RECOMMENDATION ON UNFAIR DISMISSAL

RECOMMENDATION OF THE EMPLOYMENT FORUM TO THE EMPLOYMENT AND SOCIAL SECURITY COMMITTEE ON THE ISSUE OF UNFAIR DISMISSAL LEGISLATION

This is the second 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.

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.
iii) References to the United Kingdom and foreign legislation are taken from the Consultation paper issued by the Employment Forum in March 2001, the UK section of which was prepared b Marian Bell, BA(Hons) LLM.

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. The need for a body to act as a Consultative group was recognised and the need for unfair dismissal legislation was voted one of the top priorities.

- 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[1]..

- 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 protection from unfair dismissal.

[1] The right to claim for an entitlement granted by statute is known as " the assertion of a statutory right".

Section 2 - THE CONSULTATION PROCESS

Research on this topic by the Employment Forum has followed two routes. Firstly, the Forum embarked upon a research programme of what constituted unfair dismissal and how the issue was dealt with in other jurisdictions around the world. Subsequently the Forum produced a consultation paper which was used for consultation purposes amongst interested parties in the business community. Further details of the research and the consultation are given below.

A The Research

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

A.1 What is Unfair Dismissal

Generally speaking, as long as any contractual obligations are fulfilled, there are few if any common law restrictions on why, how or when an employer may dismiss. Therefore, as a matter of policy, many common law jurisdictions have introduced legislation which either imposes restrictions on why, when or how an employer may dismiss an employee, or provides compensation for those dismissed in breach of minimum standards or procedures.

The right to protection from "unfair dismissal" is a statutory right. Such a dismissal is not to be confused with the term "wrongful dismissal". A "wrongful dismissal" results from a breach of contract terms (e.g. a failure to give the right amount of notice to an employee who is being dismissed). The statutory right to protection from unfair dismissal is an additional right granted to an employee by statute in circumstances where it can be proved that the dismissal was unfair.

The restrictions or penalties that arise in unfair dismissal circumstances are a fundamental back-up to other statutory rights: without protection against dismissal for pursuing or enforcing these statutory rights, they are of little value to those they seek to protect.

A.2 Other jurisdictions

Many jurisdictions around the world grant protection to employees from dismissal in unfair circumstances and some of the different approaches are summarised below.

A2.a United Kingdom

The unfair dismissal provisions in the UK were amongst the first pieces of legislation granting employees additional statutory protection introduced in the UK in the early 1970's. Since that time the UK Government has introduced a considerable amount of employment legislation , some driven by European Union Directives, including laws dealing with maternity related issues; redundancy; working time; sex, race and disability discrimination and the transfer of

undertakings. Protection from unfair dismissal is key to the workability of all of these pieces of legislation.

The UK unfair dismissal legislation is based on the concepts of a "fair reason" for the dismissal and on "fairness" in the way the employer decides upon and implements a dismissal. In UK law, in cases other than automatically unfair dismissal (see p.), the employer must show the reason (or, if there was more than one, the principal reason) for the dismissal. That reason must also fall within one or more of the following categories:

- it related to the **capability or qualifications** of the employee for performing work of the kind which he or she was employed to do;[2]
- it related to the **conduct** of the employee;
- the employee was **redundant**;
- the employee could not continue to work in the position he or she held without contravention (either by the employer or the employee) of a duty or restriction imposed by or under statute;
- it was **some other substantial reason** of a kind such as to justify the dismissal of an employee holding the position which the employee held[3].

If the employer cannot show a reason for the dismissal, or if that reason does not fall within the above list, then the tribunal must find the dismissal unfair.

A2.b New Zealand

New Zealand approaches the issue of unfair dismissal by giving employees the right to claim for a "personal grievance". Like Jersey, New Zealand does not have extensive legislation dealing with all of the areas quoted above in the UK legislative framework. A personal grievance does not relate to any claim arising out of a contract but it does refer to any grievance that an employee may have against his employer or former employer that falls under any of the grounds listed in Section 103.1 of the Employment Relations Act 2000. These include:

i) being "*unjustifiably dismissed";*
ii) being discriminated against;
iii) being sexually or racially harrassed;
iv) being subject to duress in relation to membership or non-membership of a union or employee organisation or

[2] capability means capability assessed by reference to "skill, aptitude, health or any other physical or mental quality"; qualifications means "any degree, diploma or other academic, technical or professional qualification relevant to the position which the employee held"
[3](An employee's "position" is defined as meaning "the following matters taken as a whole – (a) his status as an employee, (b) the nature of his work and (c) his terms and conditions of employment".

v) having one or more conditions of the employee's employment affected to the employee's disadvantage by some unjustifiable action by the employer.

A2.c Other jurisdictions in brief

- **Singapore** law allows for an employee to make representations to the Minister if he considers his dismissal is "without just cause".

- In **Southern Ireland** the Unfair Dismissals Act 1977 extends protection from unfair dismissal to dismissal on the grounds of religion; politics; race; sexual orientation; age and traveller reasons (to accommodate the travelling community).

- Under **Dutch law** an employer owes his employees a duty of care and therefore has a liability not to dismiss his staff. Should he do so a very bureaucratic system, "the Permission Procedure" , is brought into play whereby a permit to allow the dismissal has to be sought from the District Labour Office.

- **In France,** in contrast, employees have a right to resign and employers need to make sure there is nothing that can be construed as grounds for constructive dismissal. Employers also cannot give imprecise reasons for dismissal. If they do the dismissal is likely to be classified as unfair.

- In **Guernsey and the Isle of Man**, the jurisdictions closest to and most closely ressembling Jersey both in size and economic considerations, the concept of unfair dismissal is based on UK law.

A.3 Other factors to consider

As can be seen from the above the concept of unfair dismissal is generally adopted though different jurisdictions emphasise and interpret its application in their own way. In addition to the bases upon which an unfair dismissal claim may be founded however there are often other qualifying rules that a claimant must satisfy before he is eligible to bring a claim. The issues addressed below all feature in UK law but can be found to varying degrees in the legislation of other jurisdictions as well.

