken over and above that which the employee or worker would have been entitled to receive during the duration of their annual leave year.

2. REST DAYS

Having considered the results of the consultation exercise the Forum recommends that each worker and employee in the Island should be entitled to one statutory rest day per week. This rest day should be a continuous period of 24 hours. A week should be defined in the terms and conditions of the contract of employment but if the contract is silent on this issue a week should run from Sunday to Saturday.

2.1 Who is covered

The Forum recommends that all employees and workers should enjoy the benefits of statutory provisions relating one rest day per week. Protection should be granted to all persons who have attained the age of 16 and no upper age limit should be incorporated into legislation.

The Forum is aware that the definition of “worker” and “employee” could play a critical role in establishing whether an individual is entitled to a rest day and therefore advice from the Law Draftsman should be sought. It is not envisaged that sub-contractors or self-employed workers serving several contractors or clients should be covered under this legislation but the Forum would wish for protection to be granted to those who routinely work for one particular employer and a relationship similar to a master and servant has evolved. As with the recommendation on leave entitlement voluntary workers employed by charitable organisations or fund raising bodies should be excluded from this provision.

2.2 Flexibility of rest day provision

The Forum is aware that the majority of those who took part in the consultation exercise were of the opinion that provision should be present in legislation for the rest day to be averaged out over a two week period. Consideration has also to be given to the health and safety concerns expressed by some respondents as does the need of employment legislation to ensure provisions are workable within industry in general or particular sectors.

Having carefully considered this issue the Forum recommends that the ability to average out the weekly rest day over a two week period should be present in legislation but that nothing should remove an employers duty of care over an employee. Such a duty is subject to common Law and includes the duty to take reasonable steps to safeguard an individual workers health and safety.

3. ADDITIONAL COMMENTS

3.1 Procedures and Employers Handbook

The Forum is aware that following the publication of “Fair Play in the Workplace”, feedback suggested that a simple, easy to follow legislative framework be developed. To this end the Forum would recommend that complex procedures should not be incorporated into legislation. The Forum takes the view that the “Employers

Handbook” should provide detailed guidance on best practice and that clear examples be given to assist all parties in applying the Law. The handbook is seen by the Forum as the primary means by which, not only will the legislative provisions be applied, but best practice and the spirit of the law become part of the industrial relations culture in the Island.

3.2 Thanks

The Forum would like to express its thanks to all those who have assisted and given their time in the consultation process that has led to the recommendation being presented.