A3.a Status - the basic right - who does the law protect?
The UK law states that "an employee has the right not to be unfairly dismissed by his employer".[4] However, not all workers have this right. The law sets out various qualifying conditions and rules.

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[4]. Section 94 of the Employment Rights Act 1996. The same formulation has been adopted in the Employment Protection (Guernsey) Law 1998.

Under current UK law, only “employees” may complain of unfair dismissal. These are defined as people who have entered into or work under (or, where the employment has ceased, worked under) a contract of employment. This is in turn defined as a “contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing”.[5]

This definition has generated a great deal of case law over the years. This has arisen primarily where the employer has asserted that the complainant does not have unfair dismissal rights because be he or she was not really an “employee”, but was engaged under a “contract for services” – that is, he or she was in reality a self-employed earner, working independently on his or her own account.

The courts’ approach to this question has been one of ascertaining the reality of any given situation, rather than being bound or swayed purely by the label put on the relationship by the parties themselves, or even by the tax and administrative arrangements adopted. Thus, for example, the tribunals and courts have frequently had to decide on the employment “status” of homeworkers, seasonal workers, casual workers, agency and contract workers, as a preliminary point in whether a claim can proceed.

The current state of the UK case law is that this question is a mixed question of law and fact for the tribunal to decide, taking into account all the circumstances. It would be fair to say that the current tendency is to find that employment status exists, except: where both parties have made a voluntary and informed decision to treat the situation differently; or where an individual is clearly and in reality working as part of his or her own independent business or undertaking.[6]

[5]. Section 230 (1) and (2) of the Employment Rights Act 1996. The same formulation has been adopted in the Employment Protection (Guernsey) Law 1998 (section 34). The Terms of Employment (Jersey) Regulations 1998 applies to “employees” who have entered into or work under a contract of employment.

[6] It is worth noting that this issue has been expressly dealt with in later UK legislation on other employment protection rights. In these cases, the rights apply to all “workers”, who are defined as individuals who have entered into or work under a contract of employment or *any other contract whereby the individual undertakes to do or perform personally any work or labour* – but with the express exclusion of workers who operate a professional or business undertaking whereby the “employer” is effectively a client or customer. Jersey will have to consider the classification of those intended to receive unfair dismissal protection before drafting the legislation and bearing in mind the future development of the employment law framework. [6]

A3.b Specific exclusions and inclusions

On policy grounds, some workers who might otherwise fall outside the above definitions, are expressly covered by unfair dismissal law – for example, Crown servants and parliamentary staff (that is, civil servants who strictly speaking are not "employed" under a contract at all). Conversely, certain groups are specifically excluded, such as police officers and members of share-fishing crews. [7]

Special provisions that previously excluded employees who worked outside the UK from bringing unfair dismissal complaints were recently repealed. This was done primarily to bring the UK into line with its EC obligations, and to ensure that an employee working temporarily in the UK has unfair dismissal rights, regardless of where their contract was concluded.

A3.c Retirement

Employees who have reached the normal retiring age applicable to their post cannot bring unfair dismissal complaints. This is backed up by a maximum age limit of 65 if there is no normal retiring age, or where the normal retiring age is different for men and women.

A3.d Industrial action

Complex special rules apply where an employee is dismissed while participating in industrial action. On the one hand, these serve to exclude or severely limit the rights of those dismissed while taking part in "unofficial" or unlawful industrial action. On the other hand, recent amendments to the law have provided extra protection for those taking part in industrial action which has been called and organised fully within the law.

A3.e Contracting out

The law expressly provides that it is not permissible for individuals to contract-out of their statutory unfair dismissal rights: any agreement or contract term which purports to have this effect is void. However, there is an exception to this otherwise strict rule. Unfair dismissal complaints may be comprehensively settled, with the effect of excluding the statutory right to bring a claim to an employment tribunal, in two ways.

The first is where the parties have concluded an agreement as a result of conciliation through the Advisory, Conciliation and Arbitration Service (and the agreement is recorded in a specified form). The second is where the parties have reached a legally binding agreement (called a "compromise" agreement) which meets certain specified requirements (most notably, that the employee must have received independent legal advice before signing).

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[7] This issue will need consideration in a Jersey context.

Until recently, the UK law allowed employees to agree to waive their unfair dismissal rights if they were employed under a fixed-term contract of one year or more, and the dismissal arose as a result of the non-renewal of the contract. However, this exception has now been repealed.[8]

A3.6 Qualifying period of service

A3.6.ii "Ordinary" cases

The right to complain of unfair dismissal has always been dependent on the employee establishing a qualifying period of service (except in specified cases – see below). That period has often been amended and has ranged from 26 weeks to two years. It currently stands at one year. Until 1995, there were also qualifying rules relating to minimum hours of work, but these were repealed so that now all employees are covered regardless of their working hours.[9]
Explicit statutory rules apply to calculate an applicant's length of service[10]. While in most cases this is straightforward, in some cases (for example, cases involving temporary or casual employees) the rules have proved to be complex and uncertain and have often led to contentious results. In addition, detailed rules apply to employment with associated companies, and the transfer of employment where, for example, a business changes ownership.

A3.6.i "Special" cases

There is a now large number of categories of dismissal where there is no qualifying period of service. These generally reflect those unfair dismissal rights introduced to underpin the provision and enforcement of other important statutory rights.

These cover, for example: maternity and parental leave rights; minimum wage rights; trade union membership and activities; working time and holiday entitlements; health and safety protections; "whistleblowing" and "protected" industrial action.

It is worth noting that in all these cases, the legislation further provides protection against detrimental treatment short of dismissal, and in some cases protection against discrimination in recruitment. These rights are enforceable in an employment tribunal as a claim for compensation.

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[8]. The Guernsey unfair dismissal legislation provides that employees may waive their unfair dismissal rights in the event of non-renewal of a fixed-term contract of two years or more.

[9] This issue will also need consideration in the Jersey context.

[10]. Similar rules are used in the Termination of Employment – Minimum Periods of Notice (Jersey) Law 1974 (Articles 3 and 4), except these also contain provisions relating to hours of work. In Guernsey, the legislation itself does not set down any special rules as to how continuity of service is to be calculated, but these may be provided by "Ordinance".

A3.7 Time limits

In the UK a complaint of unfair dismissal must be lodged at an employment tribunal within strict time limits. The basic time limit is three months beginning with the effective date of termination (which is defined in the legislation), but a tribunal has a discretion in limited circumstances to allow claims out of time.[11] Employers are also required to adhere to specified time limits in lodging their defence to a complaint (although an extension of time may be granted on application, showing good grounds).

A3.8 The position in other jurisdictions

Other jurisdictions have varying qualifying periods of service requirements before a claim for unfair dismissal can be brought.

A4 THE AWARD

As the right to challenge for the dismissal arises after the event the award made is one of two types: re-employment or monetary compensation. Where an applicant succeeds in his or her unfair dismissal complaint, the tribunal may order reinstatement (that is, re-employment in their old job on the same terms and conditions), or re-engagement (that is, re-employment in a different job but on comparable terms and conditions). In practice, in the UK at least, re-employment orders were, and still are, very rarely made, even though the legislation denotes this as the primary remedy, which a tribunal must consider first.[12] By way of contrast the re-employment option is currently being encouraged in New Zealand where re-instatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee is provided for in Section 123 of the Employee Relations Act.

In Singapore an employee can ask the Minister to re-instate him. If he feels that he has been dismissed without just cause or excuse.

A4.1 The monetary award.

Different jurisdictions calculate the monetary award in different ways.

[11]. Guernsey law has adopted a one-month time limit for presenting a complaint, with a similar discretion to extend this.

[12]. In 1999/2000, re-employment was ordered in 0.1% of successful unfair dismissal cases.

A4.2 Calculation of award in the UK

The basis for calculating compensation comprises two elements: the "basic" award, which is assessed by reference to a formula and is payable in nearly all cases, regardless of other circumstances; and the "compensatory" award, which is calculated purely by reference to the applicant's quantifiable "loss" resulting from the unfair dismissal. The compensation is not affected by the scale or "nature" of the unfairness; and there is no scope for awarding compensation for "hurt feelings" or to "punish" the employer.

The maximum level of compensation that may be awarded was £4,160 in 1972. This level was raised periodically, by Ministerial Order, until it stood at £12,000 in 1999. The current Government then took the bold step of raising the upper limit to £50,000, and provided for this limit (and other tribunal awards) to be raised annually, automatically, in line with inflation.

The legislation on the calculation of compensation is complex, and runs to some 25 detailed sections of the Employment Relations Act 1996. In summary, compensation consists of:

(a) A **basic award** calculated by reference to the employee's length of continuous employment (up to a maximum of 20 years), their age, and the amount of their weekly pay (up to a maximum of £240). The maximum award is therefore £7,200.

- In specified cases – for example, automatic unfair dismissal on trade union grounds – there is a minimum basic award of £3,300.

- The basic award may be reduced on certain grounds – for example because of the employee's misconduct before dismissal. Any redundancy payment already received, and certain ex gratia payments, will also be deducted. The amount is also reduced by scale where the applicant is over the age of 64 (so that nothing is payable to someone over age 65).

(b) A **compensatory award** of "such amount as the tribunal considers just and equitable in all the circumstances", taking into account immediate loss (that is, loss from the date of dismissal up to the date of the tribunal hearing); future loss (as estimated by the tribunal); and loss of employment protection.

- As at common law, an applicant is expected to take reasonable steps to mitigate (that is, reduce the effects of) his or her loss, and may effectively be penalised for failing to do so, by a reduction in the compensation. Any earnings or other income received since the dismissal will be taken fully into account and deducted from any element of "future" loss.[13]

[13]. The median level of compensation awarded in 1999/2000 was £2,515.

• Where an employment tribunal finds that a dismissal was procedurally unfair, but would have been inevitable in any case, it may reduce the award by a percentage, up to 100%[14].

• The maximum compensatory award is currently £51,700 (except in two specified cases where there is no maximum).

• Reductions may be made to reflect certain matters, such as the employee's contribution to his or her dismissal, or receipt of an ex gratia or redundancy payment.

• A tribunal may deduct up to two weeks' pay from the compensation if the employee was given written notice of a right to appeal under the employer's internal procedures, but failed to make use of it. Conversely, if an employer prevented an employee from using the procedure, compensation may be increased by up to two weeks' pay.

A4.3 Other jurisdictions

A4.3a In **New Zealand** Section 123 Employee Relations Act 2000 contains provisions for:

i) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance;

ii) the payment to the employee of compensation by the employee's employer, including compensation for -

    (i) humiliation, loss of dignity, and injury to the feelings of the employee; and
    (ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen.

An award can comprise one or more of these elements and the Authority or the court must consider the employee's actions and the extent to which they contributed towards the situation that gave rise to the personal grievance and, if the actions so require, reduce the remedies that might otherwise have been awarded.

A4.2b In **Singapore** the Minister, if satisfied that an unfair dismissal case is proven, can direct the employer to re-instate the employee and pay the employee an amount in wages that is equivalent to the wages that he would have earned had he not been dismissed by the employer or direct the employer to pay such amount of wages as compensation as may be determined by the Minister.

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[14]. see footnote 25.

A4.2c In **Guernsey** the Unfair Dismissal provisions are very similar to the UK law, though not the remedies. If an unfair dismissal claim is proven the Guernsey adjudicators have authority to make a fixed compensatory award equal to three months of the employee's pay. Alternatively they can award re-instatement as a remedy and if the employer offers to re-employ the employee after the dismissal but before the claim is lodged and the employee refuses, it is open to the adjudicator to reduce the award. The monetary value of any benefits due to the employee is also added to the fixed award.

A5 Automatic Grounds for Unfair Dismissal

Under the provisions of UK law some reasons for dismissal are treated as automatically unfair. If the applicant establishes, on the evidence, that the reason or principal reason for his or her dismissal fell within one of these categories, the claim will succeed without further investigation of the employer's conduct or procedures prior to dismissal.

These provisions also apply to redundancy situations: if the applicant establishes that the reason or principal reason why they were selected for redundancy was one of the "inadmissible" reasons, the dismissal is unfair.

These categories of "automatic unfairness" very much mirror those cases in which there is no qualifying period of service required for a complaint. Similarly, they are primarily concerned with strengthening and underpinning other important statutory rights. The list, therefore, has grown in tandem with the growth of other statutory employment rights.[15]

The cases currently covered run to some twenty categories. They include, by way of example:

- dismissal or selection for redundancy on grounds of trade union membership or non-membership or activities;
- dismissal or selection for redundancy on specified grounds relating to pregnancy, childbirth and maternity, parental leave, or time off for dependants;
- dismissal or selection for redundancy on certain grounds related to statutory health and safety rights;

[15]. Guernsey law has adopted the same formula of specifying certain categories of dismissal or selection for redundancy as automatically unfair (trade union membership or activities; pregnancy and related reasons; health and safety rights; and assertion of statutory rights). The latter three categories are not subject to any qualifying period of service. It is proposed that some categories of "automatic" unfair dismissal will be contained in the new Jersey legislation, as indicated in the Employment Legislation proposals, and it is envisaged that, over time, others would be added as has happened in the UK.

- dismissal or selection for redundancy on the grounds that the employee was acting as an employee or workforce representative (or was candidate for such a post);[16]

- dismissal or selection for redundancy because the worker refused to work in breach of the statutory working time rules, or refused to forgo statutory annual leave;

- dismissal or selection for redundancy because the worker asserted their rights under the minimum wage legislation (or because their employer was prosecuted after such an assertion, or because the worker would or might qualify for the minimum wage in future);

- dismissal because the worker exercised or sought to exercise his or her statutory right to be accompanied at disciplinary and grievance hearings[17], or because they accompanied or sought to accompany another worker in accordance with that right;

- dismissal or selection for redundancy because the employee brought proceedings against the employer to enforce a "relevant" statutory right or alleged that the employer has infringed such a right ("relevant" rights include all rights enforceable via a complaint to an employment tribunal).

Note, that where a tribunal finds that a dismissal was *not* automatically unfair under one of the above headings, but the employee has sufficient qualifying service for an "ordinary" unfair dismissal complaint, it will usually go on to determine whether the dismissal was nevertheless unfair under the general principles.

UK unfair dismissal law does not set out any special rules on dismissals which amount to unlawful discrimination. This is simply because such claims may be brought under the specialised discrimination legislation, which currently prohibits discrimination in the areas of sex, race, marital status, gender reassignment, disability (and in Northern Ireland, religious or political beliefs). There are no qualifying rules for such claims (either in terms of status, hours of work or length of service).[18]

Section 3 - THE JERSEY UNFAIR DISMISSAL PROPOSALS

[16]. In the UK, the law requires an employer to consult with employee or workforce representatives in the event of collective redundancies or transfers of an undertaking. The law also allows employers to reach agreement with workforce representatives on parental leave provision and working time arrangements.

[17]. This is new right introduced by the Employment Relations Act 1999. (see also 3.6.1.3.)

[18]. In Jersey, so far as employment legislation is concerned, the issue of discrimination is to be addressed in Phase Two of the proposals. However, the forthcoming Race Relations Law will provide protection for employees who are discriminated against in the workplace on racial grounds.

The Committee intends the new legislative framework dealing with employment issues to be as workable and understandable as possible. The new legislation is not intended to be either bureaucratic or complex. It does however need to be modern in its approach, acceptable and suited to the needs of the Island.

The Committee's unfair dismissal proposals were presented by the Committee with these benchmarks in mind.

A.1 A qualifying period of service?

The Committee considered the need for a qualifying period to be worked by an employee before that employee could acquire a right to protection from unfair dismissal.

The Committee also noticed the large and increasing number of areas in the United Kingdom where there is no qualifying period of service before an employee can make a claim. Many of those areas are also ones in which the claimants can claim "automatic" unfair dismissal. These claims tend to revolve around situations where the individual is given a statutory right (eg. to some form of health and safety protection or to a statement of terms and conditions). If an individual seeks to assert such a right and is dismissed as a result, the dismissal is unfair.

The Committee then considered the question of whether an unfair dismissal could ever be fair. It decided that it could not and that, therefore, unfair was unfair and meant that no qualifying period of service need be completed by an employee before he/she could claim for unfair dismissal.

Accordingly the proposal suggested that no qualifying period of service should be required. The Committee felt that if contracts were properly negotiated and clearly understood by the parties and if good disciplinary and grievance procedures were in place it should be possible for there to be no need of a qualifying period of service before an unfair dismissal claim could be brought. In addition, as one respondent to the survey put it *"poor recruitment practices must not enjoy the support of a qualifying period."*

A.2 The Award

The Committee then considered the way in which any award granted to a successful claimant in an unfair dismissal claim might be structured. The Committee felt that a simple award structure was required that, so far as possible, would not give rise to lengthy and expensive legal processes.

Section 4   THE CONSULTATION PROCESS

A Consultation Paper and Discussion Forum

The consultation paper on "Unfair Dismissal" prepared on behalf of the Employment Forum, "Unfair Dismissal" - The UK Law and Experience and a Comparison with the Proposed Jersey Laws, was discussed at a consultation meeting arranged by the Employment Forum in March 2001. The meeting was attended by representatives from a wide selection of organisations at which a presentation outlining the key issues of the UK law and the Jersey proposals highlighted in the text above was given. Thereafter a discussion forum was opened with those present entering into debate.

After the meeting a questionnaire was released and circulated to all organisations on the Employment Forum database. The consultation paper and questionnaire was also placed on the States internet site and a press release issued.

B The Responses to the Questionnaire

Respondents were asked to give their views on each of the three parts of the Committee's proposals outlined above.

A total of 54 written responses were received from organisations representing both employer and employee and union views. Organisations were representative of a wide cross-sections of the Island's working community including hospitality; agriculture; construction; small business; banking; the legal profession; insurance; education; civil service; employment agencies; freight operater and personnel practitioners.

No respondents opposed the introduction of Unfair Dismissal legislation though some felt that small business would feel the impact more than larger organisations, as one respondent clearly explained: "*Jersey has lots of small employers, the number of large employers being relatively small. In the main, large employers will already comply with much of the proposed legislation by virtue of good practice imported from other environments, typically the UK. This cannot necessarily be said for small employers who will probably be those against whom most claims are made. Their case needs to be considered sympathetically and while good practice overall must apply it would be improper to lay the burden of heavy legislation over these people simply by virtue of the omission of minor details.*"

On balance however consensus was reached in all three areas as the following breakdown shows:

B.1.a The qualifying period

Eleven respondents agreed with the Committee's proposal that no qualifying period was necessary and five were of the view that a qualifying period of a year was necessary. However three organisations felt that a three month period would be appropriate and nine that six months would suffice. It is perhaps interesting to note that those voting for three months included both Island organisations that advise both employees and employers, namely CAB and JACS, and that amongst those voting for a year's qualifying period were those organisations perhaps most representative of small business.

A consistent view seemed to be the need for employers to have the flexibility of a period of time in which to assess an employee's suitability for a post without the fear of having to face a possible unfair dismissal claim at that end of that period if the employment is not to continue. It was felt that the probationary period that is specifically given in contracts of employment should provide the employer with this assessment opportunity.

Further it was felt that three - six months would cover most probationary periods and that even if longer probationary periods were granted the three - six month period should give an employer sufficient time to assess the situation and, in the words of one respondent in cases of termination, "*be in a position to objectively state the reasons for dismissal and to ensure that they are fair."*

Respondents however could distinguish between "a qualifying period of service" for the purposes of eligibility of bringing an unfair dismissal claim, and a probationary period, which is used to determine the suitability of an employee for a new job. The general view was that if a qualifying period was felt appropriate, it should be long enough to encompass the majority of probationary periods.

Further respondents' comments on this issue were as follows:

"Dismissal during, or at the end of probation should also be able to withstand the "fairness" test, experience suggests that in many cases it is a question of a subjective assessment of the new employee's "fit" in terms of team integration, customer skills, being able to adjust to the ethos of the new employer etc. While it is important that such dismissals are fair, it is more difficult to justify such subjective reasons for dismissal and, as a consequence it is probable, in my view, that the enforcement body could be swamped if this proposal were to be carried."

This response echoed others such as:

During the probationary period "*the employer has the opportunity of monitoring the individual's contribution and possibly reflecting on the fact hat he or she might have "got it wrong" and the probationer is unsuited to the position for any number of reasons. In this circumstance one could readily foresee the possibility of a significant number of vexatious claims of unfair dismissal,"*
and

" We consider that the use of "probationary periods" is justified and can be beneficial to both parties as an initial screening process which allows mistakes on either side to be rectified by early termination at little cost to either party. They are also useful in cases where personality clashes, for example, arise or become evident early in the course of someone's employment. We believe that "no qualifying period" would effectively render probationary periods useless. It is not a question of the employer wanting to be unfair from the start of employment, more a question of ensuring that the person fits the job and vice versa,"
and

"The Forum will be aware that many employers have a probationary period, during which the termination process is slightly different to that which applies after the probationary period. The procedures allow a fair but realistic approach where new employees are not found to be suited to the role or the organisation. Having no qualifying period would potentially put these probationary periods at risk."

Some voiced concerns relating to the employer's need to keep the business operating efficiently:

"*we have a six month probationary period and on rare occasions we will use this to allow us to exit staff who have not met our expectations for one reason or another. This is obviously following a rigorous process to give them the opportunity to improve but without us having to use a protracted disciplinary process which is both costly in terms of time and expenditure*
and similarly

"It is often clear, within a short period of time, that someone may not be suitable for a position and so it makes sense to dismiss that individual swiftly to minimise cost and disruption to the business".

Another observation made by one respondent acknowledged the view that an unfair dismissal is unfair whenever it occurs in the employment relationship but

"bearing in mind how new the legislation is and the standards that we are required to operate under, that to move immediately to no qualifying period would be too large a step. As such a period of between six and twelve months would allow some bedding in, and if it was found that the qualifying period was unnecessary, then it could be removed. It was remarked upon that it would be much easier to remove a qualifying period than to add to it at a later date."

B1.b Vexations claims

The fear of vexations claims being brought if there was to be no qualifying period was referred to in other responses. However this point raises an example of how the new employment legislation will be developed in a step-by-step manner and with the pieces of the employment legislation framework jig-saw being designed to fit together. The Employment Forum in its

Recommendation on enforcement issues outlined the need for a Process Officer to ensure the efficient filing of claims and referral to JACS. It also recommended that powers be vested in the Employment Panel to make an order for costs against a vexatious litigant. Both such measures should help to prevent the bringing of too many vexatious claims.

B1.c Short term and fixed contracts

Finally some concerns were expressed that if a qualifying period were to be introduced quite a number of employees who work either as seasonal workers or on short fixed term contracts would gain no protection. Suggestions were made that to overcome this problem it might be possible to pro - rata any qualifying period to a short term contract, whether seasonal or otherwise. For example, if a six month qualifying period were introduced, the qualifying period for a contract of six months or less would be three months.

There was also a concern in connection with fixed term contracts, that employers should be allowed to enter into such contracts with their employees without the fear of being subjected to an unfair dismissal claim, if the contact was not renewed. In one respondent's words

"*Such contracts must be allowed to expire naturally without there being an opportunity for the employee to seek remedy through such a thing as unfair dismissal. The whole concept of time limited contracts is that both parties enter the agreement in the clear understanding that there is a natural life to the relationship and for this not to be renewed should not be seen as unfair.*"

As a result of new legislation introduced in the UK the employer still has the right to show that the non-renewal of the fixed-term contract <u>was</u> fair (e.g. for valid business reasons.) If proven fair then no unfair dismissal claim would be possible.

Although the Committee are not suggesting that the non-renewal of a fixed-term contract should automatically qualify as an unfair dismissal, protection will be needed for employees against those unscrupulous employers who may tactically decide to continually offer only short fixed term contracts to avoid the accumulation of service time by employees who would then be eligible for benefits, whether internal via participation in for example, a bonus scheme, or statutory such as the right to claim unfair dismissal after a certain period of service.

B1.d Part-time workers

Another observation related to the need to include part-time workers within the legislative provisions relating to unfair dismissal.

B1.e High employment levels

Finally, there was also a view that Jersey's high employment levels made a policy of no qualifying period unnecessary. The following three quotes from respondents demonstrate this view:

"*A policy of no qualifying period is unnecessary in Jersey's particular circumstances of a very mobile workforce and full employment. In practice, employers find it difficult and expensive to fill vacancies, and we do not believe there is any evidence or reasonable expectation that employers would abuse their position during any qualifying period."*
and

"Those employers who do not implement and use good practice will soon become regarded as 'employer of last choice' in the employment market and their reputation will ensure their fate. Such pressure as this, which can be communicated in various ways to employees, will undoubtedly lead to practices being enhanced to recognise at least the minimum good practice standard"

and

"The recommendation made is over-protective for the employee at the expense of the employer. In an employee's market staff are in a strong and therefore a transient position. They can leave places of current employment and find alternative work very quickly as a result of the demands for staff already facing the marketplace."

Finally on this issue one respondent commented on the need to capture the spirit of the Termination of Contract - Minimum Periods of Notice (Jersey) Law, 1974 . It was believed that *"the* law *would appear to have been written with the intention of making the first six months of employment a probationary period whereby either side can terminate employment by mutual agreement; failing which one week's notice is required from either side. It is important that any new legislation on unfair dismissal captures the spirit of the above law."*

B.2 The Award

Of the responses received to this question thirteen agreed in principle with the Committee's proposal that there should be a two-element award, one based on length of service and the other comprising a fixed award of three months salary. Although agreeing in principle some still wanted to see the award itself either capped, made discretionary or subject to higher multipliers.

However the other seventeen respondents disagreed with the proposal for a number of reasons.

- Some felt that awards made early in the period of employment would be excessive, especially if there were to be no qualifying period.

- Others wanted to see a discretionary compensatory award (as opposed to a fixed award) introduced, as in the UK, which would allow for an employee's potential loss of benefits to be taken into account or his/her failure to find another job.

- others felt that mitigating circumstances, such as the contributory actions of the employee to the dismissal or the fact that the employee had found another job straightaway, should result in a potential reduction of the award.

- Views varied as to whether the amount of any award should be capped. On balance it was not suggested that any capped level should amount to the current UK levels which are in excess of £53,000.

- It was generally recognised that salary levels in Jersey can be very high and that any award should perhaps be linked to a sliding scale based on an individual's salary. It was felt that this would reflect the individual's particular circumstances in terms of seniority and status. However it was also suggested that either the salary level be capped or that a maximum award figure be established.

- According to one respondent the official statistics state that the average Jersey salary is £400 per week whereas another respondent gave a figure of £830.

- Two general views were that any award should adequately compensate the employee and that the method of calculating awards should result in an award that would act as a deterrent to employers.

One respondent commented

"*If the amounts are minimal, the effort in bringing in this legislation will potentially be wasted, as it will be less likely to change the behaviour of employers".*

Another commented that

" *limiting the fixed award to three months salary with no discretionary element would mean very little to some employers financially if the awards structure is too low and inflexible then companies will continue to unfairly dismiss employees because the punishment will not have an effect on their activities."*

All respondents seemed to want the award to include an element to recognise length of service. In addition several commented that any payments already made by the employer must be taken into account when calculating the remedy payment. For example

"if the employer had already paid for a notice period, either to be worked or to be given in lieu, then this must be subtracted from the calculation. Similarly, if a severance payment or redundancy payment has been made this too must be taken into account. We also strongly recommend that the re-employability of the individual should be considered. In this regard if the employee has already found another position by the time the unfair dismissal case is heard then there should be some balance in this regard when calculating this figure.

Another commented

"*There are occasions where an employee is dismissed, but a sum of money is paid in excess of the notice entitlements. Should that employer then take an unfair dismissal claim and be successful, these amounts should be deducted from any settlement. To do otherwise would only ensure that organisations would never make any payments over and above the minimum, the employee may be entitled to under their notice provisions."*

Concern was expressed as to the definition of a month's salary. If the process is to be kept simple, one respondent suggested that

"a months salary should be the physical payments made to an individual on a monthly basis, possibly averaged over the last three or six months. As soon as other factors are brought into account i.e. cars, healthcare, pensions, commissions etc the calculation become particularly difficult and we would foresee that the tribunals could spend as much time trying to calculate an amount due as actually deciding on the merits of a case. As such we believe that the process should be kept as simple as possible and the calculations of a months salary should be based on an average of over the last three or six months."

Some respondents offered specific alternative methods of calculating an award to that proposal and three are shown by way of example. These are as follows:

OPTION A

a) The purpose of the award should be to properly compensate the employee and not to sanction the employer
b) the full employment position in Jersey should be taken into account in assessing the level of this compensation
c) we would not be in favour of any element of the award being discretionary. The benefit of a fixed scale of compensation is that it will in many cases avoid unnecessary and lengthy disputes being fought before The Tribunal.
d) Our recommendation is that the level of compensation should be assessed by reference to contractual or statutory notice entitlement, and basic salary in accordance with a sliding scale as follows:

6- 12 months' employment	*One month's basic salary plus notice entitlement*
12-24 months' employment	*Two month's basic salary plus notice entitlement*
24-36 months' employment	*Three month's basic salary plus notice entitlement*
36-48 months' employment	*Four month's basic salary plus notice entitlement*
48-60 months' employment	*Five month's basic salary plus notice entitlement*
over 60 months' employment	*Six month's basic salary plus notice entitlement*

e) *You will see that the award is "capped" at a maximum of six months basic salary. You, will also see we have used basic salary as the basis of calculation. The additional element of other employment benefits such as share options, health and life insurances, should not, in our view, be introduced into the compensation award. It can be extremely difficult to calculate the monetary value of these benefits and this would most certainly complicate the calculation of entitlement and be open to dispute.*

OPTION B
One respondent suggested that minimum and maximum payments should be set and reviewed triannually. *"We believe that length of service and salary should be taken into account."*

OPTION C
Another stated that:

a)say 1 weeks pay for every year of service, up to a maximum of 30 years
b)a week's pay should be calculated including salary and a cash value for contractual benefits
c)the maximum amount for a week's pay should be £830, to reflect Jersey salary levels
d)This would result in a maximum award under this part of the sanction, £24,900
e)a compensatory award is also recommended, allocated on a similar basis to that in the UK, with a maximum award of £25,000.

B3 Procedural irregularity

One respondent commented on the need for the Tribunal to consider the impact of any procedural irregularity on the making of an award. The view expressed was "*The example has been given of where a dismissal may have been procedurally unfair but the employee should obviously have been dismissed due to their conduct. Under what we believe the present proposals are, the claim for unfair dismissal would be successful and 100% payments would be made. We do not believe this meets standards of natural justice on the requirements for balance which we would also expect."*

B4 Re-instatement and re-engagement/written statement of reasons

Finally, although not specifically referred to in the proposal one respondent commented on the need to get an alternative remedy to the financial compensatory award namely that of either re-instatement or re-engagement.

This practice is available in the UK and Guernsey and positively encouraged in New Zealand. Another respondent wanted employees who brought successful unfair dismissal claims to have the right to a written statement of reasons.

C Automatic Grounds for Dismissal

Two clear views were apparent from the responses. Firstly, although not objecting in principle to the two automatic grounds referred to in the Committee's proposals, namely the dismissal of a woman because she is pregnant or for pregnancy related reasons and secondly because an individual is a trade union member or because of his/her participation in trade union activities, respondents did not feel easy about such legislation being introduced in isolation of other legislation relating to maternity or trade union issues.

It was generally felt more appropriate to introduce the unfair dismissal grounds at the same time as the forthcoming maternity or trade union legislation. Some felt dismissal on the grounds of pregnancy or trade union membership might be workable now in advance of such legislation but that dismissal on the grounds of pregnancy - related reasons or trade union activities would not be workable without much greater definition of these phrases being supplied.

The second view was the surprise expressed at there being no reference to the fact that dismissal for asserting a health and safety right or a claim under the Terms of Employment Regulations should automatically be unfair. However the Committee had not intentionally omitted such references. In the Report that accompanied the Proposition the examples of pregnancy and trade union membership had been examples of new issues being addressed. It had intended that legislation that already existed giving individuals statutory rights would be included in the automatic grounds for dismissal. It is fully expected that the list of automatic unfair dismissal grounds will grow as the legislation grows particularly where it is possible to "assert a statutory right."

It is of interest to note the considerable number of respondents who felt that the automatic grounds for unfair dismissal should be extended to include dismissals on the grounds of sex, race, discrimination, religion, age, whistle blowing and transfer of undertakings; refusal to work overtime.

In conclusion it was generally recognised that education of both employers and employees concerning all the new legislation would be key.

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 other research on the issue of unfair dismissal.

THE RECOMMENDATION IS AS FOLLOWS.

1. Unfair Dismissal

The Forum recommends that within the new legislative framework adequate protection should be granted to employees against arbitrary termination of employment. It should be emphasised that the Forum does not wish to remove or reduce the importance of the employment contract as this should remain the primary source of contractual obligations between employee and employer.

Unfair dismissal (but not wrongful dismissal) must be dealt with in employment legislation. Where dismissal involves a breach of the employment contract this amounts to wrongful dismissal and redress by either party should be sought through the Courts under common law. To prevent unfair dismissal there should be restrictions on why, when and how an employee may be dismissed, in common with other jurisdictions. Detailed procedures for dismissal and the fair treatment of employees should be presented in the "Employers Handbook".

Employers should still retain the right to dismiss employees in certain circumstances. The Forum therefore suggests that a dismissal should be classed as fair if the circumstances of that dismissal:

- related to the capability or qualifications of the employee to perform work of the kind which he or she was employed to do
- related to the conduct of the employee
- was because the employee was redundant
- was because employee could not continue to work in the position he or she held without contravention (either by the employer or the employee) of a duty or restriction imposed by or under statute
- was for some other substantial reason which would justify the dismissal of an employee holding the position which the employee held

2. Who is covered

Whilst researching the issue of unfair dismissal the Forum has become aware that in other jurisdictions not all groups or categories of employees are necessarily granted protection under legislation in cases of unfair dismissal (e.g. members of the Police Force in the UK).

However, having fully considered this matter the Forum suggests that no particular profession, group or category of employee or worker in Jersey should be excluded from enjoying the rights and obligations of local unfair dismissal legislation.

All employees and other workers (i.e. those routinely working for a particular employer on contracts for services) who have attained the age of 16 should enjoy the benefits of statutory unfair dismissal protection. However, once they have reached the statutory pensionable age of 65 (as defined under the Social Security (Jersey) Law 1974) they should no longer be entitled to bring claims of unfair dismissal.

In many jurisdictions specific provision has been written into legislation regarding part-time workers. The Forum is aware that some part-time workers will in fact work very few hours each week (e.g. domestics working 3 - 4 hours per week) and this could be considered as inconsiderable employment, the cost effectiveness of bringing claims of unfair dismissal and the related administrative burden has to be considered. The Forum is therefore of the opinion that whilst part time workers who are employed for 8 hours or more each week should be entitled to protection those working less than 8 hours per week should not be so entitled. This "8 hour" provision corresponds to a similar definition of inconsiderable employment in Jersey Social Security Legislation regarding contribution liability. It is hoped that by utilising the "8 hour rule" in employment legislation the legislative complexities under which employers must operate can be kept to a minimum.

The Forum is aware that the definition of "worker" or "employee" could play a critical role in establishing whether an individual is entitled to unfair dismissal protection. 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.

3. Time limits

In common with the previous recommendation made by the Forum it is suggested that there be a time limit of two months from the effective date of termination of employment in which employees who feel aggrieved must lodge their claim for unfair dismissal with the Process Officer. This would link with the recommendations made on enforcement issues. It is felt that such a time limit would not only be fair to all parties but that standardization throughout Jersey's employment legislation will avoid unnecessary confusion and reduce complexity.

Whilst the time limit for lodging a claim should be rigorously adhered to, the Forum points out that if the services of JACS are being utilised by the parties concerned and an amicable outcome is likely, the matter should not be immediately referred to a Tribunal by the Process Officer. Every effort should be made to address the issue through conciliation first. In such

cases the Director of JACS should be required to notify the complainant in writing that he should claim within the two months period to preserve his rights, regardless of the ongoing conciliation.

4. Automatic grounds

The Forum suggests that there should be provision for dismissal in certain circumstances automatically to amount to unfair dismissal. In other jurisdictions these circumstances involve matters such as pregnancy or trade union membership. However the Forum considers that unlike in some jurisdictions the Jersey Legislation should require that during the determination process a test of "reasonableness" should be employed, rather than a rigid list of circumstance which would attract a decision of unfair dismissal. The Forum believes that this system would work effectively if the "Employers Handbook" were utilised at Tribunal hearings in the sense that it provides guidance to all on best practice.

5. Qualifying Periods

Throughout the consultation process the Forum has become increasingly aware that many organisations and members of the community are anxious that there should be a qualifying period. Taking this into account the Forum suggests that only those employees and other workers who have been employed for a period of six months or more, should be entailed to lodge a claim for unfair dismissal and have their case determined by a Tribunal.

Jersey has a high proportion of seasonal / short term workers who service some of the Islands main industries. The Forum believes that such employees and workers should be afforded protection under the unfair dismissal proposal if an equitable system is to be present. As such it is recommended that employees and workers who enter into first time contracts with a particular employer be an exception to the six month qualifying rule suggested above. The Forum would wish that a provision in the Employment Legislation allows for such people to qualify to lodge a claim for unfair dismissal if they have completed a period of two thirds or more of their contract.

6. Contracting out and fixed term contracts

In the UK the law expressly provides that it is not permissible for individuals to contract-out of their statutory unfair dismissal rights. Any agreement or contract term which purports to have this effect is void. The Forum believes that this provision should be incorporated into Jersey employment legislation and sees no justification for having a system which enables either party to waive legal provision.

During the consultation process it became evident that much of the Island's workforce, employed in major industries, work under fixed term contracts and the legislation should provide that consecutive fixed term contracts are to be aggregated. It is recognised that many employers may employ staff under fixed term contracts for valid business reasons. However,

it is also believed that less scrupulous employers could utilise several fixed term contracts of less than six months with short gaps between them so as to ensure that the qualifying period would never be satisfied. If such a situation were to occur an employee, with perhaps a number of years service, may never be in a position to benefit from the unfair dismissal provisions. The Forum therefore recommends that the legislation should provide that gaps up to a certain period of time in employment should not prevent one fixed term contract period form being aggregated with another. The maximum period for a gap should be six months. The gap arrangement should only apply in regard to fixed term contracts or when employment commenced under a fixed term contact and altered to a "normal" contract.

7. Awards

The Forum recommends that the value of the award should take into account both the salary of the employee and their length of service. In addition, an award of pay for the minimum period of notice (as provided for under the Termination of Employment - Minimum Periods of Notice (Jersey) Law 1974) should be included when calculating the award. The Forum suggest the following framework:

6-12	months employment	1 months	basic salary plus notice entitlement
12-24	months employment	2 months	basic salary plus notice entitlement
24-36	months employment	3 months	basic salary plus notice entitlement
26-48	months employment	4 months	basic salary plus notice entitlement
48-60	months employment	5 months	basic salary plus notice entitlement
	Employment over 60 months	6 months	basic salary plus notice entitlement

A model, in financial terms, can be found at Appendix A.

There should however be reduced from the award any sums already paid (a) in lieu of notice (whether of the minimum amount or more), and (b) otherwise in respect of such dismissal over and above any contractual entitlement. The Forum is aware that on occasions the Tribunal may be of the opinion that the employee contributed to their dismissal (e.g. through poor conduct), and recommends that discretionary powers be given to the Tribunal to reduce the award on such grounds in order that natural justice will prevail. Such provisions would also give redress to the employer for procedural irregularities. The following principles should apply:

- The Tribunal should begin with an assumption that the claimant is entitled to a full award, and the burden of proof for a finding of contributory conduct by the claimant is upon the employer.

- Where an employer can demonstrate to the Tribunal that the dismissal of the employee was due to their conduct, or that their conduct was a contributory factor in the dismissal, awards may be reduced or withheld in full.

The Forum is however concerned that the model above could result in substantial awards being made by the Tribunal in the case of dismissed, high earning, long serving employees. The amounts of money involved, the complexities of such cases and the importance of Tribunal decisions cannot be underestimated. As such it is recommended that the Committee set a limit, in financial terms, of the maximum amount a Tribunal can decide to award. If this limit is exceeded or it is reasonably considered that is likely to be so at the commencement of a Tribunal hearing the matter should be referred to a higher Court.

8. Re-Instatement and Re-engagement

Research has shown that in other jurisdictions there is provision for Tribunals to order that the dismissed employee should be reinstated to their previous employment after a decision of unfair dismissal has been determined. Having carefully considered this issue the Forum is of the opinion that there is nothing to be gained by having such a provision present in Jersey legislation. Of course, should both parties wish to enter into a new contract of employment there would be nothing to prevent this.

ADDITIONAL COMMENTS

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 this document should be used by Tribunal members when determining a claim of unfair dismissal. By utilising this handbook during a hearing it is hoped that matters such as discrimination could also be considered in unfair claims and that cases involving procedural irregularity could be effectively determined. However, it must be remembered that appropriate resources have to be available to ensure that effective distribution channels are developed and maintained in order that amendments and additions to procedures are delivered to Employers.

2. Education

It is felt that the utilisation of the Employment Tribunal to decide on claims for unfair dismissal should be viewed as a last resort. Effective education on the developing legislation, best practice and adherence to the procedures and guidance set out in the handbook will play a key role in ensuring that new systems of industrial relations are incorporated into everyday working life. Clearly JACS will play an important role in the education of employers and in providing advice and guidance on an ad hoc basis.

3. 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.